U.S. Customs and Border Protection

Slip Op. 11–99

KAIRALI DECAN, INC., A CALIFORNIA CORPORATION, Plaintiff, v. THE UNITED STATES, Defendant.

Before: Gregory W. Carman, Judge
Court No. 10–00242

[*Court lacks jurisdiction; case will be dismissed absent request for transfer*]

Dated: August 10, 2011

Law Offices of John M. Daley (*John M. Daley*), for Plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*L. Misha Preheim, Aimee Lee*); *Jonathan D. Stowers*, United States Customs and Border Protection, of counsel, for Defendant.

OPINION & ORDER

CARMAN, JUDGE:

Introduction

This matter is before the Court on Defendant's motion to dismiss for lack of subject matter jurisdiction pursuant to USCIT Rule 12(b)(1). (Def.'s Mot. to Dismiss (*"Def.'s Mot."*).) The question for the Court is whether an importer, whose identity is alleged to have been surreptitiously used by another to enter goods that never came into the importer's possession may pay liquidated damages and sue for a refund in this court under 28 U.S.C. § 1581(i)(4). The Court rules that Plaintiff, importer Kairali Decan, may not sue under § 1581(i)(4) because Kairali Decan could have brought a suit under 28 U.S.C. § 1581(a) and obtained a remedy not manifestly inadequate, but failed to do so. Absent a request filed by Plaintiff within one week showing why the interest of justice requires transfer of this case to another judicial forum, the case will be dismissed.

Background

I. *Importation of the Entry*

Plaintiff, a corporation located in Fremont, California, imports and wholesales foreign foods. (Third Amended Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandate ¶¶ 11, 14 ("*Compl.*").) On January 17, 2007, a shipment of food from Sri Lanka arrived in San Francisco, with Kairali Decan listed as the importer, and was signed for by "Khan," listed as the "CEO." (Pl.'s Resp. to Def.'s Mot. to Dismiss ("*Pl's Resp.*"), Ex. G ("*Entry Summary*").) The shipment was given entry number C280264041–0. (*Id.*) On January 24, 2007, the shipment was delivered, per instructions on purported Kairali Decan letterhead signed by "Salman F. Khan, Director," to a warehouse belonging to "SF Food" at 30998 Huntwood Avenue #106, Haywood, California—a premises leased by S.F. Foods (for whom the lease was signed by "Abdul Salman-Fariz."). (*Id.* at Ex. K, Attach. 6–7.)

II. *FDA Attempts to Examine the Entry*

On January 23, 2007, the Food & Drug Administration ("FDA") received the entry documents, which contained no contact information. An FDA import specialist looked up Kairali Decan's phone number and spoke to the CEO, Joseph Thomas, on February 1, 2007. (*Id.* at Ex. S.) The FDA specialist asked Mr. Thomas about entry C280264041–0; Mr. Thomas said "Mr. Salman" was handling the entry and gave a phone number. (*Id.*) The FDA specialist then called the given number and left a message about arranging an inspection of the shipment. (*Id.*) Mr. Salman left a message for the FDA on February 2, 2007 saying that he was overseas and could arrange inspection when he returned on February 15, 2007. (*Id.*) On February 5, 2007, the FDA left Mr. Salman a message requesting that he call back with the best time to reach him in person; to tell the FDA who picked up the shipment, and its current location; and to give the name of anyone else who could assist with an FDA inspection in Mr. Salman's absence. (*Id.*) Mr. Salman did not return this call. (*Id.*) On February 13, 2007, the FDA, having discovered that Mr. Salman was the subject of a prior case for failure to redeliver imports for FDA inspection, asked CBP to issue a Notice of Redelivery to Kairali Decan to facilitate FDA inspection. (*Id.*)

III. *Notice to Redeliver, Notice of FDA Action, Notice of Liquidated Damages*

CBP records show that CBP issued the Notice to Redeliver on February 16, 2007 and mailed it to Kairali Decan's office. (*Def.'s Mot.*, Exs. 4, 7.) It is unclear whether Kairali Decan received the Notice to Redeliver; Kairali Decan contends that the Court has jurisdiction under § 1581(i) to decide whether an importer that is a "***complete stranger***" to an entry and who "may or may not" have received a Notice to Redeliver that entry must file a protest in order to preserve its right to challenge the Notice to Redeliver at the Court of International Trade. (*Compl.* ¶ 12 at 5 (emphasis in original).) Kairali Decan also states that it has no record of receipt of a Notice to Redeliver and does not recall receiving one, from which it concludes that it never received the Notice. (*Id.* ¶ 19.) In any case, it is agreed that Kairali Decan did not respond to the Notice to Redeliver. (*See id.* at ¶¶ 19–20; *Def.'s Mot.* 5–7.)

Kairali Decan admits, however, that in February 2007 it received a Notice of FDA Action regarding entry "C28–02640041–0" [sic], which listed Sri Lankan products. (*Compl.* ¶ 18; *see also Pl.'s Resp.*, Ex. A.) Knowing that Abdul Salman-Fariz was the only local distributor of Sri Lankan foods, Kairali Decan contacted him regarding the FDA notice. (*Id.*) Mr. Salman-Fariz admitted importing the goods under Kairali Decan's name and assured Kairali Decan that he would take care of the FDA Notice. (*Id.*) When an FDA employee later called Kairali Decan about the entry, he was told to call Mr. Salman-Fariz, who was the importer of the goods. (*Id.*)

On April 20, 2007, CBP issued a Notice of Liquidated Damages in the amount of $24,606.00 to Kairali Decan. (*Def.'s Mot.*, Ex. 4.) Kairali Decan claims that it received this Notice of Liquidated Damages only in July 2007, when the surety provided a copy. (*Compl.* ¶ 20.) Plaintiff filed a petition for relief from liquidated damages, together with evidence that Mr. Salman-Fariz was the actual importer at issue, but CBP refused to cancel or mitigate liquidated damages. (*Id.* ¶¶ 20, 21.) CBP also rejected an offer in compromise proposed by Kairali Decan (*id.* ¶¶ 23, 24) and a supplemental petition for relief from liquidated damages (*id.* ¶¶ 32, 33). Kairali Decan then filed suit in the U.S. District Court for the Northern District of California, and, a short time later, paid $24,606.00 to CBP to avoid sanctions for non-payment. (*Id.* ¶¶ 34, 35.)

In February 2009, the parties stipulated that this action be transferred from the Northern District of California to the Court of Federal Claims. (*Pl.'s Resp.* at 8.) In the Court of Federal Claims, Plaintiff

amended its complaint and Defendant moved to dismiss. (*Id.*) The Court of Federal Claims, noting that it "lacks jurisdiction to hear claims within the exclusive jurisdiction of the Court of International Trade" and that 28 U.S.C. § 1581(i) "grants exclusive jurisdiction to the CIT on any claims against the United States providing for 'administration and enforcement with respect to the matters referred to in (a)-(h) of this section'," found that "the CIT is in the best position to decide which subpart of section 1581 applies to plaintiff's claim." (*Def.'s Mot.*, Ex. 5.) Stating that, pursuant to 28 U.S.C. § 2631,[1] "the possibility exists that plaintiff's claim could be time barred if we dismiss and Kairali is required to re-file, the interest of justice dictates transfer of the claim rather than dismissal," the Court of Federal Claims transferred the case to this Court for its jurisdictional determination. (*Id.*)

Jurisdiction

The threshold issue here is whether this Court has jurisdiction to hear this case under 28 U.S.C. § 1581(i). Upon examining the record and relevant body of statutory and case law, the Court concludes that it does not.

I. *Discussion*

Kairali Decan asserts that the Court has jurisdiction over this suit pursuant to 28 U.S.C. § 1581(i), which states in relevant part:

> [i]n addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section . . . the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenue from imports or tonnage;
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

[1] When a "court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer" the action to another court in which the case "could have been brought at the time it was filed." 28 U.S.C. § 1631.

Kairali Decan specifies that subsection (i)(4) pertains to this case. (*Compl.* ¶ 12.)

Jurisdiction under subsection (i) of 28 U.S.C. § 1581 "may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Int'l Custom Prods.*, 467 F.3d 1324, 1327 (Fed. Cir. 2006) (*quoting Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992)).

The Court finds that because Kairali Decan could have pursued a remedy under subsection (a), and because that remedy would not have been manifestly inadequate, Kairali Decan cannot now bring suit under subsection (i) after it failed to seek relief under subsection (a).

A. Whether Jurisdiction Was Available Under 28 U.S.C. § 1581(a)

Jurisdiction under subsection (a) would have been available to Kairali Decan had it acted within the allotted time. Let us examine the "road not taken" to *see* why Kairali Decan's choice of remedy "has made all the difference"[2] in this case.

1. *Requirements for Bringing Suit Under Subsection (a)*

Subsection (a) states that "[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930 [19 U.S.C. § 1515]." 28 U.S.C. § 1581(a). Section 1515 governs the manner in which the CBP will administratively adjudicate protests filed under 19 U.S.C. § 1514.

> [D]ecisions of the Customs Service . . . as to [among other things] a demand for redelivery to customs custody . . . shall be final and conclusive upon all persons (including the United States and any officer thereof) *unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest . . . is commenced in the Court of International Trade*.

28 U.S.C. 1514(a) (emphasis added). Protests may be filed by "the importers or consignees *shown on the entry papers*" within 180 days

[2] "I shall be telling this with a sigh / Somewhere ages and ages hence: / Two roads diverged in a wood, and I— / I took the one less traveled by, / And that has made all the difference." ROBERT FROST, *The Road Not Taken*, *in* MOUNTAIN INTERVAL (1920).

after a Demand for Redelivery. *Id.* at § 1514(c)(2)(A), (c)(3) (emphasis added).[3] If a protest is denied, that denial may be challenged in the Court of International Trade "by the person who filed the protest." 28 U.S.C. § 2631(a).[4]

2. *Positions of the Parties*

Kairali Decan contends that the remedy of filing a protest and bringing a subsection (a) suit was unavailable because it never received the Notice to Redeliver and was therefore unable to protest it. (Pl.'s Resp. 16–19.) Kairali Decan also argues that it could not have filed a protest because it was not the *actual* importer of the entry; Mr. Salman-Fariz, who allegedly stole Kairali Decan's identity, was. (*Id.* at 19–20.) Finally, Kairali Decan asserts that it could not have filed a protest because identity theft is not one of the grounds for protesting a Notice to Redeliver given in 19 C.F.R. § 174.11, which only permits, in relevant part, protests of the legality of orders excluding merchandise from entry or delivery.[5] (*Id.* at 20–21.)

The government argues that Kairali Decan should be charged with actual knowledge of the Notice to Redeliver for three reasons: (1) Kairali Decan is legally presumed to have received the properly-mailed notice pursuant to case law; (2) even if Kairali Decan did *not* receive the notice, it has admitted that it had "ample notice of the substance of the notice" in February 2007; and (3) Kairali Decan received the Notice of Liquidated Damages in late April or early May 2007 and then had actual knowledge of the February 2007 Notice to Redeliver within the time for protesting that earlier notice. (*Def.'s Reply in Support of Mot. to Dismiss* ("*Def.'s Reply*") 3–5.) The government also maintains that Kairali Decan could have protested the Notice to Redeliver because it was the "importer . . . shown on the entry papers"—one of the entities that may file a protest listed in 19 U.S.C. § 1514(c)(2) and the implementing regulation at 19 C.F.R. § 174.12. (*Id.* at 7.) The government insists that Kairali Decan would have been able to raise its identity theft claim in its protest as a

[3] Congress amended § 1514(c) to extend the time for filing a protest from ninety to 180 days effective as of December 2004. *See* note under 19 U.S.C. § 1514.

[4] Suit may be brought in the Court of International Trade "only if all liquidated duties, charges, or exactions have been paid at the time the action is commenced." 28 U.S.C. 2637(a). Such suit is timely if brought "within one hundred and eighty days after the date of mailing of notice of denial of a protest [or] denial of a protest by operation of law." 28 U.S.C. § 2636(a).

[5] The regulation provides that protests under 19 U.S.C. § 1514 may include "decisions of the port director, including the legality of all orders and findings entering into the same, [regarding, *inter alia*,] exclusions of merchandise from entry or delivery under any provision of the Customs laws." 19 C.F.R. § 174.11.

defense to the Notice to Redeliver, and could have appealed an adverse decision to the Court of International Trade under 28 U.S.C. § 1581(a). (*Id.* at 6–7.)

3. *Analysis*

It is beyond question that Kairali Decan was the "importer shown on the entry papers." 19 U.S.C. § 1514(c)(2)(A); *See Entry Summary*. Kairali Decan was therefore authorized to file a protest under § 1514 challenging the Notice to Redeliver, despite not being the *actual* importer of the goods at issue. The plain language of the statute is sufficient to make this clear.

Kairali Decan admits that it received the Notice of Liquidated Damages, at the latest, in July 2007, when the surety forwarded a copy. Although Kairali Decan does not specify *when* in July 2007 it received the Notice of Liquidated Damages, that does not matter; the time for filing a protest—180 days—had not expired by July 31, 2007, which was 165 calendar days after the issuance of the Notice to Redeliver. This demonstrates that Kairali Decan *could have* filed a protest, since it learned of the Notice to Redeliver at least two weeks before the time to file a protest expired.[6]

The Court determines that, in permitting an attack on the *legality* of an order from Customs to redeliver goods, the statute and regulations provide an adequate arena in which an importer may raise identity theft as a legal defense. As the government suggests, the protest would, in essence, challenge the basis for the order by demonstrating that the importer was listed on the entry paperwork in error. The Court does not share Kairali Decan's too-narrow reading of the grounds permitted for protest under 19 C.F.R. § 174.11.

