U.S. Court of International Trade

Slip Op. 16–64

RZBC Group Shareholding Co., Ltd., RZBC Co., Ltd., RZBC Imp. & Exp. Co., Ltd., and RZBC (Juxian) Co., Ltd., Plaintiffs, v. United States, Defendant, and Archer Daniels Midland Company, Cargill, Incorporated, and Tate & Lyle Ingredients Americas LLC, Defendant-Intervenors.

Before: Richard W. Goldberg, Senior Judge
Court No. 15–00022
PUBLIC VERSION

[Remanding in part the Final Results of a review of a countervailing duty order on citric acid from the People's Republic of China.]

Dated: June 30, 2016

Michael S. Holton, Husch Blackwell LLP, of Washington, DC, argued for plaintiffs. With him on the brief was *Jeffrey S. Neeley*.

Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Melissa M. Devine*, Trial Attorney, *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, and *Jeanne E. Davidson*, Director. Of counsel on the brief was *Whitney M. Rolig*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Patrick J. Togni, King & Spalding LLP, of Washington, DC, argued for defendant-intervenors. With him on the brief was *Joseph W. Dorn*.

OPINION AND ORDER

Goldberg, Senior Judge:

This case concerns the fourth administrative review of a countervailing duty order on citric acid and certain citrate salts from the People's Republic of China (the "PRC"). *See Citric Acid and Certain Citrate Salts from the People's Republic of China*, 79 Fed. Reg. 78,799 (Dep't Commerce Dec. 31, 2014) (final admin. review) ("*Final Results*") (covering imports from January 1, 2012 to December 31, 2012). Plaintiffs, the RZBC Group Shareholding Co. and related companies ("RZBC"), sue to reduce the final countervailing duty rate imposed on them by the U.S. Department of Commerce ("Commerce" or "the agency"). Constituents of the U.S. domestic industry—including Archer Daniels Midland Company, Cargill, Incorporated, and Tate &

Lyle Ingredients Americas ("ADM")—side with the agency in defending the countervailing duty rate against these attacks.

After carefully considering the parties' briefs and the record, the court remands one issue to commerce for reconsideration: the adverse inference that RZBC benefited from the Buyer's Credit program.

GENERAL BACKGROUND

Countervailing duties serve the same purpose as their better-known cousins, antidumping duties: They level the playing field between U.S. manufacturers and their overseas competition. But each regime addresses a different problem. Antidumping duties were made to fight price discrimination, so if a foreign producer sells goods in the United States for less than in the home market, antidumping duties bring the U.S price back to fair value. *See* 19 U.S.C. § 1673 (2012). Countervailing duties ("CVDs"), by contrast, were created to correct the cost-distorting effect of subsidies. When a foreign government lends support to a producer, CVDs boost the producer's U.S. prices to offset the net benefit from the subsidy. *See id.* § 1671(a).

In the review underlying this appeal, Commerce imposed a 17.55% total CVD rate on RZBC's citric acid exports. *Final Results*, 79 Fed. Reg. at 78,800. With this duty, Commerce aimed to offset the benefit RZBC received from concessional loans, steam coal, sulfuric acid, limestone flux, land purchases, and other subsidies from the PRC. *See* I&D Mem. 14–32, PD 226 (Dec. 22, 2014). On appeal, RZBC contests aspects of Commerce's work, including (1) the agency's decision to adversely infer that RZBC benefited from a concessional lending program called the Buyer's Credit program; (2) the decision to impose an adverse 10.54% rate with respect to the Buyer's Credit program; (3) the agency's selection of benchmark sources for steam coal, sulfuric acid, and limestone flux; (4) the agency's selection of benchmark sources for a land-purchase subsidy benchmark; and (5) the decision not to omit "special equipment services" surcharges from certain price quotes used to calculate the international freight-rate component of the limestone flux benchmark.

The court has jurisdiction to hear these claims under 28 U.S.C. § 1581(c). The court must uphold the agency's results 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

In light of this standard, the court remands for reconsideration Commerce's adverse inference that RZBC benefited from the Buyer's Credit program. Given the remand on the adverse-inference issue,

the court has no cause to consider the validity of the ultimate 10.54% adverse-interest rate. With respect to the remaining issues, the court sustains the *Final Results* in full.

I. Commerce's Adverse Inference that RZBC Benefited from the Buyer's Credit Program Lacks the Support of Substantial Evidence

In the underlying review, Commerce adversely inferred that RZBC benefited from the Buyer's Credit program, a concessional-loan program instituted by the Government of China ("GOC") owned EXIM Bank. I&D Mem. 75. The GOC and RZBC had represented that RZBC received no benefit from the program, but the GOC refused to allow Commerce to verify this representation by querying the EXIM Bank's internal database of financing information. *Id.* at 74. Accordingly, Commerce found that RZBC benefited from concessional loans offered under the Buyer's Credit program and ascribed an adverse interest rate of 10.54%. *Id.* at 74–76. RZBC argues that the GOC cooperated sufficiently at verification to preclude an application of "adverse facts available" ("AFA") premised on the GOC's failure to cooperate. RZBC further argues that, even if the GOC's cooperation was insufficient, Commerce unduly rejected the prospect of verifying non-use with RZBC, notwithstanding "neutral evidence on the record" indicating that RZBC did not use the Buyer's Credit program. Mem. of Law in Support of Pls.' Mot. for J. on the Agency R. Under USCIT Rule 56.2, at 22, ECF No. 29. Therefore, says RZBC, Commerce lacked grounds to adversely infer that RZBC drew benefit from the Buyer's Credit program. The court holds that Commerce's adverse inference lacks the support of substantial evidence.

A. Background

Commerce's application of AFA, or adverse inferences, is governed by the two-step analysis set forth in 19 U.S.C. § 1677e. First, Commerce is obligated to resort to "facts otherwise available" if the agency finds that "necessary information is not available on the record" or that an interested party or other person has withheld requested information, significantly impeded Commerce's proceeding, or provided information that Commerce must, but cannot, verify under 19 U.S.C. § 1677m(i). 19 U.S.C. § 1677e(a). Second, Commerce has discretion to draw an "inference that is adverse to the inferences of [a] party in selecting from among the facts otherwise available" if the agency "finds that [the] interested party has failed to cooperate by not acting to the best of its ability to comply with a request for informa-

tion." *Id.* "Applying AFA" is shorthand for when Commerce makes affirmative findings under both steps of 19 U.S.C. § 1677e and as a result draws an adverse inference.

In CVD proceedings, Commerce will sometimes draw an adverse inference due to a foreign government's lack of cooperation in providing requested information, as opposed to a respondent's. *See Archer Daniels Midland Co. v. United* States (*ADM I*), 37 CIT __, __, 917 F. Supp. 2d 1331, 1342 (2013); *GPX Int'l Tire Corp. v. United States*, 37 CIT __, __, 893 F. Supp. 2d 1296, 1333 (2013); *Fine Furniture (Shanghai) Ltd. v. United* States, 36 CIT __, __, 865 F. Supp. 2d 1254, 1262 (2012). Such an inference might nonetheless collaterally effect a respondent, even though the respondent did nothing to incur the inference. *ADM I*, 37 CIT at __, 917 F. Supp. 2d at 1342; *GPX*, 37 CIT at __, 893 F. Supp. 2d at 1333; *Fine Furniture*, 36 CIT at __, 865 F. Supp. 2d at 1262. Although these collateral effects can be excusable, Commerce must strive to avoid them by examining the record. *ADM I*, 37 CIT at __, 917 F. Supp. 2d at 1342; *GPX*, 37 CIT at __, 893 F. Supp. 2d at 1333; *Fine Furniture*, 36 CIT at __, 865 F. Supp. 2d at 1262. "When Commerce has access to information on the record to fill in the gaps created by the lack of cooperation by the government, as opposed to [a respondent] . . . it is expected to consider such evidence." *GPX*, 37 CIT at __, 893 F. Supp. 2d at 1333.

In the review at issue here, Commerce drew its adverse inference that RZBC benefitted from the Buyer's Credit program based on the GOC's failure to cooperate during a verification meeting. In a questionnaire response leading up to the verification meeting, the GOC had stated that it maintained a database of loans provided through the Buyer's Credit program, and that the database included the names of participating Chinese firms as well as their buyers. The GOC also stated that, to the best of its knowledge, none of RZBC's customers used the Buyer's Credit program. Commerce notified the GOC in the verification outline that the agency would seek on-site access to the EXIM Bank's database to confirm that none of RZBC's buyers were listed as beneficiaries of the Buyer's Credit program. I&D Mem. 74. At verification, representatives of the GOC orally reiterated that the EXIM Bank "maintains records of all lending provided under the program." *Id.* GOC representatives further stated that "they searched [the EXIM Bank] records and found no entry for any of the customers' names given to them by [RZBC]." *Id.* But the GOC refused Commerce the requested database access on grounds that "proper authorization" was required. GOC Verification Report 3, PD 207 (Oct. 8, 2014).

In lieu of database access, the GOC offered "screen shots of EXIM's query results," which Commerce's officials "declined to review." *Id.* Commerce reasoned that without real-time database access, Commerce could not sufficiently "test and confirm" RZBC and the GOC's purported non-use, per the agency's "standard verification protocols." I&D Mem. 74. In Commerce's view, by refusing database access, the GOC "prevent[ed] the verifiers from completing their verification procedures" and "precluded the [agency] from verifying the non-use claims made by [RZBC] and the GOC." *Id.*

The GOC and RZBC rebutted that Commerce could verify non-use "at the company level" (that is, with RZBC, instead of with the GOC). *Id.* at 73–74. In prior proceedings, Commerce had determined that the GOC's EXIM Bank was the "primary entity" with which the agency could verify non-use of the Buyer's Credit program. *Id.* Commerce had reasoned that, based on the record available in those prior proceedings, the EXIM Bank appeared to disburse loans to "the customers of Chinese producers"—i.e. to buyers, not to the Chinese producers themselves. *Id.* But the GOC insisted that the EXIM Bank disbursed Buyer's Credit funds "directly to the Chinese producers," rendering verification with RZBC feasible. *Id.*

To test the GOC's claim, Commerce asked the GOC "whether the transfer of funds directly to the Chinese producer was explicit in the *Administrative Measures*" that governed the Buyer's Credit program. *Id.* The EXIM Bank officials explained "that [the disbursement] was not explicit in law, but understood in practice." *Id.* a 74. So Commerce followed up by asking the GOC for "sample contracts and documentation" to illustrate the usual disbursement song and dance. *Id.* To allay confidentiality concerns, Commerce "provided . . . the option of redacting all business proprietary information." *Id.* But the GOC nonetheless "refused to provide the requested information." *Id.* In sum, although "[t]he GOC provided an oral explanation of how [RZBC] might be involved in the application process and the disbursement of funds," the GOC never tendered the disbursement evidence of the sort that could be "tied to the EXIM Bank's audited financial statements." *Id.* at 75. As a result, "[h]ad [Commerce] attempted to verify non-use at [RZBC's] facility with only declarative statements as guidance, [the agency] could have done no more than speculate on how to confirm non-use; any procedures [Commerce] might have undertaken . . . would have been guess work . . . concerning the operations of the program." *Id.* at 74–75. Commerce therefore declined the GOC's invitation to verify non-use of the Buyer's Credit program with RZBC, and "continue[d] to find [that the agency's] ability to determine non-use . . . hinges on its ability to examine usage

records in the possession of the GOC." *Id.* at 74.

Commerce also found that the GOC's refusal to provide the information that the agency had requested compelled the use of facts otherwise available. *Id.* at 75. And Commerce further determined that the agency should draw an adverse inference regarding use of the Buyer's Credit program because "the GOC failed to cooperate by not acting to the best of its ability." *Id.* Accordingly, Commerce inferred that RZBC had benefited from the Buyer's Credit program and applied an AFA interest rate of 10.54%. *Id.* at 76.

B. Discussion

The court holds that Commerce's adverse inference lacks the support of substantial evidence. Commerce was justified in concluding that the GOC did not act "to the best of its ability" during verification because the GOC refused Commerce's requests for access to the EXIM Bank's database as well as "sample contracts and documentation." *Id.* at 74–75; GOC Verification Report 3. Likewise, Commerce had grounds to conclude that most of the "neutral evidence on the record" invoked by RZBC did not amount to verifiable record evidence that RZBC abstained from using the Buyer's Credit program. Pls.' Mot. for J. on the Agency R. 22. But there is one piece of record evidence that appears as though it should have been verifiable. Specifically, the record indicates that the Buyer's Credit program is available only with respect to sales contracts valued over $2 million dollars, and RZBC swore under penalty of perjury that it had no such contracts. I&D Mem. 73; GOC NSA Resp. Ex. C-1, at art. 5, PD 78 (Mar. 19, 2014). Commerce never explained why it could not verify RZBC's non-use of the Buyer's Credit program by checking the firm's audited financial statements or other books and records for the value of RZBC's sales contracts. *See* I&D Mem. 73–75. Given that Commerce's adverse inference collaterally impacted RZBC (who bore the brunt of the 10.54% adverse interest rate), the agency had an obligation to heed any verifiable evidence that RZBC never used the Buyer's Credit program. *ADM I*, 37 CIT at __, 917 F. Supp. 2d at 1342; *GPX*, 37 CIT at __, 893 F. Supp. 2d at 1333; *Fine Furniture*, 36 CIT at __, 865 F. Supp. 2d at 1262. As a result, Commerce's adverse inference that RZBC used the Buyer's Credit program is unwarranted.

First, the court addresses what the agency got right. Commerce had grounds to find that the GOC did not act "to the best of its ability" while Commerce was trying to verify non-use of the Buyer's Credit program. I&D Mem. 75. "Compliance with the 'best of its ability' standard is determined by assessing whether [the] respondent has put forth its maximum effort to provide Commerce with full and

complete answers to all inquiries in an investigation. While the standard 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). At the verification meeting, the GOC refused to allow Commerce access to the EXIM Bank's database even though Commerce had notified the GOC in the Verification Outline that the agency would seek such access. I&D Mem. 74. The GOC stated that the "proper authorization" had not been secured. GOC Verification Report 3. If the GOC were acting to the best of its ability, it would have at the very least sought the necessary authorization in advance. The GOC's failure to do so smacks of "inattentiveness," a hallmark of less-than-best effort. *Nippon*, 337 F.3d at 1382.

RZBC rebuts that the GOC offered "screen shots" in lieu of database access. Pls.' Mot. for J. on the Agency R. 22. But screenshots are not what Commerce asked for, nor are they a suitable substitute. Screenshot is just a fancy way to say picture, and a picture is something that can be fabricated in anticipation of a meeting like the verification meeting. Access to a database, by contrast, is interactive, hence tougher to spoof. Because, with database access, Commerce would be able to request its own queries in real time, mucking with the results would be much more difficult than with a picture. So screenshots are incommensurate with database access, and therefore irrelevant in determining whether the GOC acted to the best of its ability. The fact remains that the GOC failed to act to the best of its ability when it refused Commerce database access.