[6] The record strongly suggests that Kairali Decan knew, or should have known, of the Notice to Redeliver much earlier. For instance, Kairali Decan admits that it received a Notice of FDA Action, which showed that the entry was made in the name of Kairali Decan, in February 2007. (*Pl.'s Resp.* at 2–3.) Kairali Decan admits that it contacted Mr. Salman-Fariz upon receiving this notice, and that he admitted that he had used Kairali Decan's identity to make the entry and assured Kairali Decan that he would take care of the matter. Thus at some time in or shortly after February 2007, Kairali Decan learned that it was the importer of record for an entry that was actually made by another. The Notice of FDA Action also made Kairali Decan aware of the possibility that redelivery would be requested: it stated, in part, "FDA will not request redelivery for examination or sampling if the products are moved, following USCS conditional release to a location within the local . . . area or to a location approved by the FDA office." (*Id.*, Ex. A at 3.) This language should have warned Kairali Decan that issuance of a Notice of Redelivery was a real possibility if the importer who stole Kairali Decan's identity did not make good on his promise to "take care of any problem with the matter without further involvement by plaintiff." (*Id.* at 3.) While not dispositive of the issues in this case, these established facts in the record show Kairali Decan taking an oddly blasé position regarding an entry it claims was falsely made under its name.

For these reasons, the Court holds that Kairali Decan could have filed a protest, and challenged any denial under subsection (a) of 28 U.S.C. § 1581.

B. Whether § 1581(a) Relief Was Manifestly Inadequate

Because the Court finds that Kairali Decan could have brought a case pursuant to § 1581(a), the only way jurisdiction under § 1581(i) might still be available is if the Court finds that the remedy available under § 1581(a)—the road not taken—would have been manifestly inadequate. *See Int'l Custom Prods.*, 467 F.3d at 1327. The Court finds that such relief would not have been manifestly inadequate and that § 1581(i) jurisdiction is therefore unavailable.

1. *Positions of the Parties*

Kairali Decan argues that the filing of a protest is a manifestly inadequate remedy for an importer whose identity was stolen and falsely used to make an entry of goods that the importer never received. Kairali Decan states that "[t]his is because a victim of identity theft, by definition, (1) does not have the goods, and (2) does not have access to *any of the information it would need to establish that it was not the actual importer of the goods in issue*, including" the entry summary, bill of lading, and Customs bond, "all of which it would need to demonstrate that it was not liable for the importation." (*Pl.'s Resp.* at 22 (emphasis in original).)

The government counters that CBP Form 19 (*see Mot. to Dismiss*, Ex. 6) "allows parties to contest such a notice like the one at issue in this case . . . . In that protest, Kairali could have raised the claim . . . that it was not Kairali that imported the merchandise and that it had no control over the merchandise." (*Def.'s Reply* at 6.) The government also contends that Kairali Decan's manifest inadequacy argument "is, in essence, speculating that Customs would not believe Kairali had it presented its claim as a protest." (*Id.* at 7.) The government notes that if CBP denied the protest, the denial would have been appealable to the Court of International Trade, where the identity theft claim could have been presented. Finally, the government notes that Customs has the authority to "revise or correct the notice to redeliver to reflect a different importer or to repay amounts paid by Kairali as a result of the failure to redeliver merchandise." (*Id.* at 8.)

2. *Analysis*

Kairali Decan's argument about manifest inadequacy misses the point. A remedy may be manifestly inadequate where the protest is futile because a Customs regulation directly on point makes the

outcome of the protest a "preordained ruling" that is a "mere formality in light of" the regulation, which "unmistakably indicate[s] how [CBP] would determine the issue." *Int'l Custom Prods.*, 467 F.3d at 1328 (*citing Pac Fung Feather Co. v. United States*, 111 F.3d 114, 116 (Fed. Cir. 1997). Lack of access to paperwork needed to demonstrate the merits of its claim does not necessarily render a protest futile or nullify the appeal of a denial of that protest under subsection (a) of §1581. *See Autoalliance Int'l, Inc. v. United States*, 29 C.I.T. 1082, 1094, 398 F. Supp. 2d 1326, 1337 (2005) (noting that the plaintiff might have been able to uncover relevant facts "quickly during the discovery allowed in a § 1581(a) proceeding.").

There is nothing inherent in the protest procedure, or the scope of a challenge to the denial of a protest under § 1581(a), that rendered these procedures inadequate for addressing Kairali Decan's difficult position regarding the entry Mr. Salman-Fariz made under Kairali Decan's name. The Court finds that, had Kairali Decan protested the Notice to Redeliver, it could have raised in the protest the exact issues it raises in this suit. If those issues did not prevail before CBP, Kairali Decan could have later sought relief in this Court under § 1581(a); its claims would have received a hearing on their merits, and discovery would have been available to permit Kairali Decan to establish the necessary factual basis to demonstrate that its claims had merit.

Because Kairali Decan had an adequate remedy available via § 1581(a), but failed to make use of that remedy, Kairali Decan cannot now invoke jurisdiction under § 1581(i)(4). The Court therefore finds that it does not have jurisdiction over this case under § 1581(i)(4).

Conclusion

Upon determining that the Court has no jurisdiction, the next question is what the Court should do with the case. The possibilities are to grant Defendant's motion and dismiss the case, or to transfer the case to another court and deny Defendant's motion.

The Court notes that the Court of Federal Claims transferred the case here pursuant to a provision that requires transfer where the transferring court "finds that there is a want of jurisdiction," among other things. 28 U.S.C. § 1631. The Court of Federal Claims having rejected the possibility that it has jurisdiction, transfer back to that court is not "in the interest of justice." Moreover, no party to this case has shown that the interest of justice requires transfer of the case to any forum other than the Court of Federal Claims, and the Court has not identified any grounds for transfer on its own.

In an excess of caution, however, any party is permitted to file before August 17, 2011 a letter showing that the interest of justice

requires transfer of this case to another judicial forum, absent which the case will be dismissed. It is therefore

ORDERED that the Clerk of the Court dismiss this case on August 17, 2011 unless a party shows by letter filed with the Court before August 17, 2011 that the interest of justice requires transfer to another forum.

Dated: August 10, 2011
New York, NY

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

Slip Op. 11–100

UNITED STATES COURT OF INTERNATIONAL TRADE TIANJIN MAGNESIUM INTERNATIONAL CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and US MAGNESIUM LLC, Intervenor Defendant.

Before: Jane A. Restani, Judge
Court No. 09–00535

[Judgment sustaining remand results setting an AFA antidumping duty rate will be entered.]

Dated: August 10, 2011

Riggle and Craven (*David A. Riggle*, *Lei Wang*, and *Saichang Xu*) for the plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David S. Silverbrand* and *Renee A. Gerber*); *Thomas M. Beline*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for the defendant.

King & Spalding, LLP (*Stephen A. Jones*, *Jeffery B. Denning*, and *Joshua M. Snead*) for the intervenor defendant.

OPINION

Restani, Judge:

Introduction

This matter comes before the court following its decision in *Tianjin Magnesium Int'l Co. v. United States*, Slip Op. 2011–17, 2011 Ct. Int'l Trade LEXIS 16 (CIT Feb. 11, 2011), in which the court remanded *Pure Magnesium from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 Fed. Reg. 66,089 (Dep't Commerce Dec. 14, 2009) ("*Final Results*"), instructing the United States Department of Commerce ("Commerce") to make a finding as to whether plaintiff Tianjin Magnesium International Co., Ltd. ("TMI") cooperated to the best of its ability in its antidumping ("AD")

review. *Tianjin Magnesium Int'l*, 2011 Ct. Int'l Trade LEXIS 16, at *18. For the reasons stated below, the court sustains the *Final Results of Redetermination Pursuant to Court Remand Pure Magnesium from the People's Republic of China* (Dep't Commerce May 12, 2011) ("*Remand Results*") (Docket No. 63). In accordance with this conclusion, the court now reaches the remaining issues raised by TMI's motion for judgment on the agency record challenging the legality of the adverse facts available ("AFA") rate assigned to it by Commerce and rejects these claims as well.

Background

The facts of this case have been well documented in the court's previous opinion. *See Tianjin Magnesium Int'l*, 2011 Ct. Int'l Trade LEXIS 16, at *2–5. The court presumes familiarity with that decision, but briefly summarizes the facts relevant to this opinion.

In July 2008, Commerce initiated an administrative review of its AD order on pure magnesium from the People's Republic of China ("PRC"). *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 73 Fed. Reg. 37,409, 37,409 (Dep't Commerce July 1, 2008). During verification, Commerce concluded that certain documents supplied by TMI, the only respondent, were unreliable and assigned it an AFA rate of 111.73%. *See Issues and Decision Memorandum for the Final Results of the 2007–2008 Administrative Review of Pure Magnesium from the People's Republic of China*, A-570–832, POR 5/1/2007–4/30/2008, at 10 (Dep't Commerce Dec. 7, 2009) ("*Issues and Decision Memorandum*"), *available at* http://ia.ita.doc.gov/frn/summary/PRC/E9–29727–1.pdf (last visited Aug. 2, 2011); *Final Results*, 74 Fed. Reg. at 66,090. In making this determination, Commerce based its application of AFA on a finding that TMI's producers "failed to cooperate to the best of their ability." *Final Results*, 74 Fed. Reg. at 66,090.

In December 2009, TMI filed a complaint challenging the *Final Results* on various grounds. TMI then moved for judgment on the agency record, claiming that Commerce improperly assigned it an AFA rate based on a finding of its unaffiliated producer's uncooperative behavior, that the AFA rate of 111.73% is contrary to law and not supported by substantial evidence, and that its due process rights had been violated. *See* Mot. for J. on the Agency R. Submitted by Pl. Tianjin Magnesium Int'l Co., Ltd. Pursuant to Rule 56.2 of the Rules of the U.S. Court of Int'l Trade ("Pl.'s Br.") 3. Upon considering these arguments, the court held that "Commerce's decision to apply AFA to TMI . . . was in violation of 19 U.S.C. § 1677e(b) because it did not make a fail[ure] to cooperate finding as to the actual respondent,

TMI." *Tianjin Magnesium Int'l*, 2011 Ct. Intl. Trade LEXIS 16, at *8–9 (alteration in original) (internal quotation marks omitted). In addition, the court denied TMI's motion as to its due process claims. *Id.* at *18. The court, however, did not reach TMI's corroboration arguments because consideration of those issues, absent a finding that TMI failed to cooperate, was premature. *See id.* at 11 n.7. Thus, the court ordered a remand, instructing Commerce "to either find that TMI failed to cooperate to the best of its ability and assign it an AFA rate, or calculate a neutral facts available rate for TMI . . . ." *Id.* at *9.

On remand, Commerce found that "TMI failed to cooperate to the best of its ability," *Remand Results* at 24, because it "significantly impeded the review and provided information that could not be verified," *id.* at 4. Based on this determination, Commerce stated that it would "continue[] to assign, as AFA, the rate of 111.73 percent for TMI . . . ." *Id.* at 24. TMI now claims that this finding is contrary to law and not supported by substantial evidence. Pl.'s Cmts. on the Results of Redetermination Pursuant to Court Remand ("Pl.'s Cmts.") 10. In addition, TMI continues to challenge the legality of the 111.73% AFA rate. *See id.* at 23.[1]

Jurisdiction And Standard Of Review

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court will uphold Commerce's final results, as well as its remand results, in AD reviews unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i).

Discussion

I. Failure to Cooperate

TMI claims that Commerce's finding that it failed to cooperate by not acting to the best of its ability is contrary to law and not supported by substantial evidence. *See* Pl.'s Cmts. 10–23. Specifically, TMI argues that Commerce failed to establish with evidence that it had access to, and thus, could verify, information from its unaffiliated supplier. *See id.* at 13. This claim lacks merit.

During an AD review, when "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority . . . the administering authority . . . may use an inference that is adverse to

[1] The intervenor defendant US Magnesium LLC asks the court to sustain the Remand Results. *See* US Magnesium's Cmts. Concerning Commerce's Redetermination Pursuant to Remand 5.

the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). Although the case law "does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003); *see Tianjin Magnesium Int'l*, 2011 Ct. Int'l Trade LEXIS 16, at *10 n.6. Moreover, under 19 C.F.R. § 351.303(g)(1), "Commerce's regulations require a representative of the company participating in an administrative review or investigation to certify that he has read the attached submission, and that to the best of his knowledge, the information contained in the submission is complete and accurate." *PAM, S.p.A. v. United States*, 31 CIT 1008, 1018, 495 F. Supp. 2d 1360, 1369 (2007).