Besides, the GOC also acted to less than the best of its ability in declining Commerce's requests for "sample contracts and documentation" that would illustrate the Buyer's Credit disbursement process. GOC Verification Report 3. Commerce sought the documents so the agency could *see* whether verification with RZBC (as opposed to the GOC) would be feasible, but the GOC refused on confidentiality grounds. *Id.* (In briefing, RZBC also raises confidentiality as a concern with respect to the EXIM Bank's database, even though it is not clear that this concern was vocalized at verification. *See* Pls.' Mot. for J. on the Agency R. 21– 22.) But Commerce was sensitive to the GOC's confidentiality concerns, offering "the option of redacting all business proprietary information" from the tendered samples. GOC Verification Report 3. The GOC simply refused to do so without so much as proposing alternatives that might be still more confidentiality-conscientious than Commerce's offer. This cursory response strikes the court as falling somewhere short of the "maximum effort" re-

quired by the best-of-its-ability standard. *Nippon*, 337 F.3d at 1382. Commerce was therefore justified in concluding that the GOC had not behaved to the best of its ability, both in refusing to provide sample contracts and documentation and in denying access to the EXIM Bank's database.

Commerce also weathers all but one of RZBC's arguments that the agency "failed to consider neutral evidence on the record [showing] non-use [of the Buyer's Credit program] by RZBC." Pls.' Mot. for J. on the Agency R. 22. RZBC begins by invoking the now-familiar rule that Commerce must "seek to avoid an adverse impact [on a respondent] if relevant information exists elsewhere on the record." *Id.* RZBC further argues that "th[is] court has held that the existence of and the amount of the benefit conferred [by a subsidy program] should be based on the respondent parties' information." *Id.* RZBC notes that Commerce verified non-use of a whopping eighty-two other programs, including the EXIM Seller's Credit Program, with RZBC. *Id.* at 23. When verifying non-use of those other programs, not once did Commerce find that RZBC "reported inaccurately or failed to report a program." *Id.* Yet Commerce still declined to verify non-use of the Buyer's Credit program with RZBC. And, according to RZBC, neutral, verifiable record evidence suggests that RZBC eschewed the Buyer's Credit program. *Id.* Specifically, the record establishes that (1) RZBC, not its buyers, would have been the recipient of any Buyer's Credit loan disbursements, (2) RZBC would have been required to initiate and cooperate in the Buyer's Credit application process, and (3) eligible sales contracts would have to be valued above $2 million. *Id.* at 26, 28. Notwithstanding these requirements, RZBC disavowed ever participating in the Buyer's Credit application process or having any sales contracts valued above $2 million. I&D Mem. 73. The upshot, says RZBC, is that Commerce could have verified RZBC's claims of non-use by crosschecking RZBC's audited financial statements for disbursements, application participation, or hefty sales contracts. Pls.' Mot. for J. on the Agency R. 28.

For the most part the court disagrees, beginning with RZBC's contention that the court has imposed on Commerce an obligation to base "the existence of and amount of the benefit conferred [by a subsidy program] . . . on the respondent parties' information." *Id.* at 22. No we have not. The court has, at times, observed that foreign governments are typically in the best position to provide information on how a subsidy program is administered, whereas respondents are best situated to provide information on the particulars of the benefit conferred to them, if any. *See, e.g.*, *Archer Daniels Midland Co. v. United* States (*ADM I*), 37 CIT __, __, 917 F. Supp. 2d 1331, 1342 (2013) (citing *Essar*

Steel Ltd. v. United States (*Essar Steel CIT*), 34 CIT 1057, 1070, 721 F. Supp 2d 1285, 1297 (2010), *rev'd in part on other grounds*, 678 F.3d 1268 (Fed. Cir. 2012)). But there remain instances in which this shorthand truism will not hold. Sometimes, for instance, respondents simply will not have furnished Commerce with the information the agency needs to formulate benefit benchmarks. *E.g.*, *Fine Furniture (Shanghai) Ltd. v. United* States, 36 CIT __, __, 865 F. Supp. 2d 1254, 1262 (2012). Or perhaps, even if respondents claim to have provided the necessary benefit information, Commerce will be obligated to verify the information under 19 U.S.C. § 1677m(i), and the respondents' information will not be amenable to such rigorous examination. There is no *per se* rule that Commerce must, in every proceeding, base the amount of the benefit conferred on the respondent parties' data, whatever that data may be. Rather, as already articulated, Commerce's obligation when drawing an adverse inference based on a lack of cooperation by a foreign government is to avoid collaterally impacting respondents to the extent practicable by examining the record for replacement information. *ADM I*, 37 CIT at __, 917 F. Supp. 2d at 1342; *GPX*, 37 CIT at __, 893 F. Supp. 2d at 1333; *Fine Furniture*, 36 CIT at __, 865 F. Supp. 2d at 1262. This rule holds whether Commerce is drawing the adverse inference as to the administration of a subsidy program, *ADM* I, 37 CIT at __, 917 F. Supp. 2d at 1342, or as to the benefit to a particular respondent, *Fine Furniture*, 36 CIT at __, 865 F. Supp. 2d at 1262.

Most of the neutral record evidence invoked by RZBC does not cure the GOC's lack of cooperation because the information is unverifiable. RZBC argues that the GOC disbursed Buyer's Credit funds directly to Chinese producers, such that Commerce could verify RZBC's stated non-use by checking the firm's audited financial statements for traces of any such disbursements. Pls.' Mot. for J. on the Agency R. 24–26. But Commerce properly inferred that the Buyer's Credit program disbursed to Chinese producers' buyers, not to the producers themselves. In previous reviews, Commerce determined that Buyer's Credit funds were disbursed to buyers. I&D Mem. 73. The GOC challenged this understanding in the instant review, and Commerce asked the GOC for tangible proof in the form of sample contracts and documentation. I&D Mem. 73–74. The GOC provided none. *Id.* So Commerce reendorsed its disbursement-to-buyers determination. *Id.*

RZBC now points to two reports that ADM put on the administrative record, Pls.' Mot. for J. on the Agency R. 24–26, both of which detail the general application and disbursement process for EXIM Bank's concessional-loan programs (including the Buyer's Credit program), NSA Submission Exs. 18 & 19, PD 49 (Nov. 12, 2013). The

reports suggest that Chinese producers, not their buyers, receive loan disbursements. NSA Submission Ex. 18 at 4, Ex. 19 at 19. But the reports do not contradict Commerce's determination, because they discuss the EXIM Bank's concessional lending programs generally, and provide no specific information on the operation of the Buyer's Credit program. The reports therefore cannot have compelled Commerce to conclude that Chinese producers like RZBC received Buyer's Credit disbursements. Because Commerce's disbursement-to-buyers determination stands, nothing about the disbursement process lights a path to verification with RZBC.

Nor could Commerce verify non-use with RZBC on grounds that RZBC would have been involved in the Buyer's Credit application process, but said it was not. Here, RZBC offers Article 14 of the *Administrative* measures, which lists Chinese producers' "credit materials and related supporting documents" as required documentation. Pls.' Mot. for J. on the Agency R. 26 (citing GOC NSA Resp. Ex. C-1). RZBC also again invokes the two reports submitted by ADM. *Id.* at 25. According to RZBC, if the EXIM Bank would demand credit materials and other documents pertaining to Chinese producers, then the producers would necessarily be involved in any application process and would therefore know if their buyers used the program. In light of the evidence submitted by RZBC, the firm did have a reasonable basis to swear that it knew that none of its buyers used the Buyer's Credit program because RZBC never saw any applications. But the problem is that verifying RZBC's claim is nigh on impossible. The court cannot *see* a way for Commerce to reliably tie RZBC's potential involvement in an application process to RZBC's audited financial statements, or any other books and records. This being the case, "any [verification] procedures [Commerce] might have undertaken at [RZBC] simply would have been guess work based on assumptions concerning the operations of the program." I&D Mem. 74–75. So the court cannot hold that Commerce could have verified non-use with RZBC simply because RZBC would know whether RZBC was or was not involved in the application process.

But Commerce never explained why it could not verify non-use of the Buyer's Credit program by taking a peek at RZBC's sales contracts. Article 5 of the *Administrative Measures* suggests that the Buyer's Credit program is unavailable with respect to sales contracts under $2 million dollars. GOC NSA Response Ex. C-1, at art. 5. As far as the court is aware, no other evidence on the record contradicts Article 5's $2 million dollar requirement during the period of review. And when Commerce asked whether RZBC had "signed any single sales contract exceeding two million U.S. dollars for a sale that

included, in whole or in part, subject merchandise to the United States," the company said no. I&D Mem. 73; RZBC NSA Resp. 9, PD 76 (Mar. 19, 2014). Based on this answer and the text of Article 5, verifying RZBC's non-use of the Buyer's Credit program seems like it should have been a straightforward process: Commerce could simply have checked RZBC's audited financial statements or other books and records for sales-contracts values (or perused whatever other documentation would satisfy Commerce; one expects the value of RZBC's sales contracts, unlike whether or not the company helped with loan applications, to be internally documented). Commerce never provided any explanation of why reviewing the sales contracts would not allow the agency to sufficiently verify non-use of the Buyer's Credit program. I&D Mem. 73–75.

We repeat once more, Commerce has an obligation to avoid collaterally impacting a respondent with an adverse inference drawn as a consequence of a foreign government's noncooperation by consulting the record. *ADM I*, 37 CIT at __, 917 F. Supp. 2d at 1342; *GPX*, 37 CIT at __, 893 F. Supp. 2d at 1333; *Fine Furniture*, 36 CIT at __, 865 F. Supp. 2d at 1262. In this case, the record appears to present easily verifiable evidence that RZBC did not use the Buyer's Credit program because it never signed a sales contract above $2 million. Commerce never addressed this evidence. Therefore, on remand, Commerce must reconsider whether it can verify RZBC's non-use of the Buyer's Credit program by inspecting RZBC's audited financial statements or other books and records for sales contracts valued over $2 million. If the agency continues to conclude that verifying non-use with RZBC is impossible, then it must explain how this can be the case in light of the $2 million threshold laid out in the *Administrative Measures*. If, on the other hand, Commerce concludes that RZBC is in a position to verify non-use, then the agency must either make an attempt at doing so or explain why not.[1]

[1] RZBC also attacks Commerce's conclusion that verification at RZBC "would have been guess work based on assumptions concerning the operations of the program" on grounds that, if Commerce had to guess about how the Buyer's Credit program worked, then the agency had no grounds to initiate its investigation of the program under 19 U.S.C. § 1671a(b)(1). This argument fails because the standard for investigating a program is low, *RZBC Grp. Shareholding Co. v. United States*, 39 CIT __, __, 100 F. Supp. 3d 1288, 1295 (2015), and distinct from the requirement that Commerce verify certain information, *see* 19 U.S.C. §§ 1677e(a)(2)(D), 1677m(i).

Also, because the court holds that RZBC's adverse inference lacks the support of substantial evidence, the court does not reach the issue of whether Commerce's 10.54% adverse interest rate is proper.

II. Commerce Properly Selected Benchmark Sources for Steam Coal, Sulfuric Acid, and Limestone Flux

Among the inputs RZBC used to produce its citric acid were steam coal, sulfuric acid, and limestone flux. Commerce calculated benchmarks for each of these inputs by selecting price data from a variety of sources proposed by RZBC and ADM. *See* Preliminary Decision Mem. 17–19, 22, PD 146 (June 19, 2014); I&D Mem. 87–92. RZBC now takes issue with Commerce's selections. RZBC argues that Commerce was obligated to calculate benchmarks using only a select set of prices that RZBC deemed "specific to RZBC's inputs" in terms of grade, specification, and quantity. Pls.' Mot. for J. on the Agency R. 41, 44–45. The court disagrees, and sustains Commerce's selection of price data.

A. Background

Before turning to the merits, the court must first further explain Commerce's benchmark calculation process. Commerce's benchmark calculations are governed by both statute and regulation. Under 19 U.S.C. § 1677(5)(E)(iv), Commerce must set benchmarks that reflect "prevailing market conditions." The statute further defines prevailing market conditions as including "price, quality, availability, marketability, transportation, and other conditions of purchase or sale."

19 C.F.R. § 351.511(a)(2) (2016) provides additional guidance on how Commerce sets benchmarks. The regulation offers three methodological tiers in descending order of availability. Under tier one, Commerce sets benchmarks using a "market-determined price...resulting from actual transactions in the country in question.... In choosing [actual transactions, Commerce] consider[s] product similarity; quantities sold, imported, or auctioned; and other factors affecting comparability." But sometimes market-determined prices are unavailable, in which case Commerce drops to the second tier and uses a "world market price." For Commerce to use a world market price, "it [must be] reasonable to conclude that such price would be available to purchasers in the country in question. [Furthermore, w]here there is more than one commercially available world market price, [Commerce] will average such prices to the extent practicable, making due allowance for factors affecting comparability." If, however, "there is no [tier-two] world market price available to purchasers in the country in question," then Commerce repairs to the third tier and calculates a benchmark "consistent with market principles."

In the Preliminary Results, Commerce adversely inferred that actual Chinese market prices for steam coal, sulfuric acid, and limestone flux were "significantly distorted by the involvement of the

GOC." Preliminary Decision Mem. 5. As a result, tier one was not available, and Commerce took the middle road, tier two, to calculate benchmarks. *Id.* at 5, 16, 18, 21. To do so, Commerce needed at least one "world market price" for each of the three inputs. 19 C.F.R. § 351.511(a)(2)(ii).

ADM proposed that Commerce get some of its world market prices from the Global Trade Atlas ("GTA") published by Global Trade Information Services, Inc. Preliminary Decision Mem. 16, 18–19, 21–22. GTA indexes commodity prices according to the Harmonized Tariff Schedule ("HTS"), a system of four-to ten-digit classification codes in which longer codes pertain to narrower classes of product. ADM provided Commerce with GTA prices for anthracite coal (HTS 2701.11), bituminous coal (HTS 2701.12), sulfuric acid (HTS 2807), and limestone flux (HTS 2521). *Id.* at 19; *see* I&D Mem. 87–90. For each of these products, though, ADM only gave Commerce GTA prices from a limited list of countries curated by ADM. Preliminary Decision Mem. 16. Besides the GTA prices, ADM also offered country-specific prices from Platts for "various types of coal," the IMF for steam coal, ICIS for sulfuric acid, and Metal Bulletin for ground calcium carbonate (the last for the limestone flux benchmark). *Id.* at 16, 18–19, 22. RZBC countered ADM's selected-country GTA submissions with a fuller suite of GTA data for bituminous coal, sulfuric acid, and limestone flux. RZBC also submitted country-specific coalspot.com prices for steam coal and CRU Group prices for sulfuric acid. *Id.* at 17, 19, 21–22. *See also* Pls.' Mot. for J. on the Agency R. 7.

Commerce tentatively accepted all of the parties' proposed benchmark sources except the GTA anthracite-coal data and the Platts data hailing from Colombia, Poland, Russia, and Australia. Prelim. Decision Mem. 17, 19, 22. Commerce explained, "[i]n its questionnaire response, [RZBC] indicated that it purchased bituminous coal in the production of citric acid; therefore, we will utilize coal prices representative of the steam coal (*i.e.*, thermal coal) purchased by RZBC Companies." *Id.* at 19.[2] For RZBC's sulfuric acid and limestone flux, Commerce allowed all proposed prices. *Id.* at 17, 22. Commerce then averaged the various benchmark prices to construct world market prices. *Id.* at 17, 19, 22.

RZBC objected on grounds that Commerce was obligated to "only utilize export prices on the record that clearly demarcate a quantity of shipment, particle size or other nuanced specification reflective of [RZBC's] own specific input purchases." I&D Mem. 90. In support of

[2] Evidently, Commerce and the parties agree that bituminous coal is steam coal is thermal coal, whereas anthracite coal is something different. *See, e.g.*, I&D Mem. 19; Pls.' Mot. for J. on the Agency R. 54; RZBC Rebuttal Factual Information Comments Ex. 1, PD 104 (May 1, 2014).

its objection, RZBC cited both 19 U.S.C. § 1677(5)(E)(iv) and the tier-two regulation. RZBC Case Br. 3–4, PD 213 (Oct. 20, 2014). With respect to the tier-two regulation, RZBC pointed out that the regulation instructed Commerce to make "due allowance for factors affecting comparability" when averaging prices to construct benchmarks. *Id.* (citing 19 C.F.R. § 351.511(a)(2)(ii)). To define "factors affecting comparability," RZBC turned to the tier-one regulation, which states that "the [s]ecretary will consider product similarity; quantities sold, imported, or auctioned; and other factors affecting comparability." *Id.*(citing 19 C.F.R. § 351.511(a)(2)(i)). Reading tier two in concert with tier one, RZBC deduced that "product similarity" and "quantities sold" were both "factors affecting comparability" that Commerce was obligated to consider when determining benchmarks. *Id.*

RZBC argued that only a few select benchmark sources satisfied the tier-two regulation and the statute. With respect to steam coal, RZBC second-guessed Commerce's rejection of Platts data from Colombia, Poland, Russia, and Australia. I&D Mem. 88. According to RZBC, these data were more specific to RZBC's inputs than the GTA data that Commerce accepted, which were "basket" data pertaining to bituminous coal exports generally. *Id.* At the least, if Commerce was going to reject Platts data from the four aforementioned countries, Commerce should have also rejected the GTA bituminous-coal data (and, it follows, used only RZBC's coalspot.com data to calculate the steam coal benchmark). *Id.*

Turning to sulfuric acid, RZBC argued that its proposed CRU Group prices were the only prices specific to RZBC's inputs in terms of quantity and quality. *Id.* RZBC purchased industrial grade sulfuric acid by the tank load, and record evidence showed significant price differences between various grades of sulfuric acid. *Id.* Because the CRU Group prices were specific to bulk, industrial-grade purchases, Commerce should have used those prices. *Id.*

Finally, moving to limestone flux, RZBC argued that the only sufficiently specific prices proposed by ADM were the Metal Bulletin prices pertaining to 50–22 micron limestone flux. *Id.* at 88–89. The GTA data Commerce had accepted should have been excluded as basket data that included prices for nonflux products such as bulk limestone and other calcareous material. *Id.* And the Metal Bulletin prices pertaining to lower micron ranges also should have been excluded because record evidence showed that RZBC purchased 60 micron limestone flux. *Id.* The 50–22 micron prices fell closest to RZBC's inputs, so those were the only prices to use. *Id.*

Commerce rejected RZBC's arguments in the Final Results. Commerce began by noting that, notwithstanding RZBC's citation to the tier-one regulation, the agency was setting benchmarks under tier two. *Id.* at 90. In contrast to tier one, where Commerce would use "actual transactions in the country in question" to set a benchmark, tier-two benchmarks were supposed to represent a "world market price." *Id.* at 90–91 (citing 19 C.F.R. § 351.511(a)(2)(i)–(ii)). Constructing tier-two benchmarks using prices "solely reflective of a respondent's particularities, such as the size of its input purchases [or the inputs' grades and specifications] ...would detract from calculating a truly *world* market price." *Id.* at 91. Commerce continued, "in interpreting this tier two benchmark regulation, it is the Department's practice to calculate a world market price that is as robust as possible in order to capture the range of possible market prices and variances that occur when market principles govern transactions." *Id.*

To illustrate the perceived problem with calculating benchmarks using prices "solely reflective of a respondent's particularities," Commerce used the sulfuric acid benchmark as an example. *Id.* Were Commerce to take RZBC's advice and reject the GTA sulfuric acid price data in favor of CRU Group prices, Commerce would have to discard

> hundreds of market prices from 64 countries in favor of 24 market prices from northwestern Europe, Japan and South Korea. Limiting the abundant and available world market price data on the record to the few data on the record that only and explicitly reflect bulk shipments, results in a skewed benchmark that cannot be considered a *world* market price.

Id.

In closing, Commerce noted that world market prices calculated using GTA data were "reflective" of RZBC's "particularities" in any case: To the extent that RZBC argued that Commerce should only use bulk-pricing data, GTA data are "collected from customs agencies around the world, and hence, represent industrial and commercial shipments of goods, which are typically large." *Id.*[3]

B. Discussion

The court agrees with Commerce that the agency properly selected benchmark sources for steam coal, sulfuric acid, and limestone flux. Contrary to RZBC's argument, Commerce was not obligated to use only the narrow set of prices that RZBC identified as "specific to

[3] Commerce also rejected all Platts data in the Final Results, for reasons that are unimportant for this case. *Id.* at 87.

RZBC's inputs" in terms of grade, specification, and quantity. Pls.' Mot. for J. on the Agency R. 41. Under tier two, Commerce's duty is simply to make "due allowance for factors affecting comparability" when averaging benchmark prices. 19 C.F.R. § 351.511(a)(2)(ii). This means that Commerce must at least "consider" the factors in the course of evaluating potential benchmark sources. *ADM I*, 37 CIT at __, 917 F. Supp. 2d at 1345. But a price can ultimately serve as a benchmark source so long as it is a "comparable market-determined price"—the priced input need not be "identical" in order for Commerce to use it. *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1273 (Fed. Cir. 2012).[4]

In this case, the prices Commerce used pertained to inputs that were comparable to RZBC's. Commerce derived its benchmarks in large part from GTA HTS data for the tariff headings covering bituminous (or steam) coal, sulfuric acid, and limestone flux—i.e., the tariff headings that correspond to RZBC's inputs. Preliminary Decision Mem. 16–19, 21–22; *see* I&D Mem. 87–90. Commerce drew the HTS data at the four-and six-digit levels. Preliminary Decision Mem. 16–19, 21–22; *see* I&D Mem. 87–90. The court has previously approved tier-two benchmarks predicated on HTS four-and six-digit tariff-heading prices when the respondent fails to "demonstate[] that Commerce's selection of benchmarks ...is so distortive as to render Commerce's benchmark calculation unreasonable." *Archer Daniels Midland Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1269, 1277–78 (2014). That is precisely the case here, because RZBC has

[4] *See also Beijing Tianhai Indus. Co. v. United States*, 39 CIT __, __, 52 F. Supp. 3d 1351, 1369 (2015) (rejecting argument that Commerce erred "when it chose to average the available steel tube prices from [Italy, Iran, and Ukraine], rather than selecting the Ukranian prices" because "although Commerce must use benchmark prices for merchandise that is *comparable* to a respondent's purchases to satisfy the regulation, there is nothing that requires that it use prices for merchandise that are *identical* to a respondent's purchases"); *Archer Daniels Midland Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1269, 1277–78 (2014) (rejecting argument "that Commerce should use benchmarks that are more specific to the grade of sulfuric acid used by RZBC"—in particular, that Commerce should limit HTS tariff-heading price data to the ten-digit level, rather than including data from the four-, six-, and eight-digit levels—because "[t]he selected benchmarks are comparable in the sense that they all reflect world market prices for sulfuric acid (a commodity product) under [the four-digit HTS heading]" and "RZBC has not demonstrated that Commerce's selection of benchmarks at the [four-, six-, and eight-]digit levels is so distortive as to render Commerce's benchmark calculation unreasonable."); *Essar Steel CIT*, 721 F. Supp. 2d at 1294 (rejecting argument that Commerce acted "contrary to law when it regarded . . . [blast-furnace-grade] iron ore fines as comparable" to plaintiff's non-blast-furnace-grade fines because "[t]he regulation requires product comparability, but does not mandate that the products be identical" and "[i]n its calculations, the Department considered differences in iron content between the [blast-furnace-grade fines] and [plaintiff's non-blast-furnace-grade] iron ore fines, and adjusted the benchmark price accordingly").

not shown "variations in pricing" or "divisions within the [steam coal, sulfuric acid, and limestone flux] market[s]" that would compel Commerce to deviate from the HTS data. *Id.* at 79. And the remainder of Commerce's benchmark sources are also acceptable, because those sources, like the HTS data, offer prices for the same inputs that RZBC consumed. Commerce's benchmark sources were therefore comparable to RZBC's inputs, which is sufficient to satisfy the tier-two regulation.

III. Commerce Properly Selected Benchmark Sources for Certain Land Purchases by RZBC

Commerce counted as a countervailable subsidy certain below-market land purchases that RZBC made from the GOC in 2011. To set a benchmark for the land purchases, Commerce resorted to certain Thai industrial land prices.[5] RZBC now argues that Commerce should have used a different set of Thai prices from Colliers because those prices are "more representative of RZBC's land purchases." Pls.' Mot. for J. on the Agency R. 48. The court sustains Commerce's selection of land benchmark sources.

A. Background

Commerce's choice to countervail purchases of land by RZBC dates back to the review before this one, the third review. During the third review period, RZBC purchased the rights to three industrial plots of land in China's Shandong province at below market value. *RZBC Grp. Shareholding Co. v. United States*, 39 CIT __, __, 100 F. Supp. 3d 1288, 1303 (2015). Although RZBC did not use this land in the manufacture of citric acid, Commerce countervailed the purchases nonetheless. *Id.*

To do so, Commerce needed to set a benchmark. Commerce had already considered how to set benchmarks for Chinese land purchases in *Laminated Woven Sacks from the People's Republic of China*, 73 Fed. Reg. 35,639 (Dep't Commerce June 24, 2008) (final admin. determination) ("*Laminated Woven Sacks*") and accompanying I&D Mem. at Analysis of Programs. In *Laminated Woven Sacks*, Commerce "determined that the most appropriate [benchmark] ...would be ...the sales of certain industrial land in [Thai] industrial

[5] In the *Final Results* of the underlying review, Commerce indicated that it would use the same benchmark (and, it follows, same underlying benchmark source) as it had in the third review. I&D Mem. 95. In the third review, Commerce used a set of Thai industrial land prices. *See Citric Acid and Certain Citrate Salts from the People's Republic of China,* 79 Fed. Reg. 108 (Dep't Commerce Jan. 2, 2014) (final admin. review) and accompanying I&D Mem. at 28.

estates, parks[,] and zones." *Id.* To get Thai industrial-land sales data, Commerce turned up a number of "Asian Industrial Property Reports." *Id.* In this case's third review, Commerce followed *Laminated Woven Sacks* and used the same kind of reports to value RZBC's land. *See Citric Acid and Certain Citrate Salts from the People's Republic of China*, 78 Fed. Reg. 34,648 (Dep't Commerce June 10, 2013) (prelim. admin. review) ("*Citric Acid and Certain Citrate Salts Third Review Preliminary Determination*") and accompanying Preliminary Results Calculation Memorandum for RZBC 8, *unchanged in Citric Acid and Certain Citrate Salts from the People's Republic of China,* 79 Fed. Reg. 108 (Dep't Commerce Dec. 7, 2009) (final admin. review) ("*Citric Acid and Certain Citrate Salts Third Review Final Determination*") and accompanying Final Results Calculation Memorandum for RZBC 2–3. Commerce merely replaced the outdated reports from *Laminated Woven Sacks* with four new reports pertaining to the four quarters of 2010 (the third review period). The new reports were titled a bit differently, as the Asian Marketview Reports.

In the fourth review (the one at issue in this case), RZBC sought for Commerce to use a different source for the land benchmarks. Specifically, RZBC proposed that Commerce use two Industrial Real Estate Market Reports, published by Colliers in the first and second halves of 2012. RZBC Benchmark Submission Ex. 25, PD 97 (Apr. 21, 2014). According to RZBC, the Colliers reports would form better benchmarks because they were "more representative of the actual land purchased by [RZBC]" because they included "industrial land prices from 13 provinces in Thailand, rather than the single price from the province of Bangkok [offered by the Asian Marketview Reports] which is clearly not representative of [RZBC's] land purchases." I&D Mem. 94. RZBC also argued that the Colliers reports were more contemporaneous to the POR than the Asian Marketview Reports. *Id.*

Commerce declined RZBC's invitation to use the Colliers reports to set benchmarks. Commerce reasoned that the data from the Colliers reports was "not transaction-specific and therefore [was] not reliable." *Id.* at 95. By contrast, the Asian Marketview Reports selected by Commerce in the third review "used actual transaction prices." *Id.* Commerce also noted that RZBC was wrong about the breadth of the Asian Marketview data: Far from being comprised of "a single price from the province of Bangkok," the data included "36 price points from five provinces within Thailand." *Id.* Finally, Commerce added that RZBC failed to demonstrate that "(1) our land benchmark is not comparable to their land purchase[, and] (2) price points from seven additional provinces would make the benchmark more representative." *Id.*

B. Discussion

RZBC renews its ask for a Colliers-based benchmark before this court. RZBC argues that the five provinces covered by the third-review reports are all "around Bangkok," but that Commerce "failed to address how [those five provinces] are similar to RZBC's land purchases[, which] are located far away from any major city center." Pls.' Mot. for J. on the Agency R. 48. Given that the Colliers reports draw data from thirteen provinces (including lower priced areas far from Bangkok), it is unclear to RZBC how Commerce's current benchmarks are "more representative" than their Colliers-based counterparts. *Id.* Commerce preferred the Asian Marketview Reports because they reported "actual transactions" whereas the Colliers reports were "not transaction-specific," but RZBC argues that this does nothing to prove that the Asian Marketview Reports better represent RZBC's land purchases. *Id.*

Besides, RZBC questions whether the Asian Marketview Reports really are specific to "actual transactions." *Id.* at 47–48. RZBC says it cannot *see* for itself whether the Asian Marketview Reports are transaction specific because Commerce did not bother to put the reports on record. *Id.* at 48. RZBC also notes that the Asian Marketview Reports list pricing data in U.S. dollars, which suggests that the data are not specific to actual Thai transactions. By contrast, the Colliers reports list data in Thai Bhat, "which would seem to indicate that the reported price[s] are based on actual Thai rates." *Id.*

RZBC's arguments miss the mark. Commerce's primary reason for using the Asian Marketview Reports was that the reports' transaction specificity made them reliable in a way that the non–transaction specific Colliers reports were not. I&D Mem. 95. Contrary to RZBC's arguments, there was sufficient indication that the Asian Marketview Reports really are transaction specific, and transaction specificity was a good enough reason for the agency to prefer the Asian Marketview Reports over the Colliers ones.

To begin with, Commerce sufficiently demonstrated that the Asian Marketview Reports are transaction specific. Although Commerce did not place the Asian Marketview Reports on this review's record, Commerce supported its statement that the reports were transaction specific with a citation to the third review—where the reports were on record (and also evidently available online). *Id.; Citric Acid and Certain Citrate Salts Third Review Preliminary Determination*, at 34,648 and accompanying Preliminary Results Calculation Memorandum for RZBC 8. Given that RZBC was a party to the third review and therein contested Commerce's decision to countervail RZBC's

land purchases, *see Citric Acid and Certain Citrate Salts Third Review Final Determination*, at 108 and accompanying I&D Mem. 64–65, the argument that RZBC could not access the Asian Marketview Reports to confirm that they were transaction specific comes across as disingenuous.