On remand, Commerce determined that TMI failed to cooperate to the best of its ability because it continued to purport the accuracy of certain favorable valuations, despite the existence of discoverable falsifications in its producers' supporting documentation.[2] *See Remand Results*, at 15–16. The record evidence shows that during its review, Commerce attempted to verify the by-product offset claimed by TMI by examining the records of its unaffiliated producers. *See Issues and Decision Memorandum* at 6. Commerce, however, encountered multiple documents that were obviously altered. *Id.* at 6. Specifically, Commerce discovered that certain vouchers had been pasted into accounting books. *Id.* In addition, the producers repeatedly thwarted Commerce's requests for information by, *inter alia*, throwing voucher books out of office windows. *Id.* at 7. Commerce concluded that TMI possessed the ability to discover these inaccuracies because the evidence suggests that it had access to the unaffiliated producers' production records and other ledgers, and had its officials and attorney actively assist Commerce on behalf of the producers during verification. *See Remand Results* at 5–6, 9, 12–13. Commerce's application of AFA, therefore, is adequately supported because TMI failed to perform the tasks required of it by the AD law, or to timely seek direction from Commerce. *See Nippon Steel Corp.*, 337 F.3d at 1382 (stating that a respondent must "have familiarity with all of the records it maintains . . . and conduct prompt, careful, and compre-

[2] Even assuming, for arguments sake, that TMI did not have the resources to completely verify the accuracy of its producer's documentation, the court notes that Commerce did not place TMI in this situation. *See* Pl.'s Cmts. 13–16. Rather, TMI claimed certain by-product offsets to its normal value, rendering the verification of this supposed unobtainable information necessary. *See Remand Results* at 7. Furthermore, at no time did TMI notify Commerce of any of the difficulties it now claims. *See Wuhan Bee Healthy Co. v. United States,* 31 CIT 1182, 1193 (2007).

hensive investigations of all relevant records . . . ."); *Pac. Giant, Inc. v. United States*, 26 CIT 1331, 1332–33 (2002) (providing that a respondent must alert Commerce to any discovered problems).

Commerce's finding that TMI failed to cooperate by not acting to the best of its ability, therefore, is supported by substantial evidence. Accordingly, Commerce's *Remand Results* are sustained.

II. Corroboration

Next, TMI challenges the *Final Results* on the grounds that the selected AFA rate of 111.73% violates 19 U.S.C. § 1677e(c) because it is not corroborated and is punitive. Pl.'s Br. 26; Pl.'s Cmts. 23. This claim lacks merit.

When Commerce uses inferences that are adverse to the interests of an uncooperative party, the AD duty rate[3] will be an AFA rate and may be based on information obtained from: "(1) the petition, (2) a final determination in the investigation under this subtitle, (3) any previous review under [19 U.S.C. § 1675] . . . or determination under [19 U.S.C. § 1675b] . . ., or (4) any other information placed on the record." 19 U.S.C. § 1677e(b). Although "the possibility of a high AFA margin creates a powerful incentive to avoid dumping and to cooperate in investigations, there is a limit to Commerce's discretion." *PAM S.p.A. v. United States*, 582 F.3d 1336, 1340 (Fed. Cir. 2009). Pursuant to 19 U.S.C. § 1677e(c), "[w]hen the administering authority . . . relies on secondary information rather than on information obtained in the course of an investigation or review, the administering authority . . . shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal." 19 U.S.C. § 1677e(c). Here, the AFA rate of 111.73% was a weighted-average margin calculated for a cooperating respondent during the previous administrative review and thus, is secondary information. *See KYD Inc. v. United States*, 607 F.3d 760, 765 (Fed. Cir. 2010) ("Secondary information includes [i]nformation derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under [19 U.S.C. § 1675] concerning the subject merchandise." (Al-

[3] A dumping margin is the difference between the normal value ("NV") of merchandise and the price for sale in the United States. *See* 19 U.S.C. § 1673e(a)(1); 19 U.S.C. § 1677(35). Unless nonmarket economy ("NME") methodology is used, an NV is either the price of the merchandise when sold for consumption in the exporting country or the price of the merchandise when sold for consumption in a similar country. 19 U.S.C. § 1677b(a)(1). In an NME case, NV is calculated using information from comparable surrogate market economies. 19 U.S.C. § 1677b(c)(1). An export price or constructed export price is the price that the merchandise is sold for in the United States. 19 U.S.C. § 1677a(a)-(b).

teration in original) (Internal quotation marks omitted)). Commerce, therefore, must corroborate this rate by showing that it used "reliable facts" that had "some grounding in commercial reality." *Gallant Ocean (Thai.) Co. v. United States*, 602 F.3d 1319, 1324 (Fed. Cir. 2010) (Internal quotation marks omitted); *see* 19 U.S.C. § 1677e(c).

In the *Final Results*, Commerce reasoned that 111.73% was reliable because it "is a calculated rate from the most recently completed segment of the proceeding" and relevant because the "rate has not been judicially invalidated and indicates that pure magnesium is dumped in the United States at a rate of 111.73 percent."[4] *Issues and Decision Memorandum* at 13. Commerce explained that this rate was the best available information because TMI was the only respondent in the current review, and TMI's information from previous reviews was unreliable, as Commerce had granted similar by-product offsets in the past without verification.[5] *Id.* at 13. The AFA rate assigned to TMI under these circumstances, therefore, is lawful because it is equal to the only weighted-average rate calculated for a cooperating-company in the prior review.[6] *See Shanghai Taoen Int'l Trading Co. v.*

[4] TMI claims that this rate of 111.73% has been discredited and is now 95.93%. Pl.'s Br. 24. The rate from the prior review for the cooperating respondent at issue, however, remains 111.73% because a motion to amend the rate was denied and an appeal was not pursued. *See Tianjin Magnesium Int'l Co. v. United States*, 722 F. Supp. 2d 1322, 1328 (CIT 2010). Thus we cannot know if the final result of further litigation would have been an altered rate. Furthermore, TMI notes that this rate is not accurate without putting forth specific information in this review or before the court that would permit the court to find 95.93% is a more accurate AFA margin. *See* Pl.'s Br. 24 n.2. Some inaccuracy is inherent in AFA rates, which are simply a proxy for missing data. In the prior review, the China-wide AFA rate was also in the same general range. *See Pure Magnesium from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 73 Fed. Reg. 76,336, 76,337 (Dep't Commerce Dec. 16, 2008). The differences here are not so great that the court would overlook TMI's lack of substantial briefing in this regard.

[5] TMI argues that Commerce failed to corroborate this rate because it failed to tie this rate to TMI's actual sales. Pl.'s Br. 23. TMI also contends that Commerce ignored "a large body of reliable information," presumably TMI's sale data from past reviews, "supporting the application of a much lower margin." *Id.* Commerce, however, "note[d] concern with using a prior margin calculated after [Commerce] granted the by-product offsets requested by TMI," the same by-product offsets that were unverifiable in the current review. *Issues and Decision Memorandum* at 13. Thus, TMI's prior margins, as well as the sales data underlying those results, were unreliable. *See Qingdao Taifa Grp. Co. v. United States*, Slip Op. 2011–83, 2011 Ct. Int'l Trade LEXIS 81, at *13 (CIT July 12, 2011) ("*Taifa IV*").

[6] TMI contends that this rate is punitive, and aberrational, and therefore, contrary to law because it is 177 times greater than the highest calculated rate for TMI from a previous review. Pl.'s Br. 24. Although Commerce calculated AD margins of zero and 0.63% for TMI in prior reviews, *Pure Magnesium from the People's Republic of China: Final Results of 2004–2005 Antidumping Duty Administrative Review*, 71 Fed. Reg. 61,019, 61,020 (Dep't Commerce Oct. 17, 2006); *Pure Magnesium from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 73 Fed. Reg. at 76,337, Commerce also expressed skepticism of the accuracy of those rates because it granted TMI the same by-product offsets that it could not verify in this review, *Issues and Decision Memorandum*

United States, 29 CIT 189, 197, 360 F. Supp. 2d 1339, 1346 (2005) (providing "that in cases in which the respondent fails to provide Commerce with information necessary to calculate an accurate antidumping margin, it is within Commerce's discretion to presume that the highest prior margin reflects the current margins" (internal quotation marks omitted)). Accordingly, the AFA rate of 111.73% assigned to TMI is corroborated to the extent practicable.

Conclusion

For the foregoing reasons, Commerce's determinations are supported by substantial evidence and are in accordance with the law. Accordingly, the *Remand Results* are sustained.

Dated: This 10th day of August, 2011.
New York, New York.

/*s*/ *Jane A. Restani*
JANE A. RESTANI

Slip Op. 11–101

ASSOCIATION OF AMERICAN SCHOOL PAPER SUPPLIERS, Plaintiff, v. UNITED STATES, Defendant, and SHANGHAI LIAN LI PAPER PRODUCTS CO., LTD., Defendant-Intervenor.

Before: WALLACH, Judge
Court No.: 09–00163

[Commerce's Final Results of Redetermination Pursuant to Court Remand are AFFIRMED.]

Dated: August 11, 2011

Wiley Rein LLP (*Alan H. Price*, *Timothy C. Brightbill*, and *Maureen E. Thorson*) for Plaintiff Association of American School Paper Suppliers.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael D. Panzera*).

Dorsey & Whitney LLP (*William E. Perry*, *Emily Lawson*, and *Elizabeth Crouse*) for Defendant-Intervenor Shanghai Lian Li Paper Products Co., Ltd.

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at 13. Some of the offsets do seem to be unusually large. *See Remand Results* at 8–9. The seemingly large difference between TMI's previous AD margins and the assigned AFA rate in this review, therefore, is irrelevant due to the fact that TMI's previous AD margins cannot be said to reflect TMI's commercial reality. *See Taifa IV*, 2011 Ct. Int'l Trade LEXIS 81, at *13.

OPINION

Wallach, Judge:

I.
Introduction

This action for review follows a remand to the Department of Commerce ("Commerce") of its determination pursuant to the administrative review of the antidumping duty order covering certain lined paper products from the People's Republic of China ("PRC"). Certain Lined Paper Products from the People's Republic of China: Notice of Final Results of the Antidumping Duty Administrative Review, 74 Fed. Reg. 17,160 (April 14, 2009) ("Final Results"). The court has jurisdiction to entertain this action pursuant 28 U.S.C. § 1581(c).

Previously, the court upheld Commerce's determination in the Final Results except with regard to Commerce's "selection of information to calculate surrogate financial values." *Ass'n of Am. Sch. Paper Suppliers v. United States*, 716 F. Supp. 2d 1329, 1331 (CIT 2010) ("*AASPS I*"). The court held that this selection was unsupported by substantial evidence and remanded "for Commerce to revisit this determination." *Id.* at 1336.[1]

Plaintiff Association of American School Paper Suppliers ("AASPS" or "Plaintiff") continues to challenge Commerce's selection of information to calculate surrogate financial values. Association of American School Paper Suppliers' Comments on the Remand Results ("Plaintiff's Comments"), Doc. No. 108 at 1–2; *see also* Reply Brief to Defendant and Defendant-Intervenor's Response Briefs ("Plaintiff's Initial Reply"), Doc. No. 81 at 1–10; Amended Complaint, Doc. No. 70 ¶ 6. For the reasons stated below, Commerce's selection is supported by substantial evidence.

II.
Background

In September 2006, Commerce issued antidumping and countervailing duty orders on certain lined paper products from the People's Republic of China. Notice of Amended Final Determination of Sales at Less Than Fair Value: Certain Lined Paper Products from the People's Republic of China; Notice of Antidumping Duty Orders: Certain Lined Paper Products from India, Indonesia and the People's Republic of China; and Notice of Countervailing Duty Orders: Certain Lined Paper Products from India and Indonesia, 71 Fed. Reg. 56,949, 56,949

[1] For a more comprehensive overview of the underlying litigation, *see AASPS I*, 716 F. Supp. 2d 1329.

(September 28, 2006). In October 2007, Commerce initiated the first administrative review of those orders for the period of review ("POR") from April 17, 2006 through August 31, 2007. Initiation of Antidumping and Countervailing Duty Administrative Reviews, 72 Fed. Reg. 61,621, 61,621 (October 31, 2007). Commerce selected Defendant-Intervenor Shanghai Lian Li Paper Products Co. Ltd. ("Defendant-Intervenor") as a mandatory respondent. *Id.*

During this review, Defendant-Intervenor submitted financial information for Sundaram Multi Pap Ltd. ("Sundaram data"),[2] an Indian paper producer. Lined Paper Products from China; Supplemental Section D Response of Shanghai Lian Li Paper Products Co., Ltd. (January 23, 2008), Public Document ("P.D.") 45;[3] Letter from Garvey Schubert Barer to Carlos Gutierrez, Secretary of Commerce, Re: Certain Lined Paper Products from China; Submission of Surrogate Value Information (April 1, 2008), P.D. 63 at 5. AASPS submitted financial information for Navneet Publications ("Navneet data"), another Indian paper producer. Letter from Wiley Rein LLP to Carlos M. Gutierrez, Secretary of Commerce, Re: Certain Lined Paper Products from China, First Antidumping Duty Administrative Review: Comments on the Valuation of Factor Inputs (April 8, 2008), Confidential Document ("C.D.") 16 at 7.[4]

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[2] The Sundaram data contained financial information for Sundaram Multi Pap Ltd. for the years 2003–2007; this financial information was gathered from two secondary sources and not directly from Sundaram Multi Pap Ltd. Letter from Garvey Schubert Barer to Carlos Gutierrez, Secretary of Commerce, Re: Certain Lined Paper Products from China; Submission of Surrogate Value Information (April 1, 2008), Public Document ("P.D.") 63 at 5; Remand Redetermination at 23–25.

[3] Public Document ("P.D.") and Confidential Document ("C.D.") citations refer to the administrative record filed in Plaintiff's original challenge to the Final Results, not the record filed by Commerce concurrent with the Remand Results. Public Document on Remand ("P.D.R.") citations refer to the administrative record filed by Commerce concurrent with the Remand Results.

[4] In antidumping duty proceedings concerning merchandise from the PRC, Commerce determines the normal value of that merchandise through an approach specific to non-market economy countries. *See* 19 U.S.C. § 1677b(c); 19 C.F.R. § 351.408; Department of Commerce, Antidumping Manual (October 13, 2009), Chap. 10; AASPS I, 716 F. Supp. 2d at 1333, 1335; Certain Lined Paper Products from the People's Republic of China: Notice of Preliminary Results of the Antidumping Duty Administrative Review, 73 Fed. Reg. 58,540, 58,542 (October 7, 2008) ("Preliminary Results"). This approach uses surrogate data from a comparable market economy country to value the factors of production ("FOP") (including materials, labor, and energy) and other costs of production ("non-FOP costs of production") (including factory overhead; selling, general, and administrative expenses; and profit) for the merchandise. Department of Commerce, Antidumping Manual (October 13, 2009), Chap. 10 at 14–18; *see also* 19 CFR § 351.408(c)(4). In valuing non-FOP costs of production, Commerce calculates surrogate financial values using the publicly available financial statements of a producer of comparable merchandise from the surrogate country. 19 CFR § 351.408(c)(4). For the instant review, Commerce chose India as the surrogate country,

Commerce determined for the reasons stated below, *see infra* at n.5 and n.7, that the Sundaram data were the "best available information" to calculate surrogate financial values and declined to use the Navneet data for this purpose. Memorandum from John M. Andersen, Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Import Administration, Issues and Decisions for the Final Results of the First Administrative Review (April 6, 2009), P.D. 117 ("Final Results Memorandum") at cmt. 4; *see also AASPS I*, 716 F. Supp. 2d at 1333, 1335; Certain Lined Paper Products from the People's Republic of China: Notice of Preliminary Results of the Antidumping Duty Administrative Review, 73 Fed. Reg. 58,540, 58,547 (October 7, 2008) ("Preliminary Results").

In *AASPS I*, AASPS argued, *inter alia*, "that substantial evidence supports neither (1) Commerce's selection of the Sundaram [data] for the purpose of calculating surrogate financial values nor (2) Commerce's rejection of the Navneet [data]." *AASPS I*, 716 F. Supp. 2d at 1334 (internal citations omitted) (citing Plaintiff's Initial Reply at 6–7, 20); *see also* Amended Complaint at ¶ 6. The court agreed, holding, *inter alia*, that "Commerce failed to articulate a rational connection between the evidence on the record and its selection of the Sundaram [data]." *AASPS I*, 716 F. Supp. 2d at 1335. Because "Commerce's determination that the Sundaram [data] is the best available information for calculation of surrogate financial values [was] unsupported by substantial evidence[,] [t]his matter [was] remanded for Commerce to revisit this determination." *Id.* at 1336.

In December 2010, Commerce issued its Final Results of Redetermination Pursuant to Remand, Doc. No. 105 ("Remand Redetermination"). Remand Redetermination at 1. Commerce "consider[ed] specificity, contemporaneity, and the quality of available data" to determine what constitutes best available information. *Id.* at 24. Commerce again concluded that the Sundaram data "constitutes the best available information on the record" because "Sundaram is a producer of stationery products; its financial information is contemporaneous with the POR; and the data are sufficiently complete and accurate for the purpose of calculating surrogate financial ratios" and because "there is no evidence that Sundaram received [potentially distorting] countervailable subsidies." *Id.* at 14.[5]

because India is a market economy country that (1) is "at a level of economic development comparable to that of" the PRC and (2) is a significant producer of comparable merchandise. Preliminary Results, 73 Fed. Reg. at 58,542.

[5] Commerce continued to rely on the same reasoning for favoring the Sundaram data in its Remand Redetermination as it did in the Final Results. Final Results Memorandum at cmt.

In examining the accuracy of the Sundaram data, Commerce compared the data in the official 2004–2005 Sundaram annual financial report submitted by Plaintiff to "the data for year end March 2005" in the Sundaram data submitted by Defendant-Intervenor. Remand Redetermination at 26; Memorandum from Christopher Hargett, International Trade Compliance Analyst, and Michael Martin, Lead Accountant, to The File, Re: Sundaram Balance Sheet Analysis (December 6, 2010), Public Document on Remand ("P.D.R.") 13 ("Balance Sheet Analysis") at 2.[6] Using this comparison, Commerce concluded that the submitted Sundaram data were "an accurate representation" of the official 2006–2007 Sundaram annual financial report. Remand Redetermination at 26; *see also* Balance Sheet Analysis at 3 ("Thus, the accuracy and completeness of 2007 Sundaram balance sheet and profit and loss account provided by Lian Li, which includes the 2005 financial information, is corroborated by AASPS' own submission of Sundaram's 2005 balance sheet and profit and loss account.").

In contrast to the Final Results,[7] Commerce concluded that the Navneet data were "less representative" due to Navneet's receipt of countervailable subsidies and different level of integration. Remand Redetermination at 26–27. Therefore, Commerce "continue[d] to reject the use of [the Navneet data] for the purposes of calculating surrogate financial ratios." *Id.* at 19.

4 ("The Department continues to find that Sundaram's information represents the best available information on the record. We continue to find that Sundaram's financial statement is complete, publicly available and contemporaneous with the POR."); *see also* Preliminary Results, 73 Fed. Reg. at 58,547.

[6] It appears that Commerce did not have a copy of the official 2006–2007 Sundaram annual financial report on the record. A copy of the official 2004–2005 Sundaram annual financial report was submitted to Commerce by AASPS during remand proceedings, following Commerce's request. Remand Redetermination at 24; Letter from Wiley Rein LLP to Gary F. Locke, Secretary of Commerce, Re: Certain Lined Paper Products from the People's Republic of China: Submission of 2004–2005 Annual Report of Sundaram Multi Pap Ltd. (November 9, 2010) P.D.R. 10 at 1–2; Letter from James Terpstra, Program Manager, to Wiley Rein LLP, Re: Remand Redetermination, *Association of American School Paper Suppliers v. United States*, Court No. 09–00163, Request for Submission of Factual Information Referenced in the Association of American School Paper Suppliers' October 19, 2010 Comments on the Department of Commerce's Draft Results of Remand Redetermination (November 5, 2010), P.D.R. 8.

[7] In declining to use the Navneet data in the Remand Redetermination, Commerce changed its reasoning from its position in the Final Results. *Compare* Final Results Memorandum at 39 cmt. 4, *cited in AASPS I*, 716 F. Supp. 2d at 1335 ("Commerce stated that (1) during an earlier investigation, it had determined that the Navneet data [were] inaccurate and (2) nothing in the record contradicts that determination.") *with* Remand Redetermination at 13 ("We have revisited this conclusion and have not relied upon it as a basis for rejecting Navneet's financial information.").

In this action, AASPS continues to challenge Commerce's selection of the Sundaram data as the best available information and Commerce's decision not to use the Navneet data. Plaintiff's Comments at 1–2.

III.
Standard of Review

The court will hold unlawful a determination by Commerce resulting from an administrative review of an antidumping duty order if that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *see* 19 U.S.C. § 1516a(a)(2)(B)(iii).

"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Aimcor v. United States*, 154 F.3d 1375, 1378 (Fed. Cir. 1998) (quoting *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966).

This inquiry must consider "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). While contradictory evidence is considered, "the substantial evidence test does not require that there be an absence of evidence detracting from the agency's conclusion, nor is there an absence of substantial evidence simply because the reviewing court would have reached a different conclusion based on the same record." *Cleo Inc. v. United States*, 501 F.3d 1291, 1296 (Fed. Cir. 2007) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487–88, 71 S. Ct. 456, 95 L. Ed. 456 (1951)).

IV.
Discussion

Commerce's selection of the Sundaram data as the "best available information" from which to calculate surrogate values is supported by substantial evidence. Commerce rationally concluded that the Sundaram data are "not so incomplete as to warrant rejection," Remand Redetermination at 26; *see infra* Part IV.B, and that the

Sundaram data are reliable, *see infra* Part IV.C. These conclusions are reasonable, in part, because AASPS has not demonstrated that Commerce has a consistent past practice of "reject[ing] financial statements where *any* information is missing, regardless of its nature," Plaintiff's Comments at 12. *See infra* Part IV.D.[8]

A
Legal Framework

19 U.S.C. § 1677b(c)(1)(B) requires Commerce to calculate surrogate financial values "based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by [Commerce]." 19 U.S.C. § 1677b(c)(1)(B). "The statute provides little guidance as to what constitutes best available information," *Globe Metallurgical, Inc. v. United States*, 28 CIT 1608, 1621, 350 F. Supp. 2d 1159 (2004) (citing *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999)), and "Congress has vested Commerce with considerable discretion in selecting the 'best available information.'" *Allied Pacific Food (Dalian) Co. v. United States*, 587 F. Supp. 2d 1330, 1342 (CIT 2008) (same). However, Commerce's selection must still be supported by substantial evidence on the record and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

B
Substantial Evidence Supports Commerce's Conclusion That The Sundaram Data Were Sufficiently Complete

AASPS argues that Commerce "has not explained its determination that the [Sundaram] data are sufficiently complete to enable the agency to accurately calculate surrogate financial ratios." Plaintiff's Comments at 19. AASPS states that "the [Sundaram] data does not represent Sundaram's complete annual report or financial statement" because the information "is missing data required under Indian law" and missing "numerous schedules" that are present in the official 2004–2005 Sundaram annual financial report. Association of American School Paper Suppliers' Reply Comments on the Remand Results ("Plaintiff's Reply"), Doc. No. 118 at 9. AASPS focuses on the "lack [of] any schedules or breakouts for line items on the balance sheet or profit and loss statement" and states that Commerce "has previously

[8] Because Commerce's selection of the Sundaram data was within its discretion, *see infra* Part IV, AASPS' arguments concerning selection of the Navneet data and reopening the administrative record, Association of American School Paper Suppliers' Reply Comments on the Remand Results ("Plaintiff's Reply"), Doc. No. 118 at 14, are moot.

rejected financial statements that do not contain such schedules." *Id.* at 10. The lack of these schedules or breakouts, according to AASPS, "frustrates the agency's ability to perform any analysis" of some of the elements of the surrogate financial ratio calculations. *Id.* AASPS argues that "[s]imply describing the missing schedules as non-vital does not provide the required explanation." *Id.* at 11.

The Government argues that "the record demonstrates that the Sundaram [data] was not defective in a way that would warrant rejection of information as incomplete." Defendant's Response to Plaintiff's Comments Regarding the Remand Redetermination ("Defendant's Response"), Doc. No. 115 at 15 (internal quotations omitted). Commerce explained that its "primary concern is whether the financial statements contain usable data." Remand Redetermination at 11. It found that the Sundaram data contained a director's report, auditor's reports, balance sheet, profit and loss statement, notes, and accounting policies. *Id.* Commerce stated that these are "elements which are common to many financial reports." *Id.* Commerce also stated that "the details of operating expense and overhead can be presented differently for [each] different company's financial information" and that "the accounts which are required to calculate surrogate values were included in the Sundaram [data]." *Id.* at 13. Commerce concluded that the Sundaram data were "sufficiently complete . . . for the purpose of calculating surrogate financial ratios." *Id.* at 14.

AASPS fails to offer any evidence that Commerce acted beyond the scope of its discretion or that Commerce's methodology compromised its calculations. *See generally* Plaintiff's Comments; Plaintiff's Reply. Commerce here sufficiently explained its conclusion that the Sundaram data "contained all the data [it] needed to calculate financial ratios," Remand Redetermination at 11.[9]

C
Substantial Evidence Supports Commerce's Conclusion That The Sundaram Data Were Reliable

AASPS also challenges Commerce's conclusion that the Sundaram data are an accurate representation of the official Sundaram annual financial report. Plaintiff's Comments at 16. AASPS argues that "there is no reason why" matching 2004–2005 values with official documentation should necessarily mean that the 2006–2007 values

[9] AASPS argues that "any incomplete statement must be rejected. The lack of schedules is therefore an indicia of incompleteness that warrants rejection." Plaintiff's Reply at 11. To the extent that AASPS' argument rests on its theory of Commerce's past practice, this argument is also rejected. *See infra* Part IV.D.

are consistent as well, *id.* at 17–18, and that "this finding is pure speculation," Plaintiff's Reply at 8.

The Government argues that Commerce's comparison, *inter alia*, "provide[s] substantial evidence to support Commerce's determination that the information reflects the official annual report of Sundaram for the current period." Defendant's Response at 21. Defendant-Intervenor adds that this comparison was logical because "if the data given for the year ended March 2005 is accurate, the data for other years listed is also likely to be accurate." Response to Comments on Final Results of Redetermination Pursuant to Court Order ("Defendant-Intervenor's Response"), Doc. No. 116 at 13.

It may be true that, as AASPS points out, "it does not follow" that because the 2004–2005 Sundaram data were accurate, the 2006–2007 data "*must* also accurately reflect the values recorded in Sundaram's 2006–2007 financial statement." Plaintiff's Reply at 8 (emphasis added).[10] Nevertheless, it is within Commerce's discretion to conclude the data do accurately reflect those values, as long as it provides substantial evidence for its conclusion. 19 U.S.C. § 1516a(b)(1)(B)(i).

Here, Commerce provided such evidence. Commerce compared 2004–2005 values in the Sundaram data, which covered years 2003 to 2007, to the official 2004–2005 Sundaram annual financial statement. Remand Redetermination at 26; Balance Sheet Analysis at 2. Commerce found that, for the 2004–2005 values, "[a]ny differences between the values in the two reports were less than 0.1 percent," Remand Redetermination at 26, and "attributable to rounding," Balance Sheet Analysis at 3. AASPS does not dispute these findings. *See generally* Plaintiff's Comments at 16–19; Plaintiff's Reply at 7–9. Commerce then determined that the 2006–2007 values contained in the Sundaram data were "an accurate representation" of the official 20062007 Sundaram annual financial report. Remand Redetermination at 26; *see also* Balance Sheet Analysis at 3 (concluding that the official 2004–2005 Sundaram annual financial report corroborated the accuracy of the Sundaram data).[11]

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[10] Plaintiff's counsel stated at oral argument that Plaintiff "do[es no]t dispute" the accuracy of the 2004-2005 Sundaram data. August 4, 2011 Oral Argument at 10:59:00–10:59:13.