The court adds that besides putting the Asian Marketview Reports on record in the third review, Commerce also specified that it had used the reports to form benchmarks in several past proceedings, starting with *Laminated Woven Sacks*. *Citric Acid and Certain Citrate Salts from the People's Republic of China*, 78 Fed. Reg. 34,648 and accompanying Preliminary Results Calculation Memorandum for RZBC 8. In the *Laminated Woven Sacks* preliminary determination, Commerce stated that the reports offered prices for "the sales of certain industrial land in industrial estates, parks and zones in Thailand." *Laminated Woven Sacks from the People's Republic of China*, 72 Fed. Reg. 67,893, 67,909 (Dep't Commerce Dec. 3, 2007) (prelim. admin. determination). Commerce continued by noting that the Asian Marketview prices came from "an independent and internationally recognized real estate agency with a long-established presence in Asia." *Id.* The description of Asian Marketview Reports as pertaining to "sales" from a "real estate agency" clearly indicates that the reports are transaction specific. The language of the *Laminated Woven Sacks* preliminary determination plus Commerce's reference to the third review, where the Asian Marketview Reports were on record, is sufficient to demonstrate that the reports are transaction specific.

And the fact that the Asian Marketview Reports are transaction specific is enough to justify their use over the non–transaction specific Colliers reports. There is a common-sense reason that non–transaction specific price reports are "not reliable," I&D Mem. 95, in the same way as their transaction-specific counterparts: Transaction-specific reports provide the opportunity to identify and compensate for outlier sales, whereas non–transaction specific reports do not. Commerce's own regulations reflect a preference for drawing benchmarks from transaction-specific sources. Under 19 C.F.R. § 351.511(a)(2), Commerce first tries to calculate benchmarks using "actual transactions in the country in question" before resorting to the second and third tiers. Commerce therefore had ample basis for finding the Colliers reports unreliable and for using the Asian Marketview Reports to generate benchmarks instead.[6]

[6] RZBC also argues that Commerce should not have countervailed RZBC's land purchases in the first place. The court already rejected this argument in *RZBC*, 39 CIT at __, 100 F. Supp. 3d at 1304.

Finally, RZBC argues that using the Colliers reports would be more "cons[ist]ent with the determinations made by this Court in *Zhaoqing New Zhongya Aluminum Co. v. United*

IV. Commerce Properly Calculated the International Freight Component of the Limestone Flux Benchmark

In accordance with 19 C.F.R. § 351.511(a)(2)(iv), Commerce adjusted its limestone flux benchmarks to reflect the price an importer of limestone flux would pay, including international freight. Commerce arrived at its chosen freight rate by averaging three sets of international shipping quotes that the parties had provided, one of which pertained to shipping in "flat-rack collapsible" containers. I&D Mem. 25; ADM Benchmark Submission Ex. 4, PD 96 (Apr. 21, 2014); RZBC Benchmark Submission Ex. 22, PD 103 (Apr. 21, 2014). The flat-rack quotes included a "special equipment service" surcharge over and above the cost of shipping in standard containers. ADM Benchmark Submission Ex. 4. RZBC argues that Commerce should have omitted the surcharge, because limestone flux could be shipped in standard containers. The court sustains Commerce's freight-rate calculation.

A. Background

19 C.F.R. § 351.511(a)(2)(iv) instructs Commerce to adjust its benchmarks "to reflect the price that a firm actually paid or would pay if it imported the product." The regulation further provides that "[t]his adjustment will include delivery charges and import duties."

As freight-rate fodder, RZBC provided shipping quotes from Maersk and Searates. RZBC Benchmark Submission Ex. 22. The Maersk quotes referenced the shipment of "salt, [S]ulpher, earths and stone, plastering materials, lime, cement, marble, [and] granite" in "standard" containers. *Id.* ADM also provided Maersk shipping quotes, but ADM's quotes pertained to flat-rack collapsible containers, as opposed to standard ones, and included the aforementioned surcharge. ADM Benchmark Submission Ex. 4. Commerce averaged all three sets of shipping quotes in the Preliminary Results without first removing the surcharge from the flat-rack quotes. Preliminary Decision Mem. 22.

RZBC objected to Commerce's inclusion of the surcharge in the three-set average. RZBC argued that including the "special equipment service" surcharge in the average stood "in sharp contrast to every other case where the 'flat rack collapsible container rates' were placed on the record." I&D Mem. 80. According to RZBC, in two prior

States [(*Zhaoqing I*), 37 CIT __, __, 929 F. Supp. 2d 1324 (2013)] and *Zhaoqing New Zhongya Aluminum Co. v. United States* [(*Zhaoqing II*), 38 CIT __, __, 961 F. Supp. 2d 1346, 1352 & n.8 (2014)]." The court will not consider this argument because RZBC did not raise it below. RZBC Case Br. 19–20; *see* 28 U.S.C. § 2637(d) ("[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies.").

proceedings, Commerce had omitted the surcharge on grounds that the record lacked evidence that flat-rack containers were required to ship the relevant input—in those proceedings, steel-round billets. *See id.* at 80 & n.423 (citing *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China,* 75 Fed. Reg. 57,444 (Dep't Commerce Sept. 21, 2010) (final admin. determination) ("*Seamless Carbon and Alloy Steel Pipe*") and accompanying I&D Mem. cmt. 9.C; *Oil Country Tubular Goods from the People's Republic of China,* 78 Fed. Reg. 9368 (Dep't Commerce Feb. 8, 2013) (prelim. admin. review) ("*Oil Country Tubular Goods Preliminary Administrative Review*") and accompanying I & D Mem. cmt. 1.A). Moreover, RZBC placed on record quotes for shipping limestone flux in standard containers, the very existence of which suggested that flat-rack containers were not necessary. *Id.*

Commerce did not accept RZBC's arguments in the final results. Commerce succinctly explained,

> In [*Oil Country Tubular Goods* (one of the proceedings relied upon by RZBC),] there was sufficient information on the record . . . to conclude that the respondent did not incur the "flat rack" "special equipment service" fee. However, in the instant review, [RZBC] did not provide information on the record that it does not incur these fees; therefore, we will continue to use the international freight pricing data on record and will not make any changes for the final results.

Id. at 80–81.

B. Discussion

The court upholds Commerce's decision to factor the "special equipment service" surcharge into its limestone flux international-freight rate. Based on the record evidence, the court cannot conclude that it would be inappropriate to import limestone flux in flat-rack containers. The standard-container quotes on record do not delineate the usual use cases for standard-container shipment of limestone flux, much less establish that standard-container shipment is always feasible. *See* RZBC Benchmark Submission Ex. 23. The same is true of another piece of evidence invoked by RZBC in its reply brief: a Wikipedia article that lists "Bulk minerals," including "limestone," as commodities shippable in unpackaged, standard-container form. RZBC Benchmark Submission Ex. 19, PD 103 (Apr. 22, 2014). The article simply establishes that shipping limestone flux in standard containers is sometimes suitable, not that it is always suitable. *Id.* Without evidence that limestone flux is invariably shipped in stan-

dard containers, the court cannot rule out the possibility that flat-rack shipment is sensible or necessary at least some of the time. Therefore, it was not unreasonable for Commerce to calculate the freight-rate average without first omitting the "special equipment service" surcharge.[7]

CONCLUSION AND ORDER

After carefully reviewing the parties' briefs and the administrative record, the court remands Commerce's decision to adversely infer that RZBC used the Buyer's Credit program. The court sustains Commerce's benchmark calculations in full.

Accordingly, it is hereby:

ORDERED that the final determination of the International Trade Administration, United States Department of Commerce, published as *Citric Acid and Certain Citrate Salts from the People's Republic of China*, 79 Fed. Reg. 78,799 (Dep't Commerce Dec. 31, 2014) (final admin. review), be, and hereby is, REMANDED to Commerce for redetermination; it is further

ORDERED that Plaintiffs' Motion for Judgment on the Agency Record Under USCIT Rule 56.2 be, and hereby is, GRANTED as provided in this Opinion and Order; it is further

ORDERED that Commerce shall issue a redetermination ("Remand Redetermination") in accordance with this Opinion and Order that is in all respects supported by substantial evidence and in accordance with law; it is further

ORDERED that Commerce shall reconsider whether it can verify RZBC's non-use of the Buyer's Credit program by inspecting RZBC's audited financial statements or other books and records for sales contracts valued over $2 million; it is further

ORDERED that if Commerce concludes that it cannot verify non-use with RZBC, then it must explain how this can be the case in light

[7] RZBC again argues that this result is inconsistent with prior proceedings in which Commerce omitted the "special equipment service" surcharge from the freight-rate average for steel-round billets. But the proceedings that RZBC cites all follow the final determination in the *Oil Country Tubular Goods* investigation, where the record included "evidence that no special services were needed to ship steel billets and rounds." *RZBC*, 39 CIT at __, 100 F. Supp. 3d at 1313 n.7 (2015) (citing *Certain Oil Country Tubular Goods from the People's Republic of China,* 74 Fed.Reg. 64,045 (Dep't Commerce Dec. 7, 2009) (final admin. determination) ("*Oil Country Tubular Goods Final Determination*") and accompanying I&D Mem. cmt. 13.D; *Oil Country Tubular Goods Preliminary Administrative Review*, at 9368 and accompanying I&D Mem. at 1.A (relying on *Oil Country Tubular Goods Final Determination* to hold that shipping steel-round billet did not incur a "special equipment service" surcharge); *Seamless Carbon and Alloy Steel Pipe* at 57,444 and accompanying I&D Mem. cmt. 9.C (same)). In particular, the *Oil Country Tubular Goods Final Determination* record included a shipper's statement that "[s]teel billet shipments for our customers . . . were not made using flat rack containers." The record in this case, like the record before the court in the preceding *RZBC* case, is bereft of any comparable evidence that shipping limestone flux in flat-rack collapsible containers was inappropriate.

of the $2 million threshold laid out in the *Administrative Measures*; it is further

ORDERED that if Commerce concludes that it can verify non-use with RZBC, then it must either attempt to do so or explain why not; it is further

ORDERED that Commerce shall recalculate Plaintiffs' countervailing duty rate consistent with the results of its reconsideration; it is further

ORDERED that Commerce shall have ninety (90) days from the date of this Opinion and Order in which to file its Remand Redetermination, which shall comply with all directives in this Opinion and Order; that the Plaintiffs and Defendant-Intervenors shall have thirty (30) days from the filing of the Remand Redetermination in which to file comments thereon; and that the Defendant shall have thirty (30) days from the filing of Plaintiffs' and Defendant-Intervenors' comments to file comments.

Dated: June 30, 2016
New York, New York

/s/ *Richard W. Goldberg*
RICHARD W. GOLDBERG
SENIOR JUDGE

Slip Op. 16–69

ELKAY MANUFACTURING COMPANY, Plaintiff, v. UNITED STATES, Defendant, and GUANGDONG DONGYUAN KITCHENWARE INDUSTRIAL COMPANY, LTD., Defendant-Intervenor.

Before: Timothy C. Stanceu, Chief Judge
Consol. Court No. 13–00176

[Affirming an agency redetermination in an antidumping duty investigation, submitted in response to a court order]

Dated: July 14, 2016

Joseph W. Dorn and *P. Lee Smith*, King & Spalding LLP, of Washington, D.C., for plaintiff and consolidated defendant-intervenor Elkay Manufacturing Company.

Gregory S. Menegaz and *J. Kevin Horgan*, deKieffer & Horgan, PLLC, of Washington, D.C., for consolidated plaintiff and defendant-intervenor Guangdong Dongyuan Kitchenware Industrial Company, Ltd.

Patricia M. McCarthy, Assistant Director, and *Richard P. Schroeder*, Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of Washington, D.C., for defendant United States. With them on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director. Of counsel on the brief was *Whitney M. Rolig*, Attorney, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, Washington, D.C.

OPINION

Stanceu, Chief Judge:

In this consolidated action, plaintiffs Elkay Manufacturing Company ("Elkay") and Guangdong Dongyuan Kitchenware Industrial Company, Ltd. ("Dongyuan") contested an affirmative determination ("Final Determination") that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued upon concluding an antidumping duty investigation of drawn stainless steel sinks ("subject merchandise") from the People's Republic of China ("China" or the "PRC"). Both plaintiffs challenged aspects of the Department's calculation of the normal value of subject merchandise.[1]

Before the court is the Department's decision on remand ("Remand Redetermination") issued in response to the court's opinion and order in *Elkay Mfg. Co. v. United States*, 38 CIT __, 34 F. Supp. 3d 1369 (2014) ("*Elkay I*"). The court affirms the Remand Redetermination.

I. BACKGROUND

The court presumes familiarity with the court's opinion in *Elkay I*, *id.* Below, the court summarizes that background and addresses developments since the issuance of that opinion.

A. The Investigation and the Antidumping Duty Order

In March 2012, Commerce initiated an antidumping duty investigation of imports of drawn stainless steel sinks ("drawn sinks") from China covering the period of July 1, 2011 to December 31, 2011. *Drawn Stainless Steel Sinks From the People's Republic of China: Initiation of Antidumping Duty Investigation,* 77 Fed. Reg. 18,207 (Int'l Trade Admin. Mar. 27, 2012) ("*Initiation*"). Elkay, a U.S. producer of drawn sinks, was a petitioner in the investigation. *See Drawn Stainless Steel Sinks From the People's Republic of China: Antidumping Duty Investigation*, 77 Fed. Reg. 60,673 (Int'l Trade Admin. Oct. 4, 2012) ("*Prelim. Determination*"), and accompanying *Decision Memorandum for Preliminary Determination for the Antidumping Duty Investigation of Drawn Stainless Steel Sinks from the People's Republic of China*, A-570–983, at 1 (Sept. 27, 2012) (Admin.R.Doc. No. 337), *available at* http://enforcement.trade.gov/frn/summary/PRC/2012–24549–1.pdf (last visited Apr. 19, 2016)

[1] Each plaintiff is also a defendant-intervenor in this consolidated action. Order (June 28, 2013), ECF No. 16 (Court No. 13–00199) (granting Elkay's Mot. for Intervention); Order (July 09, 2013), ECF No. 21 (granting Dongyuan's Mot. for Intervention).

("*Prelim. Decision Mem.*"). Dongyuan, a Chinese producer and exporter of drawn sinks, was one of two mandatory respondents investigated by the Department. *See Prelim. Decision Mem.* 5.

In the Final Determination, Commerce ruled that imports of subject merchandise from China are being, or are likely to be, sold in the United States at less than fair value and issued an antidumping duty order assigning weighted-average dumping margins of 27.14% to Dongyuan, 39.87% to the other mandatory respondent, Superte/Zhaoshun,[2] and a simple average of the two rates, 33.51%, to the "separate rate" respondents, i.e., respondents that demonstrated independence from the government of the PRC. *See Drawn Stainless Steel Sinks from the People's Republic of China: Investigation, Final Determination*, 78 Fed. Reg. 13,019, 13,019–23 (Int'l Trade Admin. Feb. 26, 2013) ("*Final Determ.*"); *Drawn Stainless Steel Sinks from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 78 Fed. Reg. 21,592, (Int'l Trade Admin. Apr. 11, 2013) ("*Amended Final Determ. and Order*").[3]

B. The Court's Opinion and Order Remanding the Final Determination

In an action brought in June 2013, Elkay challenged the Department's method of accounting for selling, general, and administrative ("SG&A") expenses in calculating the normal value of the subject merchandise of the two mandatory respondents. *See* Compl. ¶¶ 11–14 (June 5, 2013), ECF No. 14 ("Elkay Compl."); *Elkay I*, 38 CIT at __, 34 F. Supp. 3d at 1370.