[11] AASPS also argues that Commerce's conclusion that "Navneet was subsidized during the [POR]" was based on a type of information present in the Navneet data but not present in the Sundaram data, Plaintiff's Reply at 10 n.7, and further asserts that the Sundaram data nonetheless "indicates that Sundaram received 'export incentives' during the review period," *id.* at 14. Yet, even if Sundaram received actionable subsidies, the parties agree that receipt of subsidies is not by itself enough to reject a financial statement. Remand Redetermination at 17; Plaintiff's Reply at 14. Additionally, AASPS does not contest Commerce's finding that Navneet has a different level of integration. *See generally* Plaintiff's Comments at 21–23; Plaintiff's Reply at 13–15.

D
AASPS Has Failed To Show That Commerce Has Consistently Rejected Statements Where Any Information Is Missing

AASPS contends that Commerce's "past practice is to reject financial statements where *any* information is missing, regardless of its nature." Plaintiff's Comments at 12.[12] AASPS argues that Commerce's use of the Sundaram data "is a clear deviation from past practice which [Commerce] has not explained." Plaintiff's Reply at 2.

The Government counters that "AASPS's argument distorts Commerce's practice with respect to incomplete statements," Defendant's Response at 11, pointing to Commerce's description of its past practice as rejecting incomplete financial statements in cases "where alternative information was on the record and the missing information was determined to be *vitally important*." Defendant's Response at 10 (quoting Remand Redetermination at 26) (emphasis added). The Government argues Commerce has an alternative past practice not correctly articulated by AASPS that is consistent with Commerce's actions in this case. Defendant's Response at 11–13; *see* Remand Redetermination at 26–27.

"A court may measure Commerce's reasonableness by determining whether Commerce's actions are consistent with a past practice or stated policy." *Globe Metallurgical*, 28 CIT at 1621 (citing *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 28 CIT 1185, 1199 (2004)); *see also NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1331 (Fed. Cir. 2009); Defendant's Response at 14; Plaintiff's Reply at 3.[13]

When assessing Commerce's past practice, "the proper mode of analysis requires comparison of Commerce's actions before this case with Commerce's actions in this case." *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003) (applying the arbitrary and capricious standard). In addition, Commerce's "policy statements may help identify Commerce's consistent past practice." *Id.* Plaintiff has the burden of showing "that Commerce consistently followed a contrary practice in similar circumstances." *Id.*; *see also Andaman Seafood Co., Ltd. v. United States*, 768 F. Supp. 2d 1315, 1326 (CIT

[12] AASPS points to Commerce's various instances of rejecting financial statements when missing certain information. Plaintiff's Comments at 8–10.

[13] Commerce has "discretion to . . . adapt its views and practices to the particular circumstances of the case at hand, so long as the agency's decisions are explained and supported by substantial evidence on the record." *Pakfood Pub. Co. v. United States*, 724 F. Supp. 2d 1327 (CIT 2010) (quoting *Nakornthai Strip Mill Pub. Co. v. United States*, 587 F. Supp. 2d 1303, 1307 (2008)).

2011) (holding that the plaintiffs failed to show that Commerce had an established practice of relying on indirect selling expense ratios).

Here, AASPS has not proven that Commerce consistently followed a practice of "reject[ing] financial statements where *any* information is missing, regardless of its nature," Plaintiff's Comments at 12.

On one hand, AASPS is correct that Commerce has, at times, described its practice merely as rejecting incomplete statements, without qualification.[14] Commerce has also previously rejected

[14] Memorandum from Susan H. Kuhbach, Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Seamless Refined Copper Pipe and Tube from the People's Republic of China (September 24, 2010) ("Seamless Refined Copper Pipe and Tube"), *cited in* Seamless Refined Copper Pipe and Tube From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 75 Fed. Reg. 60,725, 60,726 (October 1, 2010), at 10 cmt. 2 ("established practice of rejecting incomplete financial statements"); Memorandum from John M. Andersen, Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Antidumping Duty Investigation of Wire Decking from the People's Republic of China: Final Antidumping Duty Determination (June 3, 2010) ("Wire Decking"), *cited in* Wire Decking from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 75 Fed. Reg. 32,905, 32,906 (June 10, 2010), at 15 cmt. 2 ("practice to not use incomplete or illegible statements"); Memorandum from John M. Andersen, Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Antidumping Duty Administrative Review of Polyethylene Retail Carrier Bags from the People's Republic of China for the Period of Review August 1, 2006, through July 31, 2007 (February 4, 2009) ("Polyethylene Retail Carrier Bags"), *cited in* Polyethylene Retail Carrier Bags from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 74 Fed. Reg. 6,857, 6,858 (February 11, 2009), at 9 cmt. 2 ("long-standing practice of not using the financial statements of surrogate producers whose financial statements are incomplete"); Memorandum from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, Antidumping Duty Investigation of Lightweight Thermal Paper from the People's Republic of China: Issues and Decision Memorandum ("Lightweight Thermal Paper"), *cited in* Lightweight Thermal Paper From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 73 Fed. Reg. 57,329, 57,329–30 (October 2, 2008), at 13 cmt. 2 ("practice not to use incomplete or illegible statements"); Memorandum from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Antidumping Investigation of Certain New Pneumatic Off-the-Road Tires from the People's Republic of China (July 7, 2008) ("Certain New Pneumatic Off-the-Road Tires"), *cited in* Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 Fed. Reg. 40,485, 40,486 (July 15, 2008), at 37 cmt. 17.A ("practice not to use incomplete or illegible statements"); Memorandum from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, Issues and Decision Memorandum for the 2005–2006 Administrative Review of Folding Metal Tables and Chairs from the People's Republic of China (December 7, 2007) ("Folding Metal Tables

incomplete financial statements without discussing the significance of the missing data.[15]

However, Commerce is correct that it has also previously described its policy as rejecting incomplete statements that are missing critical information.[16] Commerce has often explicitly focused on the importance of the missing information when rejecting incomplete financial statements.[17] Commerce has also previously indicated that incom-

and Chairs"), *cited in* Folding Metal Tables and Chairs from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 72 Fed. Reg. 71,355, 71,356 (December 17, 2007), at 10 cmt. 1 ("long-standing policy to reject financial statements that are incomplete"); Memorandum from Barbara E. Tillman, Acting Deputy Assistant Secretary for Import Administration, to Joseph A. Spetrini, Acting Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Final Results and Final Partial Rescission of Certain Cut-To-Length Carbon Steel Plate from Romania (March 7, 2005) ("Cut-To-Length Carbon Steel Plate"), *cited in* Certain Cut-to-Length Carbon Steel Plate from Romania: Notice of Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 70 Fed. Reg. 12,651, 12,652–53 (March 15, 2005), at 23 cmt. 10 ("preference for using financial statements, which are audited and complete, compared to financial statements which are not audited and incomplete").

[15] Seamless Refined Copper Pipe and Tube at 10 cmt. 2 (rejecting financial statement missing income statement); Wire Decking at cmt. 2 (rejecting financial statement missing schedules A through D); Memorandum from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review and New Shipper Review of Wooden Bedroom Furniture from the People's Republic of China (August 11, 2008) ("Wooden Bedroom Furniture II"), *cited in* Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Review, 73 Fed. Reg. 49,162, 49,162 (August 20, 2008), at 14 cmt. 1 (rejecting financial statements that were missing listed items).

[16] Memorandum from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, Issues and Decision Memorandum for the New Shipper Reviews of Wooden Bedroom Furniture from the People's Republic of China covering the period June 24, 2004 through June 30, 2005 (November 21, 2006) ("Wooden Bedroom Furniture I"), *cited in* Wooden Bedroom Furniture from the People's Republic of China: Final Results of the 2004–2005 Semi-Annual New Shipper Reviews, 71 Fed. Reg. 70,739, 70,740 (December 6, 2006), at 6 cmt. 2 ("It is [our] practice to disregard incomplete financial statements as a basis for calculating surrogate financial ratios where . . . the statement is missing key sections, such as sections of the auditor's report, that are vital to our analysis and calculations.").

[17] Memorandum from John M. Andersen, Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Final Results of 1st New Shipper Review: Certain Steel Nails from the People's Republic of China ("PRC") (June 10, 2010) ("Certain Steel Nails"), *cited in* Certain Steel Nails from the People's Republic of China: Final Results of the First New Shipper Review, 75 Fed. Reg. 34,424, 34,426 (June 17, 2010), at 15 cmt. 4 ("[T]he following financial statements are incomplete because they lack certain critical components . . . ."); Polyethylene Retail Carrier Bags at 9 cmt. 2 ("Such information is critical for determining not only whether Polyplast's income comes primarily from its manufacturing operations but also for determining whether Polyplast is a producer of identical merchandise."); Memorandum from Bernard T. Carreau, Deputy Assistant Secretary for Import Administration, Group II, to Faryar Shirzad,

pleteness alone may not be sufficient to reject statements and that it has in the past relied upon incomplete financial statements.[18] Moreover, in other determinations, Commerce has "not reject[ed] the financial information *solely* for being incomplete.[19] Defendant's Response at 16 (emphasis modified).

Assistant Secretary for Import Administration Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Steel Concrete Reinforcing Bars from Belarus (June 14, 2001) ("Steel Concrete Reinforcing Bars"), *cited in* Notice of Final Determination of Sales at Less Than Fair Value: Steel Concrete Reinforcing Bars From Belarus, 66 Fed. Reg. 33,528, 33,529 (June 22, 2001), at 7 cmt. 2 ("[W]e are concerned that the statement is missing key sections, such as sections of the auditor's report, that are vital to our analysis and calculations.").

[18] Memorandum from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Final Results in the Second Administrative Review of Floor-standing, Metal-top Ironing Tables and Certain Parts Thereof from the People's Republic of China (March 10, 2008) ("Floor-standing, Metal-top Ironing Tables and Certain Parts Thereof"), *cited in* Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 73 Fed. Reg. 14,437, 14,437–38 (March 18, 2008), at 8 cmt. 1 ("[T]he lack of the [profit and loss] statement from the financial report may not always invalidate the financial statement as a potential surrogate source if no more reliable options are available."), 8 cmt. 1 ("We note that petitioner is correct that in other reviews, the Department has occasionally relied upon incomplete financial statements to derive surrogate financial ratios. However, the Act requires the Department to determine the surrogate financial ratios based on the best available information on the record. *See* section 773(c)(1) of the Act. Thus, the Department evaluates the best available surrogate information on a case by case basis, and in each case, the Department must evaluate among the surrogate value sources placed on the record to determine which constitutes the most comparable, and accurate information. Thus, the lack of the P&L statement from the financial report may not always invalidate the financial statement as a potential surrogate source if no more reliable options are available. In this case, however, the Department finds, for the reasons discussed above, that in comparing the 2005–2006 Infiniti Modules with the more complete 2004–2005 Infiniti Modules financial statements, the 2004–2005 Infiniti Modules financial statements are wholly publicly available and thus more reliable and complete.").

[19] Floor-standing, Metal-top Ironing Tables and Certain Parts Thereof at 7 n.13 cmt. 1 ("[A missing] [profit and loss] statement raises concerns that items listed on the [profit and loss] statement which may be relevant to the surrogate financial ratio calculation are not listed in the publicly available schedules."); Certain Lined Paper Products at 10 cmt. 1 ("[The f]inancial statements are illegible and undecipherable. Furthermore, the financial statements do not appear to be a complete report . . . ."); Cut-To-Length Carbon Steel Plate at 23 cmt. 10 (discussing five reasons for rejection, including incompleteness); Silicon Metal at 27 cmt. 9 ("[W]e are disregarding all Sinai Manganese financial data as either having a negative profit or incomplete and not contemporaneous financial data."); Steel Concrete Reinforcing Bars at 7 cmt. 2 ("insolvent company with an aberrational [selling, general, and administrative] expense ratio" and an incomplete statement); Memorandum from Joseph A. Spetrini, Deputy Assistant Secretary for Import Administration, to Faryar Shirzad, Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Less Than Fair Value Investigation of Silicon Metal from the Russian Federation (February 3, 2003) ("Silicon Metal"), *cited in* Notice of Final Determination of Sales at Less Than Fair Value: Silicon Metal From the Russian Federation, 68 Fed. Reg. 6,885, 6,886–87 (February 11, 2003), at 26–28 cmt. 9 ("The 1995–1998 Sinai Manganese financial data may be incomplete, and moreover is not contemporaneous with the [period of investigation]. Thus,

Indeed, as pointed out by counsel for Defendant-Intervenor in oral argument, Commerce recently stated clearly that its practice is to only reject incomplete statements when those statements are missing "key sections" that are "vital." August 4, 2011 Oral Argument at 11:11:33–11:12:08 ("Although, Petitioners argued that the Visakha statement appears to be incomplete the Department notes that it is our practice to only disregard incomplete financial statements as a basis for calculating surrogate financial ratios where the statement is missing key sections, such as sections of the auditor's report, that are vital to our analysis and calculations.") (quoting Galvanized Steel Wire From the People's Republic of China and Mexico: Initiation of Antidumping Duty Investigations, 76 Fed. Reg. 23,548, 23,551 (April 27, 2011)).