In its separate (now consolidated) action, Dongyuan challenged the Department's use of certain import data from Thailand to determine a surrogate value for cold-rolled stainless steel coil, the primary material used in producing the subject merchandise. Compl. ¶¶ 11–15 (June 12, 2013), ECF No. 9 (Court No. 13–00199) ("Dongyuan

[2] The other mandatory respondent in the investigation was "a combined entity Commerce identified as consisting of Zhongshan Superte Kitchenware Co., Ltd. ('Superte') and a related invoicing company, Foshan Zhaoshun Trade Co., Ltd. ('Zhaoshun') (collectively identified as 'Superte/Zhaoshun')." *Elkay Mfg. Co. v. United States*, 38 CIT __, __, 34 F. Supp. 3d 1369, 1371 (2014) (citing *Drawn Stainless Steel Sinks from the People's Republic of China: Investigation, Final Determination*, 78 Fed. Reg. 13,019, 13,019 n.2 (Int'l Trade Admin. Feb. 26, 2013)) ("*Elkay I*").

[3] Commerce issued the Amended Final Determination of Sales at Less than Fair Value following a ministerial error allegation filed by one of the separate rate applicants, Jiangxi Zoje Kitchen & Bath Industry Co., Ltd. *Drawn Stainless Steel Sinks from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 78 Fed. Reg. 21,592, 21,593 (Int'l Trade Admin. Apr. 11, 2013) ("*Amended Final Determ. and Order*"). The change Commerce made in the Amended Final Determination affected only that applicant. *Id.*

Compl."). In the Final Determination, Commerce used the Thai import data to calculate a surrogate value of $3.80 per kilogram for this input. *See Final Results of Redetermination Pursuant to Court Remand* 4–5 (Apr. 22, 2015), ECF No. 64 ("*Remand Redeterm.*"). Defendant requested that the court order a partial voluntary remand that would permit Commerce to reconsider the use of Thai import data for determining a surrogate value for cold-rolled stainless steel coil and to reopen the record to admit additional data. *Elkay I*, 38 CIT at __, 34 F. Supp. 3d at 1371, 1374.

In *Elkay I*, the court granted defendant's request for a partial voluntary remand. *Id.*, 38 CIT at __, 34 F. Supp. 3d at 1371. The court also directed Commerce to reconsider its method of accounting for the SG&A expenses. *Id.*

C. Dongyuan's Motion for Reconsideration

Following the court's issuance of the opinion and order in *Elkay I*, Dongyuan moved for reconsideration, alleging various errors by the court. Consol. Pl. Guangdong Dongyuan Kitchenware R. 59(a) Mot. for Reconsideration (Jan. 21, 2015), ECF No. 55. The court denied this motion. *Elkay Mfg. Co. v. United States*, 39 CIT __, Slip Op. 15–33 (Apr. 20, 2015).

D. The Remand Redetermination

Commerce issued the Remand Redetermination on April 22, 2015. *See Remand Redeterm*. On remand, Commerce made no change to its choice of surrogate value for cold-rolled stainless steel coil, which therefore remained at the $3.80-per-kilogram value Commerce calculated for the Final Determination, *id.* at 4–6, but changed its method of accounting for SG&A expenses, *id.* at 7–10. The change increased Dongyuan's weighted-average dumping margin from 27.14% to 36.59%, increased Superte/Zhaoshun's weighted-average dumping margin from 39.87% to 50.11%, and increased the margin for the separate rate respondents, which was the simple average of the two rates, from 33.51% to 43.35%. *See id.* at 25.

Elkay and Dongyuan submitted comments on the Remand Redetermination to the court on June 23, 2015. Pl.'s Comments on the Remand Redeterm., ECF No. 69 ("Elkay's Comments"); Dongyuan Kitchenware's Comments on Final Results of Remand Redeterm., ECF No. 70 ("Dongyuan's Comments"). Defendant filed a response to these comments on October 15, 2015. Def.'s Resp. to Comments on Remand Redeterm., ECF No. 77 ("Def.'s Response Comments"). In its comments, Elkay expressed agreement with the Remand Redetermination. Elkay's Comments 1–2. Dongyuan opposes the Remand Re-

determination, objecting both to the Department's surrogate value for stainless steel coil and to the change Commerce made to the method of accounting for SG&A expenses. Dongyuan's Comments 45–46.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930, as amended (the "Tariff Act"), 19 U.S.C. § 1516a, including an action contesting a final determination that Commerce issues to conclude an antidumping duty investigation.[4] In reviewing a final determination, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

B. Commerce Permissibly Determined the Surrogate Value for Stainless Steel Coil

According to section 773(c)(1) of the Tariff Act, 19 U.S.C. § 1677b(c)(1), Commerce, as a general matter, is to determine the normal value of subject merchandise from a nonmarket economy ("NME") country "on the basis of the value of the factors of production utilized in producing the merchandise," plus certain additions.producing the merchandise," plus certain additions.producing the merchandise," plus certain additions.[5] The statute further states that "the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." 19 U.S.C. § 1677b(c)(1). The statute provides that Commerce, "in valuing factors of production . . . shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are . . . at a level

[4] Unless otherwise specified, all statutory citations made herein are to the 2012 edition of the United States Code. The regulatory citation made herein is to the 2015 edition of the Code of Federal Regulations.

[5] The International Trade Administration, U.S. Department of Commerce, considers China to be a "nonmarket economy ('NME'), country," a term defined in 19 U.S.C. §1677(18)(A) as "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise."

of economic development comparable to that of the nonmarket economy country, and . . . significant producers of comparable merchandise." *Id*. § 1677b(c)(4).

During the investigation, Commerce identified Colombia, Indonesia, Peru, the Philippines, South Africa, Thailand, and Ukraine as countries comparable to China with respect to economic development. *Elkay I*, 38 CIT at __, 34 F. Supp. 3d at 1373. Commerce also found that all of these countries, except the Philippines, were significant producers of comparable merchandise. *Id.*

To value cold-rolled stainless steel coil for the Final Determination, Commerce used import data for Thailand published in the Global Trade Atlas ("GTA"), concluding that these data were more specific to the input than GTA import data for the Philippines and Indonesia, which also were on the record. *Id.* Commerce calculated a weighted average unit value ("AUV") from import data for six 11-digit Thai harmonized tariff schedule ("HTS") subheadings under two Thai HTS six-digit subheadings applying to cold-rolled stainless steel coil, subheading 7219.33 (which applies to cold-rolled stainless steel, 600 mm or more in width, of thickness exceeding 1 mm and less than 3 mm) and subheading 7219.34 (same, but of a thickness of 0.5 mm or more and not exceeding 1 mm). *See Remand Redeterm.* 2. Commerce found that the Thai import data in the six 11-digit subheadings "are specific to the types, finishes, and grades of stainless steel coil Dongyuan consumed in the production of the subject merchandise." *Id.* at 5 (footnote omitted). Commerce excluded from its AUV calculation the Thai imports that were from nonmarket economy countries, the Thai imports for which the source country was unspecified, the Thai imports from the various countries that Commerce found to maintain broadly available subsidies, and the Thai imports from the countries upon which Thailand imposed antidumping duties, which were Japan and Taiwan. *See id.* at 3 n.11. The result of the Department's calculation in the Final Determination was the aforementioned surrogate value of $3.80 per kilogram. *Id.* at 4.

In contesting the Final Determination, Dongyuan raised various objections to the suitability and reliability of the Thai import data, arguing that Commerce should have valued the stainless steel coil input using Global Trade Atlas import data for the Philippines and Indonesia. *Elkay I*, 38 CIT at __, 34 F. Supp. 3d at 1374 (citation omitted). In response to Dongyuan's claim, defendant requested a voluntary remand to place on the record import data on cold-rolled stainless steel coil for the potential surrogate countries for which import data were not already on the record, so that Commerce could

determine whether the Thai import data were aberrational. *Id.* The court granted this voluntary remand request over Dongyuan's objection. *Id.*

On remand, Commerce added to the record GTA import data pertaining to Colombia, Peru, South Africa, and Ukraine for imports of cold-rolled stainless steel made under the two six-digit harmonized system subheadings, 7219.33 and 7219.34. *Remand Redeterm.* 3. Commerce then compared the average unit values shown in the Thai import data and the AUVs obtained from import data for the other six countries (i.e., Colombia, Indonesia, Peru, Philippines, South Africa, and Ukraine). *Id.* at 3–4. Before making the comparison, Commerce excluded data on imports into these countries from nonmarket economy countries, imports from countries that maintain generally available export subsidies, and imports for which the source country was unspecified. *Id.* at 3 n.11. Commerce noted that the AUV it calculated for Thailand for the purpose of the comparison, $2.65 per kg., was within the range of the AUVs for the other six countries (Colombia, $2.81; Indonesia, $2.10; Peru, $3.08; Philippines, $2.70; South Africa, $3.21; Ukraine, $3.15). *Id.* at 3–4. The quantity on which the Thai imports were based, 34,415,219 kg., was considerably larger than each of the import quantities for the other six countries (with the next highest quantity being the imports into Colombia, which were 11,663,084 kg.). *Id.* Commerce concluded in the Remand Redetermination that the Thai import data were not aberrational. *Id.* at 13–21. In opposing the Remand Redetermination, Dongyuan challenges this finding and maintains that the Department's chosen surrogate value, $3.80 per kg., is unsupported by substantial record evidence. Dongyuan's Comments 2–19.

In response to Dongyuan's comments opposing the Remand Redetermination, the court has considered the record import data, the reasoning Commerce presented in the Remand Redetermination, and Dongyuan's arguments as to why the surrogate value Commerce applied to cold-rolled stainless steel coil was not based on the best available information. The court concludes that the surrogate value must be sustained upon judicial review. Commerce determined, based on record evidence, that the Thai import data it used in the Final Determination to calculate the surrogate value of $3.80 per kilogram were more specific to the type of cold-rolled stainless steel Dongyuan used to make the subject merchandise than were any competing data on the record. Dongyuan does not contest this particular finding. Although the Thai data were subject to certain shortcomings, as discussed herein, Commerce nevertheless acted within its discretion in choosing the Thai data as the "best available information."

Dongyuan directs its first set of arguments to the amount by which the surrogate value exceeds the values shown in import data from the other potential surrogate countries and to the relatively small quantity upon which the surrogate value is based. Dongyuan submits that the Department's comparison of the quantity and value of Thai imports with data from the other six countries "is misleading and incomplete" because the Thai data include "all of the dumped imports into Thailand." *Id.* at 3. Dongyuan points out that when the dumped imports, i.e., the imports into Thailand from Japan and Taiwan, are excluded from the total Thai imports, the quantity of Thai imports is reduced from 34,415,219 kg. to 2,786,140 kg. and the AUV is increased from $2.65 per kg. to $3.61 per kg., a value Dongyuan characterizes as "not 'in range'" when compared to the AUVs for the other six countries. *Id.* at 4. According to Dongyuan, "the Thai AUV data for this commodity steel that can be acquired anywhere in the world is aberrant because it is far above the AUVs for the other countries, particularly for a commodity." *Id.* at 6.

The court is not persuaded by Dongyuan's argument that the AUV derived from the Thai data was aberrant when compared to the AUVs for the other six countries. The $3.61 per kg. AUV for non-dumped Thai imports is higher than the other six values (in descending order, $3.21, $3.15, $3.08, $2.81, $2.70, and $2.10), but it is not so substantially higher as to be "aberrant." As Commerce pointed out (in responding to the argument as made by Dongyuan in response to a draft version of the remand redetermination), "substantial variations exist from country to country within those 6-digit AUVs, ranging from as low as two percent (between South Africa and Ukraine) to as high as 52 percent (between Indonesia and South Africa)." *Remand Redeterm.* 15. Moreover, the quantity upon which the $3.61 per kg. AUV was derived, 2,786,140 kg., is within the range of the quantities upon which the other six AUVs were based, being higher than the lowest quantity (2,254,584 kg. for South Africa). *Id.* at 14.

Dongyuan argues that the AUV Commerce actually used to value the input, $3.80 per kg., was based on an aberrantly small quantity, 374,737 kg. Dongyuan's Comments 5 ("This is less than 1% of the 6-digit HTS import totals into all six countries and 15 times smaller than the average import quantity into each country."). Dongyuan views the amount as derived from only four of the six Thai 11-digit subheadings and from individual shipment quantities that were too small to be representative of Dongyuan's purchases, which were much larger, totaling in the aggregate nearly 2 million kilograms during the period of investigation. *Id.* at 8–9. The court rejects this argument as well. Dongyuan has not shown that the 347,737 kg.

quantity is so small as to be commercially insignificant, and comparing this quantity with the larger 6-digit quantities is not meaningful because the import data associated with the 347,737 kg. quantity are the only import data on the record—from any country—that Commerce found to be "specific to the types, finishes, and grades of stainless steel coil Dongyuan consumed in the production of the subject merchandise." *Remand Redeterm.* 5 (footnote omitted).

Specifically, Commerce found that "Dongyuan uses stainless steel coil grade 304," an "austenitic grade stainless steel."[6] *Id.* at 5 n.20 (citations omitted). In support of its continuing to value the stainless steel coil input using the 11-digit Thai import data, Commerce stated in the Remand Redetermination that "[i]t is the Department's preference to select data for an input that is specific to the input consumed by a respondent for purposes of calculating surrogate values." *Id.* at 5 (footnote omitted). Commerce found that the import data for Colombia, Indonesia, Peru, the Philippines, and South Africa were available only at the level of six-digit subheadings and "do not make any distinction for grade of stainless steel coil." *Id.* at 5–6. It added that "Ukraine reports import data under 10-digit HTS subcategories for stainless steel coil; however, the Department cannot discern from the descriptions of those categories whether those subcategories are of the same or similar grade [as] the stainless steel coil that Dongyuan consumed." *Id.* at 6 (footnote omitted). In its comments on the Remand Redetermination, Dongyuan did not contest the findings by Commerce that pertained to the relative specificity of the 11-digit Thai subheadings. It was reasonable for Commerce to prefer data that has greater specificity to the input it is valuing, even where, as here, those data pertain to a smaller (but not insignificant) quantity than do the more general import data on cold-rolled stainless steel coil. That Dongyuan purchased stainless steel coil in quantities larger than those on which the surrogate value was based does not negate another critical, and uncontested, fact: of all the data on the record, only the Thai import data contained breakouts that Commerce could relate to the grade of steel Dongyuan used in making the subject merchandise.

Dongyuan argues, further, that the Thai import statistics were not the best available information upon which to base a surrogate value because "[t]he dominance of the Thai imports by non-market, subsidized, and dumped imports necessarily affects the pricing of the fairly

[6] Commerce explained that "[r]ecord evidence shows that there are several grades of stainless steel coil, including martensitic, ferritic, austenitic ferritic, austenitic, and precipitation hardening, and each grade includes a variety of finishes and chemical compositions." *Final Results of Redetermination Pursuant to Court Remand* 4 (Apr. 22, 2015), ECF No. 64 ("*Remand Redeterm.*").

traded steel in Thailand, rendering the GTA data unreliable and unrepresentative." Dongyuan's Comments 11. Dongyuan maintains that Commerce excluded the vast majority of Thai import trade data (a percentage Dongyuan describes, variously, as 92%, *id.* at 5, and as 93% or 94%, *id.* at 12) "because of dumping orders, export subsidies, or government involvement in the country of export (i.e., NME [non-market economy] status of the exporting country)." *Id*. Dongyuan draws the conclusion that the remaining 6–8% was not the "best available information" within the meaning of 19 U.S.C. § 1677b(c)(1) because "[i]n comparison" the Philippine and Indonesian import data "do not evidence pervasive market distortion." *Id.*

Dongyuan's contention that the Thai import data Commerce did not exclude are so pervasively distorted as to be unreliable (and therefore inferior to the Philippine and Indonesian import data) rests on speculation rather than record evidence. In attributing the distortions inherent in the data Commerce excluded to the data Commerce did not exclude, Dongyuan fails to present an argument grounded in record evidence. Faced with imperfect sets of data, Commerce permissibly chose the Thai data, concluding that "the Indonesian and Philippine data for stainless steel coil do not constitute the best information available to value stainless steel coil because the data from those countries were only available at the 6-digit HTS level and do not make any distinction for grade of stainless steel coil." *Remand Redeterm.* 5.