AASPS has not proven that Commerce has consistently "reject[ed] financial statements where *any* information is missing, regardless of its nature," Plaintiff's Comments at 12. AASPS cites many of the Commerce decisions referenced above, *see supra* nn. 14–20, as supporting its proposition that Commerce "has uniformly rejected financial statements that are incomplete, whether by reason of missing notes, schedules, pages or even certain figures," Plaintiff's Reply at 4. *See* Plaintiff's Comments at 8–9 n.5. However, the Government correctly counters that "Commerce did [not] somehow develop[] a policy of [always] rejecting . . . incomplete information without inquiring into whether calculations would be feasible notwithstanding the incompleteness" simply by not "fully explaining in every case its reasoning for rejecting information as incomplete." Defendant's Response at 14 (internal quotation marks omitted).

V.
Conclusion

For the reasons stated above, Commerce's Final Results of Redetermination Pursuant to Remand are AFFIRMED.

Dated: August 11, 2011
New York, New York

/s/ Evan J. Wallach
EVAN J. WALLACH, JUDGE

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we are disregarding all Sinai Manganese financial data as either having a negative profit or incomplete and not contemporaneous financial data.").

Slip Op. 11–102

UNITED STATES, Plaintiff, v. ILONA ZATKOVA D/B/A LA MONT AND GLASS NAIL FILES Defendant.

Before: WALLACH, Judge
Court No.: 10–00071

[Defendant's Motion to Dismiss is DENIED, and Plaintiff's request for an extension of time to properly effect service is GRANTED.]

Dated: August 11, 2011

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Karen Virginia Goff* and *Stephen C. Tosini*).

Neville Peterson LLP (*John M. Peterson*, *Maria E. Celis*, and *Russell A. Semmel*) for Defendant Ilona Zatkova d/b/a La Mont and Glass Nail Files.

OPINION

Wallach, Judge:

I
Introduction

The United States ("Plaintiff" or "Government") seeks to collect civil penalties plus interest, costs, and attorney fees from Ilona Zatkova ("Defendant") for allegedly attempting to enter or introduce glass nail files from the Czech Republic into United States commerce in violation of 19 U.S.C. §§ 1484, 1485, and 1592. Plaintiff's Complaint ("Plaintiff's Complaint"), Doc. No. 3 at 1–2. Pursuant to USCIT Rule 12(b)(2), Defendant requests that the court dismiss Plaintiff's complaint for lack of personal jurisdiction because Plaintiff failed to properly serve process under USCIT Rule 4. Defendant's Motion to Dismiss ("Defendant's Motion"), Doc. No. 21 at 1–2. The court has jurisdiction to entertain this action pursuant to 28 U.S.C. § 1582. For the reasons stated below, Defendant's Motion is DENIED, and Plaintiff's request for an extension of time to properly effect service is GRANTED.

II
Background

A
USCIT Service Of Process Rules

USCIT Rule 4(d) provides:

> Unless federal law provides otherwise, an individual – other than a minor, an incompetent person, or a person whose waiver has been filed – may be served in a judicial district of the United States by:
>
> (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where service is made; or
>
> (2) doing any of the following:
>
> (A) delivering a copy of the summons and complaint to the individual personally;
>
> (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there . . . .

USCIT R. 4(d).[1] In the present case, the relevant rule of the State of California is applicable under USCIT Rule 4(d)(1) because process was attempted in that state. *See* Affidavit of Service (May 7, 2010), Plaintiff's Opposition to Defendant's Motion to Dismiss, or in the Alternative, Motion to Extend the Time for Service of Process ("Plaintiff's Response"), Doc. No. 22, Exhibit ("Plaintiff's Ex.") 16 at 1. Section 415.10 of the California Code of Civil Procedure ("California Code") provides:

> A summons may be served by personal delivery of a copy of the summons and of the complaint to the person to be served. Service of a summons in this manner is deemed complete at the time of such delivery. The date upon which personal delivery is made shall be entered on or affixed to the face of the copy of the summons at the time of its delivery. However, service of a summons without such date shall be valid and effective.

[1] USCIT Rule 4 is substantially identical to Federal Rule of Civil Procedure 4; therefore, the court may consider decisions and commentary on Federal Rule of Civil Procedure 4 for guidance. *See United States v. Ziegler Bolt & Parts Co.*, 19 CIT 507, 514, 883 F. Supp. 740 (1995) ("[T]he Court's rules are substantially the same as the Federal Rules of Civil Procedure (FRCP), [and] the Court has found it appropriate to consider decisions and commentary on the FRCP for guidance in interpreting its own rules.").

Cal. Civ. Proc. Code § 415.10 (West 2011). Furthermore, section 415.20(b) of the California Code provides:

> If a copy of the summons and complaint cannot with reasonable diligence be personally delivered to the person to be served, as specified in Section 416.60, 416.70, 416.80, or 416.90, a summons may be served by leaving a copy of the summons and complaint at the person's dwelling house, usual place of abode, usual place of business, or usual mailing address other than a United States Postal Service post office box, in the presence of a competent member of the household or a person apparently in charge of his or her office, place of business, or usual mailing address other than a United States Postal Service post office box, at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint by first-class mail, postage prepaid to the person to be served at the place where a copy of the summons and complaint were left. Service of a summons in this manner is deemed complete on the 10th day after the mailing.

Id. § 415.20(b).

B
Defendant's Attempt At Service Of Process

Plaintiff claims that on May 4, 2010, a private process server delivered documents, including the summons and complaint from this case, to a Francis "Doe" at 4318 Morrell Street, San Diego, California 92109. Plaintiff's Response at 5; Plaintiff's Ex. 16 at 1. Defendant claims that she did not reside at the Morrell Street address at the time of service, but instead resided at 4903 Cape May Avenue, San Diego, California 92107. Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss ("Defendant's Memo"), Doc. No. 21–2 at 2. In February 2009, Defendant wrote to Customs and Border Protection ("Customs") stating that "all future correspondences" should be sent to the Cape May Avenue address. Letter from Ilona Zatkova to Customs (February 13, 2009), Defendant's Motion, Exhibit ("Defendant's Ex.") D at 1.[2] Following

[2] On February 17, 2009, four days after Defendant's letter to Customs with the Cape May Avenue address listed as a current address, Defendant's former attorney wrote to Customs, stating that he was no longer representing Defendant and that Defendant could be contacted at the Morrell Street address. Letter from Daniel J. Curry to Lawrence Fanning (February 17, 2009), Plaintiff's Ex. 7 at 1. However, it appears that all subsequent correspondence between Plaintiff and Defendant was exclusively at the Cape May Avenue address, suggesting that Customs only followed the instructions from Defendant and not those from her former attorney. *See* Defendant's Ex. G and Plaintiff's Ex. 8 at 1; Defendant's Ex. H and Plaintiff's Ex. 9 at 1; Plaintiff's Ex. 10 at 1.

this date, it appears that all correspondence between Plaintiff and Defendant was exclusively at the Cape May Avenue address. *See* Letter from Marcia A. Gomez to Ilona Zatkova (September 25, 2009), Defendant's Ex. G and Plaintiff's Ex. 8 at 1; Letter from Christopher J. Duncan to Ilona Zatkova (January 20, 2010), Defendant's Ex. H and Plaintiff's Ex. 9 at 1; Letter from Ilona Zatkova to Customs (October 6, 2010), Plaintiff's Ex. 10 at 1.

Plaintiff states that prior to delivering the summons and complaint at the Morrell Street address it attempted service five times at the Cape May Avenue address. Plaintiff's Response at 3–4; Non-Service Report (April 23, 2010), Plaintiff's Ex. 11 at 1. According to the report provided by Plaintiff, on the first attempt there was "no answer at the door," the "front porch light [was] on," and a "car [was] parked on the street," but the process server was "unsure if the vehicle belong[ed] to the" Defendant. Plaintiff's Ex. 11 at 1. The process server made a second attempt, but again, there was "no answer at the door." *Id.* On the third attempt, the process server "marked the door," and on the fourth attempt four days later the "marker [was] gone." *Id.* On the fifth attempt, there was "no answer at the door" or at the neighbor's door. *Id.*

Plaintiff then attempted to serve the Defendant through Doe at the Morrell Street address on May 4, 2010. Plaintiff's Ex. 16 at 1. Defendant acknowledged receipt of these documents in a letter to Plaintiff dated May 5, 2010 but marked received on the envelope by Plaintiff on May 18, 2010. Letter from Ilona Zatkova to Stephen C. Tosini (May 5, 2010), Plaintiff's Ex. 17 at 1. This letter shows that Defendant received actual notice of the summons and complaint.[3] Plaintiff argues that the Morrell Street address is considered "an alternate address" of Defendant, Plaintiff's Response at 7, but also states that it does not contest Defendant's assertion in a sworn declaration that the Morrell Street address was not her usual place of abode at the time of service, *id.* at 8; Affirmation of Ilona Zatkova in Support of Defendant's Motion to Dismiss (November 24, 2010), Defendant's Ex. M at 2. Therefore, Plaintiff appears to argue that the Morrell Street address was Defendant's prior address or place of business and that given the showing of actual notice, the Government substantially complied with the rule for service of process. Plaintiff's Response at 8. Additionally, Plaintiff admits that it did not mail the summons and complaint to Defendant following this alleged substituted service. *Id.* at 14.

[3] Actual notice is distinct from sufficient service of process. For discussion of this distinction, *see infra* note 9.

III
Standard of Review

When the court's jurisdiction is challenged, "[t]he party seeking to invoke . . . jurisdiction bears the burden of proving the requisite jurisdictional facts." *Former Emps. of Sonoco Prods. Co. v. U.S. Sec'y of Labor*, 27 CIT 812, 814, 273 F. Supp. 2d 1336 (2003) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936)). However, in deciding Defendant's motion to dismiss, "the Court assumes that 'all well-pled factual allegations are true,' construing 'all reasonable inferences in favor of the nonmovant.'" *United States v. Islip*, 22 CIT 852, 854, 18 F. Supp. 2d 1047 (1998) (quoting *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)).

IV
Discussion

Although Plaintiff did not properly serve process under either USCIT Rule 4(d)(2), *see infra* Part IV.A, or USCIT Rule 4(d)(1), *see infra* Part IV.B, USCIT Rule 4(*l*) requires that the court extend the time for that service, *see infra* Part IV.C.

A
The Government Did Not Properly Serve Process Upon Defendant Under USCIT Rule 4(d)(2)

Defendant argues that Plaintiff failed to adhere to USCIT Rule 4(d)(2)(B) when it left a copy of the summons and complaint at the Morrell Street address only, because this address was not Defendant's "dwelling or usual place of adobe" at the time of service. Defendant's Memo at 13–20.[4] Plaintiff responds that "the provisions of [Rule 4] should be liberally construed to effectuate service," Plaintiff's Response at 6–7 (brackets in original) (quoting *Karlsson v. Rabinowitz*, 318 F.2d 666, 668 (4th Cir. 1963)) and that the Morrell Street address was a valid alternative address as either Defendant's business address or Defendant's last place of abode, *id.* at 9–10.[5]

[4] There is no indication from either party that there was proper service of process under USCIT Rule 4(d)(2)(A) or 4(d)(2)(C). *See generally* Defendant's Memo at 8–10; Plaintiff's Response at 6–11. Furthermore, Defendant does not argue that Doe was not "of suitable age or discretion" or that a copy of process was not left with Doe. *See* Defendant's Memo at 13.

[5] Plaintiff points to Lexis searches and Internet searches displaying the Morrell Street address as a place of business or current address. Plaintiff's Response at 8; Lexis searches for "La Mont," "Glass Nail Files," and "Zatkova" (December 17, 2010), Plaintiff's Ex. 12 at 1–6; San Diego County Business Directory, Company Profile for Ilona Zatkova, Plaintiff's Ex. 13 at 1; PeopleFinders results for Ilona Zatkova, Plaintiff's Ex. 14 at 1. Defendant argues that Plaintiff's Exhibit 12 is irrelevant because it is dated several months after the Affidavit of Service and therefore "could not have been used or relied upon by the

Although it is well settled that "Rule 4 should be given liberal and flexible construction," *Borzeka v. Heckler*, 739 F.2d 444, 447 (9th Cir. 1984) (citing, *inter alia*, *Nowell v. Nowell*, 384 F.2d 951, 953 (5th Cir. 1967); *Karlsson*, 318 F.2d at 668; *Rovinski v. Rowe*, 131 F.2d 687, 689 (6th Cir. 1942)), the service attempted at the Morell Street address is insufficient even under a liberal construction of USCIT Rule 4(d)(2).

First, because an individual's place of business is not considered a usual place of abode under USCIT Rule 4(d)(2), Plaintiff's argument that the Morrell Street address was at least Defendant's current business address at the time of service, Plaintiff's Response at 9–10, is irrelevant. "The Federal Rules of Civil Procedure that address service on individuals do not specifically authorize serving them at their place of business." *Hides v. City of Fort Wayne*, 2006 U.S. Dist. LEXIS 91368 at *8 (N.D. Ind. 2006); *see also Smith v. W. Offshore, Inc.*, 590 F. Supp. 670, 674 (E.D. La. 1984) ("Service upon an individual through a nonauthorized agent for service of process at the individual's place of business is not a proper means of serving process under the Federal Rules of Civil Procedure."); *Gipson v. Bass River*, 82 F.R.D. 122, 125 (D.N.J. 1979) ("Clearly, leaving process at defendants' place of employment does not qualify under the dwelling house or place of abode method."). In the present case, Plaintiff's complaint is against Defendant as an individual and not against her business, Plaintiff's Complaint at 3, and Defendant properly states that "[t]he only authorized form of substitute service upon an individual must take place at the individual's current 'dwelling or usual place of abode,'" Defendant's Reply at 13 (quoting USCIT R. 4(d)(2)(B)).

Second, with respect to Plaintiff's argument that a former residence can be a "usual place of abode," Plaintiff's Response at 8, "the law does not mean the last place of abode; for a party may change his place of abode every month in the year," *Earle v. McVeigh*, 91 U.S. 503, 508, 23 L. Ed. 398 (1876); *see also Ngo v. Van Ha*, 2008 U.S. Dist LEXIS 107026 at *11–13 (W.D. La. 2008). Rather, a "usual place of abode" means that the party is living in that residence but "may be *temporarily* absent at the time." *Earle*, 91 U.S. at 508 (emphasis

Government's process server" and may be a *post hoc* attempt by Plaintiff to justify service at the Morrell Street address. Defendant's Reply at 8. Defendant also argues that all these exhibits are not authenticated. *Id.* For the purpose of this Motion to Dismiss, the court construes all facts in favor of the Plaintiff. *See Islip*, 22 CIT at 854. However, Plaintiff does not argue that the Morrell Street address was a current home address at the time of attempted service. Plaintiff's Response at 8 ("Ms. Zatkova has recently stated in a sworn declaration that 4318 Morrell Street was not her usual place of abode on May 4, 2010, the date of service of process. . . . We do not contest this assertion at this time."). Furthermore, even if this address were a business address, service would not have been proper under either USCIT Rule 4(d)(2)(B), *see infra* Part IV.A, or USCIT Rule 4(d)(1), *see infra* Part IV.B.

added). Although a former place of abode was acceptable in *Karlsson*, 318 F.2d at 666, that case involved unique circumstances not present in this case, *Karlsson*, 318 F.2d at 667.[6] Indeed, none of the cases cited by Plaintiff, *see* Plaintiff's Response at 6–11, involve service to a "former boyfriend," Defendant's Memo at 5; *see* Plaintiff's Ex. 16 at 1 (referring to Doe as a "co-occupant"), at a former address, Plaintiff's Response at 8, of a defendant who voluntarily provided a current address, Defendant's Ex. D at 1, and who, at most, "*may* have been evading service," Plaintiff's Response at 20 (emphasis added).[7]

B

The Government Did Not Properly Effect Service Of Process Upon Defendant Under USCIT Rule 4(d)(1)

1

California Courts Liberally Construe California Service of Process Statutes

"[T]he [service of process] provisions are now to be liberally construed to effectuate service and uphold jurisdiction if actual notice has been received by the defendant." *Bein v. Brechtel-Jochim Grp., Inc.*, 6 Cal. App. 4th 1387 (Cal. Ct. App. 1992) (citing *Pasadena Medi-Ctr. Assocs. v. Super. Ct.*, 511 P.2d 1180, 1184 (Cal. 1973) (noting "the desirability of liberal construction of [California's service of process statutes]")). Section 415.20(b) of the California Code allows for substitute service if "a copy of the summons and complaint cannot with reasonable diligence be personally delivered to the person to be served." Cal. Civ. Proc. Code § 415.20(b) (West 2011). This substitute

[6] In *Karlsson*, the defendant temporarily moved from Maryland to a motel in Arizona until he found a permanent residence. *Karlsson*, 318 F.2d at 667. While in Arizona, process was served at the Maryland home by leaving a copy thereof with his wife who was still residing at the home as they finalized its sale. *Id.* In the present case, it appears that Defendant did not reside at the Morrell Street address for several years, *see* Defendant's Ex. G and Plaintiff's Ex. 8 at 1; Defendant's Ex. H and Plaintiff's Ex. 9 at 1; Plaintiff's Ex. 10 at 1, and that Doe was a former boyfriend rather than a current spouse, Defendant's Memo at 5; *see* Plaintiff's Ex. 16 at 1 (referring to Doe as a "co-occupant").

[7] In *Frank Keevan & Son, Inc. v. Callier Steel Pipe & Tube, Inc.*, 107 F.R.D. 665, 671 (S.D. Fla. 1985), the defendant was nomadic, making it difficult for the plaintiff to locate the defendant and serve process. *Keevan*, 107 F.R.D. at 671. In *Nat'l Labor Relations Bd. v. Clark*, 468 F.2d 459 (5th Cir. 1972), the defendant moved from his residence but made it appear that he was still residing there. *Clark*, 468 F.2d at 464. In *Blackhawk Heating & Plumbing Co. v. Turner*, 50 F.R.D. 144 (D. Ariz 1970), the defendant "made no effort to leave a forwarding address or disconnect telephone service until after the date of service." *Turner*, 50 F.R.D. at 149. In *Nowell*, the court held that process was properly left with a landlord but cautioned against extending that holding to cotenants. *Nowell*, 384 F.2d at 953 ("[T]he substantial nexus that exists between tenant and landlord does not exist between tenants themselves. The landlord, unlike his tenants, has a degree of control over all tenants and the premises that each occupies.").

service may be made by, *inter alia*, leaving a copy of the summons and complaint at the person's usual place of business with a competent individual apparently in charge of that place of business and "thereafter mailing a copy of the summons and of the complaint by first-class mail, postage prepaid to the person to be served at the place [of business] where a copy of the summons and complaint were left." *Id.* Plaintiff argues it had reason to believe that the Morrell Street address was a valid business address. *See supra* note 5.[8]

2

Under California Law, Actual Notice Does Not Necessarily Mean That Plaintiff Has Substantially Complied With The Service Of Process Rule

"To be constitutionally sound the form of substituted service must be 'reasonably calculated to give an interested party actual notice of the proceedings and an opportunity to be heard . . . [in order that] the traditional notions of fair play and substantial justice implicit in due process are satisfied.'" *Bein*, 6 Cal. App. 4th at 1392 (quoting *Zirbes v. Stratton*, 187 Cal. App. 3d 1407, 1416 (Cal. Ct. App. 1986)) (alterations in original). However, as Plaintiff points out, "[c]ourts in California have found that where there is *substantial compliance* with the statutory requirements for service, a trial court can acquire personal jurisdiction over the defendant." Plaintiff's Response at 12 (emphasis in original) (citing *Bein*, 6 Cal. App. 4th at 1392).

Plaintiff argues that "California courts *generally* find that service of process is sufficient where the defendant has actual knowledge of the complaint." Plaintiff's Response at 12–13 (emphasis added) (citing *In re Marriage of Tusinger*, 170 Cal. App. 3d 80, 82–83 (Cal. Ct. App. 1985); *Carter v. Anderson*, 2007 WL 27138333 at *3–4 (Cal. Ct. App. 4th Sept. 19, 2007)). However, a showing of actual notice alone does not necessarily mean that the party "reasonably calculated" substitute service to ensure actual notice. *Bein*, 6 Cal. App. 4th at 1392.[9] As Defendant points out, "[t]he California Supreme Court has explained that 'substantial compliance' with a statute 'means actual compliance in respect to the *substance* essential to *every* reasonable objective of the statute.'" Reply Memorandum In Support Of Defendant's Motion to Dismiss ("Defendant's Reply"), Doc. No. 23 at 18 (quoting and

[8] Unlike USCIT Rule 4(d)(2), the California Code expressly allows service of process at a place of business. Cal. Civ. Proc. Code § 415.20(b) (West 2011).

[9] Actual notice is distinct from sufficient service of process under USCIT Rule 4. Acknowledging actual notice does not automatically make service of process sufficient. *See Ziegler Bolt & Parts Co.*, 19 CIT at 519 ("Courts have long recognized that actual knowledge of a claim is insufficient to confer jurisdiction over the person."); *Friedman v. Estate of Presser*, 929 F.2d 1151, 1155 (6th Cir. 1991) ("[A]ctual knowledge of the law suit does not substitute for proper service of process under Rule 4(c)(2)(C)(ii).").

emphasizing *Stasher v. Harger-Haldeman*, 58 Cal. 2d 23, 29 (1962)).

3

California's Mailing Requirement, With Which Plaintiff Did Not Comply, Is An Essential Requirement For Sufficient Service Of Process

Because it did not mail the complaint and summons, Plaintiff failed to adhere to the final part of Section 415.20 of the California Code. *See* Cal. Civ. Proc. Code § 415.20(b) (West 2011); Defendant's Reply at 17. Although Plaintiff argues that its failure to mail the summons and complaint was only "a minor technical error," Plaintiff's Response at 14, it points to no case that discounts the importance of mailing following substitute service. *See generally* Plaintiff's Response at 11–15. To the contrary, the mailing requirement is essential even under California's liberal approach to determining sufficient service of process. *See, e.g.*, *Donel, Inc. v. Badalian*, 87 Cal. App. 3d 327, 332 (2d Dist. 1978) ("[W]here mailing of summons was reasonably feasible, any method of service less likely to provide actual notice is insufficient."); *Khourie, Crew & Jaeger v. Sabek, Inc.*, 220 Cal. App. 3d 1009, 1013 (Cal. Ct. App. 1990) ("The evident purpose of [Section 415.20 of the California Code] is to permit service to be completed upon a good faith attempt at physical service on a responsible person, plus actual notification of the action by mailing the summons and complaint to the appropriate party."). Federal courts in California also recognize the importance of such a mailing. *See Ogundimo v. Steadfast Prop. & Dev.*, 2010 U.S. Dist. LEXIS 107791 at *9 (E.D. Cal. 2010) ("[N]o proof of mailing of the summons and complaint via first class mail [was] made as is required after leaving service documents at an individual's 'usual place of business.'"); *Radke v. Holbrook*, 2010 U.S Dist. LEXIS 61195 at *19 (C.D. Cal. 2010) (service was not proper because, *inter alia*, the summons and complaint were not mailed).[10]

[10] Plaintiff also argues that it had no reason to mail the documents because Defendant acknowledged receipt of them in a letter dated one day after the attempted service. Plaintiff's Response at 15; Plaintiff's Ex. 17 at 1. However, the received stamp on that letter's envelope suggests that Plaintiff was not aware of this acknowledgment until *fourteen days* after the attempted service. Plaintiff's Ex. 17 at 1–2.

C
Good Cause Exists For An Extension Of Time To Effect Service Of Process

USCIT Rule 4(*l*) provides that, *inter alia*, "if the plaintiff shows good cause for the failure [to properly effect service of process], the court must extend the time for service for an appropriate period." USCIT R. 4(*l*). As Plaintiff argues in the alternative, good cause for an extension exists where the "plaintiff's failure to complete service in timely fashion is a result of the conduct of a third person, typically a process server, the defendant has evaded service of process or engaged in misleading conduct, *the plaintiff has acted diligently in trying to effect service* or there are understandable mitigating circumstances." Plaintiff's Response at 17 (quoting Wright and Miller, Federal Practice and Procedure § 1137 (3rd ed. 2002)) (emphasis added). Plaintiff argues that it diligently attempted to effect service at the Cape May Avenue address five times before turning to the Morrell Street address. *Id.* at 18; Plaintiff's Ex.11 at 1; Plaintiff's Ex. 16 at 1.[11]

Defendant argues that the facts here are strikingly similar to *Rodrigue*, 645 F. Supp. 2d 1310 (CIT 2009). Defendant's Reply at 2. In *Rodrigue*, the Government did not attempt to serve the parties until 21 days before the 120-day period for service as provided by USCIT Rule 4, failed to obtain updated addresses of the parties, and did not successfully serve either party during the 120-day period, having

[11] Defendant questions the authenticity of the Affidavit of Service, Plaintiff's Ex. 16 at 1, stating:

> [N]owhere does the Affidavit state that Mr. Stallman has personal knowledge that service was made. *See* Fed. R. Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). That Mr. Stallman is apparently based in Washington, D.C. casts doubt on the likelihood that he personally effected service in this case; this is buttressed by the fact that the earlier attempts to service [sic] process at 4903 Cape May Avenue were allegedly made by a different individual, licensed to serve process in the State of California.

Defendant's Reply at 25 (citation omitted). It appears that Defendant is questioning Mr. Stallman's personal knowledge of the service at the Morrell Street address. Although Plaintiff must prove the requisite jurisdictional facts, *see Former Emps. of Sonoco Prods. Co.*, 27 CIT at 814, in a motion to dismiss a court must still construe all reasonable inferences in favor of Plaintiff, *Islip*, 22 CIT at 854. Without a showing from Defendant that reasonably casts doubt, the Affidavit of Service alone is enough to prove this jurisdictional fact. While that affidavit is flawed, Defendant does not provide sufficient facts to challenge the conclusion that Mr. Stallman had personal knowledge of the service of process, particularly in light of Defendant's acknowledgment one day after this alleged service. Plaintiff's Ex. 16 at 1; Plaintiff's Ex. 17 at 1.

previously attempted to serve process at only prior addresses. *Rodrigue*, 645 F. Supp. 2d at 1326–28. Additionally, "[t]he Government did not effect service of process on [one defendant] until . . . more than *five months* after the 120-day period had ended. And [the other defendant] still [had] not been served, *one full year* after the end of the 120-day period." *Id.* at 1331 (emphasis added). The court found that the Government was not diligent in serving process and accordingly dismissed the action. *Id.* at 1349.