Further to its argument that the Thai import data are distorted, Dongyuan contends that the domestic Thai market for cold-rolled steel coil is distorted by government subsidies provided to POSCO Thainox ("POSCO"), which produces stainless steel in Thailand. Dongyuan's Comments 14–19. Dongyuan submits that POSCO is the only manufacturer and distributor of cold-rolled stainless steel coil in Thailand and that it received both generally available export subsidies and specific subsidies under Thailand's Investment Promotion Act ("IPA") for "the business relating to the manufacturing of cold-rolled stainless steel." *Id.* at 15. Dongyuan objects that Commerce failed to follow its policy of disregarding prices that it has "reason to believe or suspect" are subsidized. *Id.* at 16. For evidence of the distortion of the domestic stainless steel market, Dongyuan relies on a 2011 POSCO financial statement disclosing that under the IPA "'the Company was granted certain promotional privileges in the business relating to the manufacturing of cold-rolled stainless steel' . . . including the 'exemption from import duty on imported machinery and

equipment' which the Department has found countervailable." Dongyuan's Comments 15–16 (citing 2011 POSCO Annual Report) (footnote omitted).

Commerce did not consider the POSCO financial statement to be sufficient record evidence upon which it could conclude "that the cold-rolled steel market in Thailand as a whole is distorted because of this subsidization." *Remand Redeterm.* 17. Although acknowledging in the Remand Redetermination that "we found sections of the IPA to be countervailable in a previous determination," Commerce noted that "we never initiated a countervailing duty investigation of POSCO itself, nor have we made a determination that POSCO is a public authority whose presence in the cold-rolled steel market is so dominant that it distorts import prices into Thailand." *Id.* (citing *Certain Frozen Warmwater Shrimp From Thailand; Final Negative Countervailing Duty Determination*, 78 Fed. Reg. 50,379 (Aug. 19, 2013)). Commerce also stated that it had "never made a determination that the Thai government owns or controls the majority or a substantial portion of the market for cold-rolled stainless steel via POSCO or any other entity." *Id.* at 18.

The court rejects the argument Dongyuan bases on the POSCO financial statement. Despite the record evidence that POSCO received one or more government subsidies, Commerce still could conclude based on the record evidence that the Thai market as a whole was not so distorted by the subsidization that data on the value of *imports* into Thailand were unsuitable for use in determining the surrogate value. Dongyuan validly points out that Commerce generally declines to use surrogate value data based on prices it suspects are subsidized, but Dongyuan has not demonstrated that Commerce ignored record evidence compelling a conclusion that these import values were distorted by the government subsidies such that they did not qualify as the best available information for valuing the stainless steel coil.

Dongyuan argues that the values reflected in the Thai import data are unreliable because Thai customs officials "regularly impose[] arbitrarily high Customs values to its imports, thereby . . . . increasing the prices published in its import data." Dongyuan's Comments 29. Dongyuan cites a report of the United States Trade Representative stating that the Thai "Customs Department Director General retains the authority and discretion to arbitrarily increase the customs value of imports." *Id.* at 30 (citation omitted). It also cites a FedEx Country Report stating that Thai Customs use the "highest declared price of products imported" to "establish and distribute the indicative price of some products" and that "this indicative price will be used instead of

the transaction value to determine the custom value," which "could happen across all sectors" when customs officials "are concerned about the accuracy of the price declared on the invoice." *Id.* at 31 (citation omitted). Concluding that that these reports of manipulation of customs values by the Thai government did not "address any of the raw material inputs that are consumed by the respondents," Commerce considered the record evidence insufficient to support a conclusion that "the steel input data relied on in this investigation was subject to the manipulation alleged." *Remand Redeterm.* 19.

The evidence of manipulation was relevant to the question of the reliability of the Thai data, but, as Commerce concluded, it does not establish that Thai Customs import values are affected generally, and significantly, by the practice the U.S. Trade Representative identified. The record evidence of manipulation of customs values does not rise to such a level that Commerce was left with no choice but to foreclose *any* use of Thai import data to determine a surrogate value for a production input. As the court discussed previously, Commerce must make selections from among imperfect data sets. On this record, Commerce was faced with the need to weigh the superior specificity of the Thai import data (as compared to other record import data) against other factors, as it did here. The record, considered as a whole, contained substantial evidence to support the Department's finding that the Thai import data were the best available information.

C. The Method Commerce Applied to Value SG&A Expenses In the Remand Redetermination Was Not Contrary to Law

In determining normal value according to Section 773(c)(1) of the Tariff Act, Commerce includes among the factors of production the hours of labor required to produce the subject merchandise. 19 U.S.C. § 1677b(c)(3)(A) ("[T]he factors of production utilized in producing merchandise include, but are not limited to . . . hours of labor required . . . ."). The statute further provides that Commerce, after calculating the total value of the factors of production (including labor), is to add "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses." *Id.* § 1677b(c)(1). In this litigation, Elkay claimed that the Department's method of determining the normal value of the subject merchandise of the two mandatory respondents did not capture the value of the labor component of these respondents' selling, general and administrative expenses, i.e., the "SG&A labor." *See Elkay I*, 38 CIT at __, 34 F. Supp. 3d at 1376.

Commerce typically calculates surrogate values for factory overhead expenses, for SG&A and interest expenses, and for profit, by

calculating and applying "financial ratios" derived from the financial statements of one or more producers of comparable merchandise in the primary surrogate country. *See* 19 C.F.R. § 351.408(c)(4). For the Final Determination, Commerce calculated surrogate SG&A expenses for the two mandatory respondents by using information obtained from the financial statements of three Thai companies (Stainless Steel Home Equipment Manufacturing Co., Ltd, Diamond Brand Co., Ltd., and Advance Stainless Steel Co., Ltd.). *Elkay I*, 38 CIT at __, 34 F. Supp. 3d at 1377. From these three financial statements, Commerce calculated separate ratios for each Thai company that represented an SG&A expense combined with interest expense, and then averaged the three ratios to derive a single SG&A/interest expense ratio for use in determining the normal value of the subject merchandise of the two investigated respondents.[7] *Id*.

1. Commerce Permissibly Calculated an SG&A/Interest Expense Ratio Using All Financial Statement Data on SG&A Expenses

In deriving an average SG&A/interest expense ratio for the Final Determination, Commerce adjusted the individual ratios to exclude certain expenses that it considered to represent a labor cost component of the reported SG&A expenses.[8] *Id.; see Remand Redeterm.* 6–7 (explaining that in the Final Determination " . . . the Department excluded certain labor costs identified in the three surrogate financial statements as 'SG&A labor costs' from the numerators of the SG&A ratios and included those costs in the denominators of those ratios to avoid double-counting those costs in the calculation of normal value ('NV').") (footnote omitted). Regarding "double counting," Commerce considered the rate by which it valued the hours of labor as a factor of production to include already the labor associated with SG&A functions as well as manufacturing labor. *Elkay I*, 38 CIT at __, 34 F. Supp. 3d at 1379. Commerce had obtained that rate from "data on the

[7] Commerce calculates the SG&A/interest expense ratio as the sum of all SG&A and interest expenses (numerator) divided by the sum of all materials, labor, energy, and factory overhead expenses (denominator). *See Antidumping Manual*, Ch. 10 at 18 (Intl. Trade Admin. 2009); *see Factor Valuations for the Final Determination*, Attach. 1 (final surrogate value worksheets) (Feb. 19, 2013) (Admin.R.Doc. No. 422) ("*Final Factor Valuations Mem.*").

[8] The financial statements of all three Thai companies reported certain labor costs separately from production labor costs, itemizing these non-production labor costs as sales or administrative expenses. *See Remand Redeterm.* 8 & 8 n.37 (citing *Pet'r's Submission of Surrogate Values,* Ex. 10 (Aug. 13, 2012) (Admin.R.Doc. No. 262) (including financial statements of Stainless Steel Home Equipment Manufacturing Co., Ltd. and Diamond Brand Co., Ltd.); *Dongyuan's Rebuttal Surrogate Values for the Prelim. Results*, Ex. 5 (Aug. 20, 2012) (Admin.R.Doc. No. 296) (including financial statement of Advance Stainless Steel Co., Ltd.)).

labor cost of '[m]anufacture of other fabricated metal products not enumerated elsewhere' contained in the 'Industrial Census 2007' published by Thailand's National Statistics Office ('NSO')." *Id.*, 38 CIT at __, 34 F. Supp. 3d at 1378 (citation omitted). Commerce considered this "NSO" labor rate to be more product-specific and more contemporaneous than other record data on labor rates and, therefore, the best available information for valuing labor hours. *Id.* In addition to the NSO data, the record contained 2005 data from Chapter 6A of the International Labor Organization ("ILO") Yearbook of Labor Statistics, which Commerce had used to value the mandatory respondents' hours of manufacturing labor in the Preliminary Results. *See id.*

In *Elkay I*, the court invalidated, as unsupported by substantial record evidence, the Department's determination that the specific downward adjustments Commerce made to the SG&A/interest expense ratios were justifiable as a compensation for "double-counting" of SG&A labor expenses. *Id.*, 38 CIT at __, 34 F. Supp. 3d at 1380–82. The court held that "[t]he record lacks substantial evidence to support the Department's conclusion that the rate Commerce applied to the hours of production labor reported by the investigated respondents overstated the value of those labor hours to such an extent as to justify the specific, compensatory adjustments that Commerce made to the SG&A/interest expense ratios." *Id.*, 38 CIT at __, 34 F. Supp. 3d at 1382. The court reasoned that "[o]n this administrative record, the Department's reliance on the extent of any 'double-counting' was too much a matter of speculation." *Id*. (citation omitted).

Reconsidering its decision on remand, Commerce recalculated the SG&A ratios to delete the "double counting" adjustment. Commerce concluded that it had "erroneously" removed SG&A labor expenses from the calculation of the SG&A financial ratios. *Remand Redeterm.* 22. Commerce explained that "[n]otwithstanding that the record shows that the NSO labor rate was derived from an average remuneration paid for persons engaged in various manufacturing and non-manufacturing activities, it does not follow that the labor expenses calculated using the NSO labor rate capture all labor expenses." *Id.* at 8. Commerce further explained that "[t]his is because under the factors of production ('FOP') methodology for calculating NV, labor expenses capture the labor cost only for manufacturing—obtained by multiplying a respondent's reported direct and indirect labor hours to manufacture subject merchandise by the surrogate labor rate (*e.g.*, the NSO labor rate or the ILO Chapter 6A labor rate)." *Id.* Commerce noted that "[t]he respondents did not report labor hours associated with the selling and administrative staff" and,

as the court held in *Elkay I*, "there is not substantial evidence to find that the NSO labor rate is high enough to compensate for those unreported hours." *Id.* at 8–9. Rather than presume that the NSO labor rate it applied to hours of labor indirectly captured the SG&A expense (as Commerce appeared to have done in the Final Determination), Commerce stated in the Remand Redetermination that it had decided to "treat the SG&A labor costs as SG&A expenses in each company's surrogate financial ratio calculation." *Id.* at 10 (footnote omitted.). Commerce cited the fact that in all three of the Thai companies' financial statements, which Commerce used to calculate the SG&A expense ratios, "the salary for selling and administrative staff and/or welfare benefits were unambiguously classified under a separate section (*e.g.*, selling and administrative expenses) from the cost-of-production or cost-of-good[s]-sold section (which included labor costs)," *id.* at 8, and "it is the Department's practice to treat labor in its financial ratio calculations in the same manner the surrogate company disaggregates its labor costs," *id.* at 9.

The court sustains the Department's valuation of SG&A expenses in the Remand Redetermination. The record evidence supports the Department's finding that the method used in the Final Determination applied a surrogate labor rate only to hours of direct and indirect manufacturing labor, not SG&A labor. Therefore, the labor component of the SG&A expenses could have been included within the normal value calculation only indirectly, through a surrogate labor rate that overstated the value of manufacturing labor as a means of compensation. But as the court concluded in *Elkay I*, and as Commerce implicitly acknowledges in the Remand Redetermination, the record does not contain substantial evidence supporting a finding that the rate Commerce used to value the manufacturing labor is overstated in such a way as to effect a defensible compensation for this omission. The recalculation Commerce made upon remand, which determined an SG&A/interest expense ratio based on the full reported SG&A expenses of the three Thai producers, corrects the error the court identified in *Elkay I*.

Dongyuan opposes the Department's decision on remand, arguing that the Department's recalculation "contains both the value of SG&A labor in the labor rate and the value of SG&A labor in the financial ratios" and thus "SG&A labor is being double-counted." Dongyuan's Comments 40. Dongyuan offers two reasons why it believes the Department failed to make an adjustment necessary to avoid the double counting of non-production labor expenses.

First, Dongyuan argues that the NSO 2007 labor rate unquestionably is higher than it would be had it been based solely on production

labor. *Id.* at 38–40. Dongyuan submits that the court, and the Department on remand, were incorrect to "doubt the double-counting of SG&A labor because it cannot be exactly quantified." *Id.* at 41. Dongyuan argues, further, that the amount of double counting is equivalent to the "cost of the non-production labor," which is quantified in the "disaggregated labor costs in the financial statements." *Id.* at 41–42. The premise of this argument is not supported by the evidence of record. In the Remand Redetermination, Commerce did not base its decision to refrain from making an adjustment to the SG&A ratio on a finding that the NSO labor rate would be no higher were it based solely on manufacturing labor. Indeed, there was no way for Commerce to determine from the record what an NSO labor rate would have been had the basis for the rate been limited in that way.[9] Instead, Commerce found on remand that record evidence did not allow it to conclude that it could capture adequately the cost of SG&A labor by applying the NSO labor rate to production labor (and only to production labor), as a substitute for including the full reported SG&A costs in the SG&A/interest expense financial ratio. This finding was central to the Department's decision on remand not to make the adjustment Dongyuan advocates, and the court, therefore, must consider whether the finding is a valid one. The court concludes that the finding is supported by substantial evidence on the record. That evidence included, significantly, the evidence that the three Thai companies separately reported certain labor expenses that are associated with SG&A functions and that the Department's methodology applied the surrogate labor rate only to hours of manufacturing labor.

Second, Dongyuan argues that in failing to make an adjustment to avoid double counting, Commerce acted contrary to the policy announced in its 2011 "*Labor Methodologies*" notice. *Id.* at 42–44. In the notice Dongyuan cites, Commerce announced a change in its methodology in which it would value hours of labor using ILO Chapter 6A data, which Commerce considered to reflect all costs related to labor "including wages, benefits, housing, training, etc.," instead of ILO Chapter 5B data, which "reflects only direct compensation and bonuses." *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production* : *Labor*, 76 Fed. Reg. 36,092, 36,093 (Int'l Trade Admin. June 21, 2011) ("*Labor Methodologies*"). To address concerns that this change could result in

[9] As the court concluded in *Elkay I*, "[t]he record data . . . do not support an actual finding that the NSO labor rate was higher—or by what percentage it was higher—than it would have been had it been derived solely from Thai data on production labor rather than from a combination of Thai data on production labor and various types of non-production labor." *Elkay I*, 38 CIT at __, 34 F. Supp. 3d at 1382. Commerce specifically expressed its agreement with this conclusion in the Remand Redetermination. *Remand Redeterm.* 10.

overstating labor costs, the notice states that "the Department will adjust the surrogate financial ratios when the available record information – in the form of itemized indirect labor costs – demonstrates that labor costs are overstated." *Id.*, 76 Fed. Reg. at 36,093–94. The notice further states that "[s]pecifically, when the surrogate financial statements include disaggregated overhead and selling, general, and administrative expense items that are already included in the ILO's definition of Chapter 6A data, the Department will remove these identifiable costs items." *Id.*, 76 Fed. Reg. at 36,094.

Dongyuan argues that Commerce must follow the policy it established in *Labor Methodologies* in this case by removing the disaggregated SG&A labor expenses identified in the surrogate financial statements from the SG&A/interest expense ratio. Dongyuan's Comments 44. This argument is unpersuasive because the adjustment contemplated in the *Labor Methodologies* notice is made when Commerce uses the ILO Chapter 6A data, which Commerce did not do here, deciding instead to use a source that resulted in application of a much lower labor rate than one obtained from ILO Chapter 6A data. *See Elkay I*, 38 CIT at __, 34 F. Supp. 3d at 1383–84. As the court stated in *Elkay I*, "[t]he notice creates 'the rebuttable presumption that Chapter 6A data better accounts all direct and indirect labor costs.'" *Id.*, 38 CIT at __, 34 F. Supp. 3d at 1383 (quoting *Labor Methodologies*, 76 Fed. Reg. at 36,093). As the court observed in *Elkay I*, "Commerce departed from the methodology announced in the notice by rejecting the ILO Chapter 6A data in the Final Determination in favor of the NSO data . . . ." *Id*. Dongyuan, understandably, does not argue that Commerce was obligated to achieve consistency with the *Labor Methodologies* notice by reverting to the ILO Chapter 6A data, which it used to value labor hours in the Preliminary Results.

2. Commerce Acted within its Discretion in Declining to Reopen the Record to Admit Additional Surrogate Data for Valuing Labor Hours

Finally, Dongyuan argues that if Commerce cannot or will not make an adjustment to eliminate double counting by removing SG&A labor expenses from the SG&A/interest expense ratio, "the Department must changes [*sic*] its labor source and methodology" for determining labor expenses. Dongyuan's Comments 44. Dongyuan adds that it "has suggested returning to ILO [Chapter] 5B data, which only covers production labor." *Id.* at 45.

The court disagrees that Commerce must change its source of data for valuing labor hours. The court previously ordered a remand that

allowed Commerce to consider "alternative data sources with which to value the labor hours reported by the two investigated respondents." *Elkay I*, 38 CIT at __, 34 F. Supp. 3d at 1385. In the Preliminary Determination, Commerce preliminarily chose to value labor using ILO Chapter 6A data. *Issues & Decision Mem. for the Final Determination in the Antidumping Duty Investigation of Drawn Stainless Steel Sinks from the People's Republic of China*, A-570–983, at 11 (Feb. 19, 2013) (Admin.R.Doc. No. 417), *available at* http://enforcement.trade.gov/frn/summary/PRC/2013–04379–1.pdf (last visited Apr. 19, 2016). Following the Preliminary Determination, Dongyuan placed on the record labor costs from the NSO data. *Id.* In the Final Determination, Commerce determined that the NSO data were the best available information on the record to value labor because they were more product-specific, were more contemporaneous, and represented a broader market average than the alternative ILO Chapter 6A data. *Id.* at 12–14.

Although derived from data on the value of non-production labor as well as production labor, the NSO data, unlike ILO data, are specific to fabrication of metal products. *See Elkay I*, 38 CIT at __, 34 F. Supp. 3d at 1381 (citing *Dongyuan's Final Surrogate Value Submission*, Ex. SV-2 (containing the NSO's description of its methodology and definitions)). In the Remand Redetermination, Commerce explained that the ILO Chapter 5B data undercount manufacturing labor expenses because they reflect "only direct compensation and bonuses" and not "indirect labor costs items (such as employee pension benefits and worker training)." *Remand Redeterm.* 22.

Moreover, the ILO Chapter 5B data are not on the record of the investigation, no party having submitted them for the Department's consideration. Dongyuan submitted the NSO 2007 data as a possible substitute for the ILO Chapter 6A data, which Commerce used for the Preliminary Results and which are less favorable to Dongyuan's position than are the NSO data. Not having submitted the ILO Chapter 5B data for the record during the investigation, Dongyuan is in a difficult position in advocating the use of these data on remand.

Ordinarily, the decision of whether or not to reopen a record following an order remanding an agency decision is a matter within the agency's discretion. *See Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1278 (Fed. Cir. 2012). Following the court's remand order, the Department determined that it accurately could calculate respondents' labor costs using the NSO labor rate and that it was unnecessary to consider using ILO Chapter 5B data, which are not on the record, to value labor. *Remand Redeterm.* 24. Commerce has the discretion to reopen or not reopen the record in the circumstances

presented here. *Essar Steel*, 678 F.3d at 1278 ("The decision to reopen the record is best left to the agency, in this case Commerce."). Because the selection of the NSO data as the best available information on the current record is supported by substantial evidence, and because the data source advocated by Dongyuan is not on that record, the court declines to disturb the exercise of the Department's discretion not to reopen the record for admission of another source of data for valuing manufacturing labor, such as the ILO Chapter 5B data.

III. CONCLUSION

For the reasons discussed in the foregoing, the court affirms the decision on remand entitled *Final Results of Redetermination Pursuant to Court Remand* (Apr. 22, 2015), ECF No. 64. The court will enter judgment accordingly.

Dated: July 14, 2016
New York, New York

/*s*/ *Timothy C. Stanceu*
TIMOTHY C. STANCEU
CHIEF JUDGE

Slip Op. 16–70

GRK CANADA, LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Claire R. Kelly, Judge
Court No. 09–00390

[Granting Plaintiff's motion for summary judgment and denying Defendant's motion for summary judgment.]

Dated: July 15, 2016

Craig E. Ziegler, Montgomery, McCracken, Walker & Rhoads, LLP, of Philadelphia, PA, for plaintiff.

Jason Matthew Kenner, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Amy M. Rubin*, Assistant Director, International Trade Field Office. Of Counsel on the brief was *Beth Brotman*, Office of the Assistant Chief Counsel International Trade Litigation, U.S. Customs and Border Protection, of New York, NY.

OPINION

Kelly, Judge:

Before the court are cross-motions for summary judgment regarding the proper classification of imports of certain steel screw fasten-

ers. *See* Def.'s Mot. Summ. J., Feb. 29, 2016, ECF No. 65; Mot. Summ. J. Pl. GRK Canada, Ltd., Feb. 29, 2016, ECF No. 68. Defendant maintains United States Customs and Border Protection ("Customs") properly classified GRK Canada, Ltd.'s ("GRK") entries of steel screw fasteners under Harmonized Tariff Schedule of the United States (2007) ("HTSUS") subheading 7318.12.00, which covers "Other wood screws." *See* Def.'s Mem. Supp. Mot. Summ. J., Feb. 29, 2016, ECF No. 65 ("Def. Br."). Plaintiff argues that Customs improperly denied GRK's protest of Customs' classification of GRK's imported steel screw fasteners and that the merchandise is properly classified under HTSUS subheading 7318.14.10, which covers "Self-tapping screws." *See* Br. Supp. Mot. Summ. J. Pl. GRK Canada, Ltd., Feb. 29, 2016, ECF No. 70 ("GRK Br.").

This matter returns to the court following a decision by the United States Court of Appeals for the Federal Circuit, which vacated and remanded the court's earlier decision granting summary judgment in favor of Plaintiff. *See GRK Canada, Ltd v. United States*, 37 CIT __, 884 F. Supp. 2d 1340 (2013) ("*GRK I*"), *vacated and remanded*, 761 F.3d 1354 (Fed. Cir. 2014) ("*GRK II*"). The court presumes familiarity with the prior decisions and will only recount the prior proceedings as necessary.

After reviewing the undisputed facts, the court in *GRK I* undertook an examination of the language of the tariff terms, aided by the Harmonized Commodity Description and Coding System's Explanatory Notes ("Explanatory Notes"), lexicographic sources, industry standards for mechanical fasteners, and expert testimony. *GRK I* at __, 884 F. Supp. 2d at 1346–52. The court identified the competing subheadings as eo nomine provisions and held that the screws imported by GRK were properly classified as self-tapping screws rather than as other wood screws, rejecting any consideration of "use" as informing the meaning of either tariff term. *Id.* at __, 884 F. Supp. 2d at 1345, 1352–56. The Court of Appeals vacated and remanded the court's decision in *GRK I*, holding that it was error for the court to "refuse[] to consider the use of the screws at any step of determining the classification of the subject articles at issue." *GRK II*, 761 F.3d at 1355. The Court of Appeals subsequently denied a petition for rehearing en banc. *See GRK Canada, Ltd. v. United States*, 773 F.3d 1282 (Fed. Cir. 2014) ("*GRK III*").

Upon remand, the Court of International Trade ordered pretrial discovery in the matter reopened "limited to the issues of 'intended use,' or 'principal use,' or 'actual use' of the imported screws at issue." Scheduling Order, Mar. 31, 2015, ECF No. 59. The parties completed

discovery on November 13, 2015, *see* Order, Aug. 4, 2015, ECF No. 62, and on February 29, 2016 the parties cross-moved for summary judgment. Together with their motions for summary judgment, the parties submitted separate statements of undisputed material facts. *See* Pl. GRK Canada, Ltd.'s Statement of Undisputed Facts, Feb. 29, 2016, ECF No. 69 ("GRK Facts"); Def.'s Statement of Material Facts Which There Are No Genuine Issues to be Tried, Feb. 29, 2016, ECF No. 67 ("Def. Facts"). Thereafter, the parties submitted responses to the statements of undisputed facts, *see* Resp. Pl. GRK Canada, Ltd. Def.'s Statement of Undisputed Facts, Apr. 4, 2016, ECF No. 75 ("GRK Facts Resp."); Def.'s Resps. Pl. GRK Canada, Ltd., Rule 56.3 Statement of Material Facts, May 6, 2016, ECF No. 79 ("Def. Facts Resp."). Briefing in the action concluded on May 20, 2016 after the parties submitted responses and replies to the motions for summary judgment. *See* Br. Pl. GRK Canada, Ltd. Opp'n Government's Mot. Summ. J., Apr. 4, 2016, ECF No. 74 ("GRK Resp."); Def.'s Mem. Opp'n Pl.'s Mot. Summ. J. and Reply Pl.'s Resp. Def.'s Mot. Summ. J., May 6, 2016, ECF No. 78 ("Def. Resp. & Reply"); Reply Br. Pl. GRK Canada, Ltd. Further Supp. Mot. Summ. J., May 20, 2016, ECF No. 80. For the reasons set forth below, the court grants Plaintiff's motion for summary judgment and denies Defendant's motion for summary judgment.

UNDISPUTED FACTS

The following facts are not in dispute. GRK imported the steel screw fasteners at issue into the United States between January 2008 and August 2008. GRK Facts ¶¶ 5, 6; Def. Facts Resp. ¶¶ 5, 6. Customs classified GRK's imported screws under HTSUS subheading 7318.12.00 as "Other wood screws" dutiable at 12.5% ad valorem, and the entries were liquidated by Customs between November 2008 and January 2009. GRK Facts ¶¶ 7, 14; Def. Facts Resp. ¶¶ 7, 14. GRK paid all liquidated duties assessed on the merchandise and filed timely protests, all four of which were denied by Customs. GRK Facts ¶¶ 7–10; Def. Facts Resp. ¶¶ 7–10.

The screw fasteners that are the subject of GRK's protests consist of two models: (1) R4 screws and (2) Trim Head screws. GRK Facts ¶ 12; Def. Facts Resp. ¶ 12. GRK's Trim Head Screws are available in two varieties – RT Composite Trim Head ("RT") screws and Fin/Trim Head ("Fin/Trim") screws. GRK Facts ¶ 13; Def. Facts Resp. ¶ 13. Each of these screws has a head, is made of steel, and is manufactured in varying lengths and diameters. GRK Facts ¶ 12; Def. Facts Resp. ¶ 12. All of GRK's screws are available in heat-treated case-hardened carbon steel, and all of these carbon steel screws are also

available with a "Climatek" coating. Def. Facts ¶¶ 11, 18; GRK Facts Resp. ¶¶ 11, 18; GRK Facts ¶¶ 16–17; Def. Facts Resp. ¶¶ 16–17. The Climatek coating includes a water-based lubricant intended to reduce the torque required to drive the screw, allowing GRK's case-hardened carbon steel screws to be used in very dense materials. Def. Facts ¶ 27; GRK Facts Resp. ¶ 27; GRK Facts ¶ 62; Def. Facts Resp. ¶ 62. The color of the Climatek coating matches almost all wood finishes. Def. Facts ¶ 28; GRK Facts Resp. ¶ 28. Certain sizes of GRK's screws are also available in stainless steel. Def. Facts ¶¶ 12, 19, 29; GRK Facts Resp. ¶¶ 12, 19, 29; GRK Facts ¶ 16; Def. Facts Resp. ¶ 16. "Stainless steel is a harder material than non-case-hardened carbon steel." GRK Facts ¶ 19; Def. Facts Resp. ¶ 19.

The screws at issue are manufactured to meet minimum torsional strength requirements,[1] which require a harder screw than screws that do not meet such torsional requirements. GRK Facts ¶¶ 22, 24; Def. Facts Resp. ¶¶ 22, 24. The screws can be used to penetrate materials such as "sheet metal, plastics, medium-density fiberboard, polyvinyl chloride (PVC) board, cement fiberboard, melamine, arborite, and other man-made composite materials." GRK Facts ¶ 30; Def. Facts Resp. ¶ 30. GRK's screws are used to mate dissimilar materials, such as plastics or dense composite materials to wood. GRK Facts ¶ 31; Def. Facts Resp. ¶ 31. GRK's screws, at least in some applications, are able to pierce the material without the need to pre-drill a bore hole. GRK Facts ¶ 30; Def. Facts Resp. ¶ 30.

The screws at issue all have gimlet points with a point angle of between 25 and 35 degrees.[2] GRK Facts ¶ 25; Def. Facts Resp. ¶ 25. Some of GRK's screws have a Type 17 point that GRK calls a "Zip-tip." GRK Facts ¶ 27; Def. Facts ¶¶ 6, 14; GRK Facts Resp. ¶¶ 6, 14. All RT and Fin/Trim screws have a Type 17 point and R4 screws that are 1¼ inches and longer have a Type 17 point. Def. Facts ¶¶ 6, 14; GRK Facts Resp. ¶¶ 6, 14. GRK's Type 17 point can be described as

> a gimlet point with a slot or groove with sharp edges cut into the point. This cut-out groove or slot adds an additional cutting edge to the point, which cuts and removes material that the screw is

[1] Pursuant to industry standards, the minimum strength requirement for a tapping screw is 4 pound-inches ("lb-in.") for a 2 inch screw, 9 lb-in. for a 3 inch screw, 12 lb-in. for a 4 inch screw, etc. *See* Thread Forming and Thread Cutting Tapping Screws and Metallic Drive Screws (Inch Series) ASME B18.6.4–1998 at Table 4. Neither party specifies the minimum strength requirement for GRK's screws or quantifies the torsional strength of GRK's screws.