The facts in *Rodrigue* are distinct from those in this case. In *Rodrigue*, "the Government . . . could hardly have done less to effect service of process on the Defendants within the 120-day period established for that purpose. Under the circumstances, extending the time for service would set a dangerous precedent, and would grant the Government (and, indeed, all parties) virtual *carte blanche* in future cases." *Id.* at 1321. In the present case, Plaintiff unsuccessfully attempted to serve Defendant five times at her current home before trying another address. Plaintiff's Response at 3–4. After an acknowledgment from Defendant following the attempted service at the Morrell Street address, Plaintiff's Ex. 17 at 1, Plaintiff believed, albeit incorrectly, that it did not have to either send a process server back to the Cape May Avenue address or mail the summons and complaint.

Because Plaintiff acted diligently to effect service and therefore displays good cause for an extension, dismissal is not appropriate. *See, e.g.*, *Fyfee v. Bumbo, Ltd.*, 2009 U.S. Dist. LEXIS 84759 at *10–12 (S.D. Tex. 2009); *Coleman v. Cranberry Baye Rental Agency*, 202 F.R.D. 106, 109 (N.D.N.Y 2001). With this showing of good cause, Plaintiff's request for an extension to properly serve process is warranted.

V
Conclusion

For the reasons stated above, Defendant's Motion to Dismiss is DENIED, and Plaintiff's request for an extension of time to properly effect service is GRANTED. Plaintiff must serve Ms. Zatkova and file proof thereof no later than 5:00pm Pacific Standard Time on August 31, 2011.

Dated: August 11, 2011
New York, New York

/s/ Evan J. Wallach
EVAN J. WALLACH, JUDGE

Slip Op. 11–103

ROCHE VITAMINS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: WALLACH, Judge
Court No.: 04–00175

[Plaintiff's Motion to Deem Admitted Certain Paragraphs of Plaintiff's Statement of Material Facts Not in Dispute is DENIED.]

Dated: August 11, 2011

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Erik D. Smithweiss*, *Joseph M. Spraragen*, and *Robert F. Seely*) for Plaintiff Roche Vitamins, Inc.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Saul Davis*); and *Sheryl A. French*, Office of the Assistant Chief Counsel, U.S. Customs and Border Protection, Of Counsel, for Defendant United States.

OPINION

Wallach, Judge:

This matter, *see generally Roche Vitamins, Inc. v. United States*, 750 F. Supp. 2d 1367 (CIT 2010), comes before the court on the Motion to Deem Admitted Certain Paragraphs of Plaintiff's Statement of Material Facts Not in Dispute ("Plaintiff's Motion") filed by Plaintiff Roche Vitamins, Inc.[1] Plaintiff asks the court to deem admitted

[1] In *Roche*, the court stated that it would "not order any statements 'deemed admitted' on the basis of argument in a reply brief; Roche may, if appropriate, file a motion seeking relief. *See* USCIT RR. 7(b), 37." *Roche*, 750 F. Supp. 2d at 1370 n.1.

paragraphs 20[2], 21[3], 22[4], 23[5], and 28[6] of Plaintiff's Statement of Material Facts Not in Dispute ("Plaintiff's Fact Statement") because "defendant's responses thereto are insufficient under USCIT R. 56(h)

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[2] In paragraph 20, Plaintiff states: "BetaTab 20% contains 20% by weight synthetic organic coloring matter. Tritsch Decl. ¶¶ 6, 8; Schwartz Decl. ¶ 11; (Russell Dep. 63:11–18)." Plaintiff's Statement of Material Facts Not in Dispute ("Plaintiff's Fact Statement") ¶ 20. Defendant responds: "Denies. BetaTab 20% contains beta-carotene with known properties discussed above, but there is no evidence that it is used as a colorant or is coloring matter." Defendant's Response to Plaintiff's Statement of Material Facts Not in Dispute ("Defendant's Fact Response") ¶ 20.

[3] In paragraph 21, Plaintiff states: "Beta-carotene imparts the essential character of BetaTab 20%. Tritsch Decl. ¶ 23." Plaintiff's Fact Statement ¶ 21. Defendant responds: "Denies. The essential character of the BetaTab 20% is provided by the beadlet. The beta-carotene cannot as a practical matter be produced into a product that will provide provitamin A and antioxidant activity in the human body without the sucrose and gelatin portion of the beadlet. If the beta-carotene cannot be effectively absorbed by the body, it cannot properly or effectively be converted into vitamin A or act as an antioxidant. Therefore, it serves no useful purpose in the BetaTab 20%, without the components of the beadlet that permit it to be properly absorbed by the body. *Ibid.* [referring to Russell Decl., p. 11, ¶ III.C.1, C.3; p. 12, ¶ V.1.]." Defendant's Fact Response ¶ 21.

[4] In paragraph 22, Plaintiff states: "Beta-carotene is commercially sold in the U.S. for use as a colorant and/or source of vitamin A only in a stabilized form. Tritsch Decl. ¶ 7." Defendant responds: "Denies. Beta-carotene in stabilized form is also sold as an antioxidant. Furthermore, beta-carotene crystalline is sold in United States for use in producing tablets and/or capsules that will provide provitamin A and antioxidant activity. Further, plaintiff sells its entire production of beta-carotene crystalline to producers of formulations or preparations that will be eventually used to make tablets and/or capsules that provide provitamin A and antioxidant activity, or formulations/preparations that will be used as a food colorant and/or nutritional supplement." Defendant's Fact Response ¶ 22.

[5] In paragraph 23, Plaintiff states: "BetaTab 20% is a powder with a reddish-brown/orange hue. The individual particles of the powder contain a finely dispersed solution of beta carotene in a cornstarch-coated matrix of gelatin and sucrose. Antioxidants are also present in the particles. Tritsch Decl. ¶ 9." Plaintiff's Fact Statement ¶ 23. Defendant responds: "Admits that the BetaTab 20% is a powder with a reddish-brown/orange hue. Denies that the individual particles of the powder contain a finely dispersed solution of beta carotene in a cornstarch-coated matrix of gelatin and sucrose. The importation constitutes submicron beadlets in powder form and there is no 'solution.' Also, we admit that while there are small amounts of other antioxidants in the product to protect the integrity of the betacarotene, the beta-carotene itself is an antioxidant." Defendant's Fact Response ¶ 23.

[6] In paragraph 28, Plaintiff states: "The sucrose in BetaTab 20% also has a plasticizing effect on the gelatin, which provides mechanical stability to the beta-carotene particles within the beadlet matrix. This stability helps prevent the beadlet from cracking during storage and handling. Tritsch ¶ 13." Plaintiff's Fact Statement ¶ 28. Defendant responds: "Denies. The patents discussing the sucrose invariably state that the purpose of the sucrose is to provide plasticity and mechanical stability, which in turn permits milling to proper size and conversion of the product into tablets and/or gel capsules. They do not discuss storage and handling." Defendant's Fact Response ¶ 28.

to controvert plaintiff's statement of material facts not in dispute." Plaintiff's Motion at 1.[7] Plaintiff's argument is as follows:

> [T]he opposing party is required to serve a response to the statement served by the movant. USCIT R. 56(h)(2). Each numbered response controverting any statement of material fact alleged by the movant must be followed by a citation to admissible evidence. USCIT R. 56(h)(4). If the responding party's statement does not actually controvert plaintiff's statement, or if the responding party's statement is not followed by citation to admissible evidence (*see* Rule 56(h)(2) and (4)), then the material fact set forth by the movant will be deemed admitted. USCIT R. 56(h)(3).

Plaintiff's Motion at 2.

Although this court has applied the remedy prescribed by USCIT R. 56(h)(3) to violations of USCIT R. 56(h)(2), *see United States v. Tip Top Pants, Inc.*, Slip Op. 10–5, 2010 Ct. Intl. Trade LEXIS 5 at *17–18 (January 13, 2010); *Deckers Corp. v. United States*, 29 CIT 1481, 1483, 414 F. Supp. 2d 1252 (2005); *United States v. T.J. Manalo, Inc.*, 26 CIT 1117, 1120, 240 F. Supp. 2d 1255 (2002); *Precision Specialty Metals v. United States*, 24 CIT 1016, 1024 n.10, 116 F. Supp. 2d 1350 (2000), Plaintiff does not identify any decision explicitly holding that this remedy also applies when an opposing party violates USCIT R. 56(h)(4), *see* Plaintiff's Motion at 1–5.[8]

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[7] USCIT R. 56(h) provides that:

> (1) On any motion for summary judgment, there must be annexed to the motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried. Failure to submit this statement may constitute grounds for denial of the motion.
> (2) The papers opposing a motion for summary judgment must include correspondingly numbered paragraphs responding to the numbered paragraphs in the statement of the movant, and if necessary, additional paragraphs including a separate, short and concise statement of additional material facts as to which it is contended that there exists a genuine issue to be tried.
> (3) All material facts set out in the statement required to be served by the movant will be deemed admitted unless controverted by the statement required to be served by the opposing party.
> (4) Each statement by the movant or opponent pursuant to Rule 56(h)(1) and (2), including each statement controverting any statement of material fact, will be followed by citation to evidence which would be admissible.

USCIT R. 56(h).

[8] Plaintiff does note, correctly, that this court has "been mindful that denials must be supported by evidence," Plaintiff's Motion at 2–3 (citing *Citizen Watch Co. of Am., Inc. v. United States*, 724 F. Supp. 2d 1316 (CIT 2010); *Ero Indus. v. United States*, 24 CIT 1175, 1177 n.2, 118 F. Supp. 2d 1356 (2000)), and points to relevant decisions interpreting a requirement similar to USCIT R. 56(h)(3) that is "found in local rules for the Northern District of Illinois," Plaintiff's Motion at 3–4 (citing N.D. Ill. LR. 56.1(b)(3)(B); *Minn. Elevator, Inc. v. Imperial Elevator Servs., Inc.*, 2010 U.S. Dist. LEXIS 67337 (N.D. Ill. July

Even if the remedy provided in USCIT R. 56(h)(3) could apply to a violation of USCIT R. 56(h)(4), it does not apply here. Because paragraphs 20 and 21 contain conclusions of law, Plaintiff's Motion is DENIED as to these two paragraphs. Because deeming paragraphs 22, 23, and 28 admitted could preclude the "correct result" that the Federal Circuit requires this court to reach in customs classification cases, *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984), Plaintiff's Motion is also DENIED as to these three paragraphs.

With respect to paragraphs 20 and 21, Defendant correctly argues that the phrases "synthetic organic coloring matter," Plaintiff's Fact Statement ¶ 20, and "essential character," *id.* ¶ 21, imply legal conclusions that are not properly asserted as facts. *See* Defendant's Opposition to Plaintiff's Motion to Deem Admitted Paragraphs 20, 21, 22, 23, and 28 of Plaintiff's Statement of Material Facts of November 16, 2009 ("Defendant's Opposition") at 4–8. "The phrase 'synthetic organic coloring matter' is part of the exact language of heading 3204." *Id.* at 4; *see* Harmonized Tariff Schedule of the United States ("HTSUS") Heading 3204. "A determination regarding essential character is a legal conclusion, applicable if merchandise is classifiable pursuant to General Rule of Interpretation . . . 3(b)." Defendant's Opposition at 7; *see* HTSUS General Rule of Interpretation ("GRI") 3(b). USCIT R. 56(h) requires a statement of certain material facts and a response thereto; it says nothing about conclusions of law. *See* USCIT R. 56(h). Indeed, "the Government cannot controvert a conclusion of law by providing 'citation to evidence which would be admissible,' Rule 56(h)(4), since any evidence that would be admissible would be factual in nature, and not legal authority or support." Defendant's Opposition at 5 (citing *Tropigas de Puerto Rico, Inc. v. Certain Underwriters At Lloyd's Of London*, 637 F.3d 53, 56–57 (1st Cir. 2011)).[9]

With respect to paragraphs 22, 23, and 28, although Defendant acknowledges its failure to provide specific citations in each particular statement, Defendant's Opposition at 8; *see id.* at 8, 9, 11, Federal Circuit precedent precludes the court from granting the remedy that Plaintiff seeks. In customs classification cases, the court must reach the "correct result." *Jarvis Clark*, 733 F.2d at 878; *see also Universal Elecs. v. United States*, 112 F.3d 488, 492 n.3 (Fed. Cir. 1997) (rejecting an approach under which "the meaning of tariff terms could

1, 2010); *Barth v. Village of Mokena*, 2006 U.S. Dist. LEXIS 19702 (N.D. Ill. March 31, 2006)).

[9] With respect to paragraph 20, Defendant also argues, correctly, that "[t]here was no citation to evidence precisely because we were asserting there was an absence of such evidence." Defendant's Opposition at 5.

depend on the quality of the importer's advocacy and could shift from case to case based on the showing made by the particular importer"); *Simod America Corp. v. United States*, 872 F.2d 1572, 1579 (Fed. Cir. 1989) ("[T]he courts are too burdened with cases for the same or similar entries to be litigated and relitigated over and over again."). This obligation extends to both "findings of fact and conclusions of law." *Peerless Clothing Int'l, Inc. v. United States*, 602 F. Supp. 2d 1309, 1315 (CIT 2009) (citing 28 U.S.C. § 2640(a); *Jarvis Clark*, 733 F.2d at 878). If the court were to deem paragraphs 22, 23, and 28 admitted on the basis of Defendant's failure to properly cite evidence, it would risk ultimately classifying the merchandise at issue according to facts that, while "true" in the courtroom, may be demonstrably false in the world in which Defendant, Plaintiff, and any other importer must operate. Because the Federal Circuit has rejected that course, *see, e.g.*, *Jarvis Clark*, 733 F.2d at 878, so too must this court.

Accordingly, for the reasons stated above, Plaintiff's Motion is DENIED.

Dated: August 11, 2011
New York, New York

/s/ Evan J. Wallach
EVAN J. WALLACH, JUDGE