[2] Pursuant to industry standards for mechanical fasteners, a gimlet point is "a threaded cone point usually having a point angle of 45 to 50 [degrees]." *See* Exs. Supp. Mot. Summ. J. Pl. GRK Canada, Ltd. Ex. 8 at 5, Feb. 29, 2016, ECF No. 71–7.

> penetrating. The presence of this cutting groove allows the screw to get started more easily and reduces the torque needed to drive the screw.

GRK Facts ¶ 28; Def. Facts Resp. ¶ 28.

The Type 17 point gives screws the ability to start quickly in certain materials. Def. Facts ¶ 20; GRK Facts Resp. ¶ 20. The American National Standards Institute and the American Society of Mechanical Engineers (collectively "ANSI/ASME") jointly publish industry standards for screw fasteners ("ANSI/ASME Standard"), and the Type 17 point is not listed as a point that is specified for tapping screws.[3] GRK Facts ¶¶ 38, 42; Def. Facts Resp. ¶¶ 38, 42.

R4 and Trim Head screws that are 1¼ inches and longer also have a patented thread design that is referred to as "W-Cut" threading. Def. Facts ¶¶ 8, 15; GRK Facts Resp. ¶¶ 8, 15. The W-Cut threading acts as a sawblade and easily cuts through a variety of materials. Def. Facts ¶ 21; GRK Facts Resp. ¶ 21.

All R4 screws have a "self-countersinking" head with saw-blade-like-cutting teeth and six self-contained cutting pockets, which allow the screw to be installed flush with the surface without a separate countersinking operation.[4] Def. Facts ¶¶ 10, 23; GRK Facts Resp. ¶¶ 10, 23. This self-countersinking head is designed to penetrate hard, brittle, or thin plasticized surfaces veneered onto lumber or composite woods without causing the surface of the material to crack, tear, or "mushroom," *i.e.*, when material displaced by a screw rises to the surface and creates a bubble. Def. Facts ¶ 24; GRK Facts Resp. ¶ 24; GRK Facts ¶ 63; Def. Facts Resp. ¶ 63. In addition to the W-Cut threading discussed above, R4 screws that are 2 inches and longer have a secondary "CEE" threading. Def. Facts ¶ 9; GRK Facts Resp. ¶ 9. The CEE threading enlarges a screw hole to allow the affixed materials to settle against each other easily around the non-threaded portion of the screw. Def. Facts ¶ 22; GRK Facts Resp. ¶ 22. "The R4 is recommended for use in wood, particle board, plastic, sheet metal, cement fiberboard and wood decking, pressure treated lumber decking, cedar and redwood decking." Def. Facts ¶ 31; GRK Facts Resp. ¶

[3] The standards published by ANSI/ASME do not cover the entire universe of screws. *See* Exs. Supp. Mot. Summ. J. Pl. GRK Canada, Ltd. Ex. 5 at 31–32, Feb. 29, 2016, ECF No. 71–5. These standards are reactive documents in that the standards respond to specific inquiries from members in the industry. *Id.*

[4] Plaintiff's expert, Dr. David R. Bohnhoff, describes countersinking as an operation "used to flare out the top of the hole" so that the screw head can "become flush with the surface after installation." *See* Exs. Supp. Mot. Summ. J. Pl. GRK Canada, Ltd. Ex. 8 at 9–10, Feb. 29, 2016, ECF No. 71–76.

31. The R4 can be used in woodworking and other applications and is designed to affix thin metal to wood. Def. Facts ¶¶ 30, 32; GRK Facts Resp. ¶¶ 30, 32.

RT and Fin/Trim screws are designed to have the "smallest screw head available." Def. Facts ¶ 17; GRK Facts Resp. ¶ 17. The small head of these screws is designed to prevent the screws from cracking the material that the screw is driven into. Def. Facts. ¶ 26; GRK Facts Resp. ¶ 26. The RT screw has "reverse threading" as its secondary threading. Def. Facts ¶ 16; GRK Facts Resp. ¶ 16. The reverse threading allows the head of the RT screw to be less noticeable when used in certain materials and is designed to avoid the problem of mushrooming by pulling any excess material cut away by the screw back into the screw hole. Def. Facts ¶ 25; GRK Facts Resp. ¶ 25; GRK Facts ¶ 63; Def. Facts Resp. ¶ 63. Fin/Trim screws do not have secondary threading. Both the RT and Fin/Trim screws are used for most fine carpentry applications and trim applications. Def. Facts ¶ 34; GRK Facts Resp. ¶ 34. The RT and Fin/Trim screws also can be used to anchor composite decking to wood beams. Def. Facts ¶ 35; GRK Facts Resp. ¶ 35.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2006)[5] and 19 U.S.C. § 1515 (2006), which grant the court authority to review actions contesting the denial of a protest regarding the classification of imported merchandise, and the court reviews such actions de novo. 28 U.S.C. § 2640(a)(1). Determining the correct classification of merchandise involves two steps. First, the court determines the proper meaning of the tariff provisions, a question of law. *See Link Snacks, Inc. v. United States*, 742 F.3d 962, 965 (Fed. Cir. 2014). Second, the court determines whether the subject merchandise properly falls within the scope of the tariff provisions, a question of fact. *Id.* The court will grant summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a).

In order to raise a genuine issue of material fact, it is insufficient for a party to rest upon mere allegations or denials, but rather that party must point to sufficient supporting evidence for the claimed factual dispute to require resolution of the differing versions of the truth at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986); *Processed Plastics Co. v. United States*, 473 F.3d 1164, 1170 (Fed. Cir.

[5] Further citations to Title 28 of the U.S. Code are to the 2006 edition.

2006); *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 835–36 (Fed. Cir. 1984). Where no genuine "dispute as to the nature of the merchandise [exists], then the two-step classification analysis collapses entirely into a question of law." *Link Snacks*, 742 F.3d at 965–66 (citation omitted). The court must determine "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

DISCUSSION

I. The Purpose of "Use" in Defining the Meaning of a Tariff Term

The Court of Appeals vacated and remanded the court's decision in *GRK I* for the court to consider use and determine how use affects the meaning of the tariff terms and the classification of the merchandise at issue in this case.[6] *GRK II*, 761 F.3d at 1355. The Court of Appeals did not instruct the court as to how use affects the meaning of a tariff term, but its opinion raises two possibilities. The Court of Appeals suggests either the provision may be controlled by use, or the physical characteristics of the putative tariff terms may overlap to the extent that it would be error not to consider the intended use implicated by each term in deciding between the possible classifications. *GRK II*, 761 F.3d at 1359.

First, a tariff term written as an eo nomine provision may be controlled by use and, if so, the court should declare as such.[7] *Id.* at 1358–59. The Court of Appeals stated that there may be cases when the goods named and described under an eo nomine provision "'in-

[6] The Court of Appeals has left it to this court to determine how use should be considered in determining the meaning and scope of the tariff subheadings. *See GRK III*, 773 F.3d at 1286 (Wallach, J., dissenting) (noting that *GRK II* "offers no answer, as a matter of law, on [the] proper construction [of the competing subheadings], other than the use of the subject merchandise involved in this case should have a bearing on the legal construction of the subheadings."). There are two distinct inquiries that implicate use: (i) use as it may inform the meaning of the tariff term, and (ii) use to which the merchandise at issue is put. The former is a question of law and the latter is a question of fact. The Court of Appeals specifically references both of these inquiries admonishing the court not to ignore use in analyzing either inquiry, "whether defining the legal meaning of the tariff terms at issue or determining the proper classification of the subject articles." *GRK II*, 761 F.3d at 1361.

[7] Provisions controlled by use can be either actual use or principal use provisions. Actual use provisions, which are rare in the HTSUS, are those in which classification is dependent upon the merchandise's actual use. Additional Rule of Interpretation ("ARI") 1(b) provides that the "tariff classification is controlled by the actual use to which the imported goods are put in the United States." ARI 1(b). Inclusion of the words "to be used for" in the additional notes to the HTSUS indicates that the classification is an actual use provision. *See Clarendon Mktg., Inc. v. United States*, 144 F.3d 1464, 1467 (Fed. Cir. 1998).

herently suggest[s] a type of use.'" *Id.* at 1359 (quoting *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375 (Fed. Cir. 1999)). The Court further clarified that in such a circumstance the "[c]lassification of subject articles may then need to reach the Additional Rules of Interpretation ("ARI"), which distinguish the treatment of articles based on whether tariff classifications are controlled by principal or actual use."[8] *GRK II*, 761 F.3d at 1359 n.2 (citing *Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1363 (Fed. Cir. 1999); *StoreWALL, LLC v. United States*, 644 F.3d 1358, 1365–67 (Fed. Cir. 2011) (Dyk, J., concurring) (discussing *Processed Plastics*, 473 F.3d at 1169–70 (Fed. Cir. 2006); *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1441 (Fed. Cir. 1998); *Minnetonka Brands, Inc. v. United States*, 24 CIT 645, 651, 110 F. Supp. 2d 1020, 1026 (2000)).[9]

"'Principal use' is defined as the use 'which exceeds any other single use of the article.'" *Minnetonka Brands*, 24 CIT at 650, 110 F. Supp. 2d at 1027 (quoting Conversion of the Tariff Schedules of the United States Annotated Into the Nomenclature Structure of the Harmonized System: Submitting Report, USITC Pub. 1400 at 34–35 (June 1983)). Principal use provisions classify merchandise according to the ordinary use of a particular class of merchandise in the United States. *See Primal Lite v. United States*, 182 F.3d 1362, 1364 (Fed. Cir. 1999) (citing ARI 1(a)). ARI 1 provides that the controlling use is the principal use, and "a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong." ARI 1(a). Courts have interpreted the "class or kind" language of ARI 1 to be those goods that are "commercially fungible with the imported goods." *See Primal Lite*, 182 F.3d at 1364.

[8] In relevant part, ARI 1 provides that

> in the absence of special language or context which otherwise requires--
>
> (a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use;
>
> (b) a tariff classification controlled by the actual use to which the imported goods are put in the United States is satisfied only if such use is intended at the time of importation, the goods are so used and proof thereof is furnished within 3 years after the date the goods are entered.

ARI 1.

[9] By stating that the ARIs "may" be reached, the Court has left open the possibility that the provisions should be considered provisions controlled by use, or alternatively that use may be implicated in deciding between the possible classifications. As the dissents in *GRK II* and *GRK III* note, the ARIs belong to a distinct interpretive framework. *See GRK II*, 761 F.3d at 1362 (Reyna, J., dissenting); *GRK III*, 773 F.3d at 1284–85, 1287 (Wallach, J., dissenting). The dissent in *GRK II* noted that

> it is improper to import a use limitation into an eo nomine provision unless the name of the good inherently suggests a type of use. A use provision, on the other hand, describes an article by its principal or actual use in the United States at the time of importation. Use provisions are governed by the U.S. Additional Rules of Interpretation ("ARI").

GRK II, 761 F.3d at 1362 (Reyna, J., dissenting) (internal citations omitted).

In the typical provision that is controlled by use, the word "use" or "used" appears in the language of the subheading.[10] In those provisions, the heading describes articles by the manner in which they are used as opposed to by name. *See Clarendon Mktg., Inc. v. United States*, 144 F.3d 1464, 1467 (Fed. Cir. 1998). The Court of Appeals' citation to *StoreWALL* indicates that where a tariff term does not include the word "use" it may nonetheless be controlled by use when the term itself (including the Section and Chapter Notes) or the Explanatory Notes indicates that, as a matter of law, the provision is controlled by use. *See GRK II*, 761 F.3d at 1359 n.7 (citing *StoreWALL*, 644 F.3d at 1365–67 (Dyk, J., concurring)).

In *StoreWALL*, the importer argued that its wall panels and hang up organizers should be classified as "parts" of unit furniture under HTSUS subheading 9403.90.50. *StoreWALL*, 644 F.3d at 1360. The Court of Appeals agreed with the importer, reversing the U.S. Court of International Trade's decision, and the concurring judge wrote separately to explain that HTSUS heading 9403 which covers "Other furniture and parts thereof" is a provision controlled by use with respect to unit furniture. The concurrence considered the Chapter Notes, as required by General Rule of Interpretation ("GRI") 1,[11] which provide that

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[10] *See, e.g.*, *Dependable Packaging Solutions, Inc. v. United States*, 757 F.3d 1374, 1378 (Fed. Cir. 2014) (HTSUS headings 7010 covering "Carboys, bottles, flasks, jars, pots, vials, ampules and other containers, of glass, of a kind used for the conveyance or packing of goods . . ." and 7013 covering "Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes . . ." are principal use provisions); *USR Optonix, Inc. v. United States*, 29 CIT 229, 246, 362 F. Supp. 2d 1365, 1381 (2005) (HTSUS heading 3204 covering "Synthetic organic coloring matter . . . synthetic organic products of a kind used as fluorescent brightening agents or as luminophores . . ." is a tariff provision controlled by principal use).

[11] Customs classification is governed by the GRIs, which are a part of the HTSUS statute. *BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1376 (Fed. Cir. 2011). Several of the GRIs are implicated by the cases discussed here, including:

> Classification of goods in the tariff schedule shall be governed by the following principles:
>
> 1. . . . classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions:
>
> . . .
>
> 3. When, by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:
>
> (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

> [t]he articles (other than parts) referred to in headings 9401 to 9403 are to be classified in those headings only if they are *designed for placing* on the floor or ground. The following are, however, to be classified in the above-mentioned headings even if they are *designed to be hung*, to be fixed to the wall or to stand one on the other: (a) Cupboards, bookcases, other shelved furniture and unit furniture....

See StoreWALL, 644 F.3d at 1365 (quoting Chapter 94 Notes, Note 2, HTSUS (2004)) (Dyk, J., concurring). The concurrence found the Chapter Notes describe unit furniture by the manner in which it is used. *Id.* The concurrence proceeded to consider the principal use of the merchandise at issue. *See id.* at 1366–67 (Dyk, J., concurring). The concurrence found the Explanatory Notes also implicated the design of the product by stating that "unit furniture" must be "'*designed to be hung*, to be *fixed* to the wall or to *stand* one on the other or side by side, *for holding* various objects or articles. . . .'" *Id.* at 1365 (quoting Explanatory Notes to Chapter 94 (2002)) (Dyk, J. concurring). The concurrence noted both the Chapter Notes and the Explanatory Notes not only referenced use, but made use the dispositive factor. *Id.* at 1364–65 (Dyk, J., concurring). The articulated use controlled what could or could not be classified within the tariff term because classification under the subheading "turns on the manner of use–whether the items are primarily used with shelves or with hooks."[12] *Id.* at 1366 (Dyk, J., concurring).

> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.
>
> . . .
>
> 6. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, mutatis mutandis, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires.

GRI 1, 3(a), 6.

[12] The concurrence in *StoreWALL* also cites to *Orlando Food*, 140 F.3d at 1441, for the proposition that use may be implicated in construing a tariff term where a specific use is inherent in the definition of an object. Although it considers use in defining a tariff term, *Orlando Food* is not directly applicable here for several reasons. The case was decided under GRI 3(a), not GRI 1. The Court of Appeals in *Orlando Food* concluded the merchandise was prima facie classifiable in both competing headings at issue. In determining which was more specific, the Court of Appeals found that HTSUS heading 2103, "Sauces and

In the *StoreWALL* concurrence, which is referenced in *GRK II*, the Court of Appeals relies upon *Processed Plastics* for the notion that use may also be inherent in the meaning of a tariff term, making use the controlling factor in classifying the merchandise.[13] *Id.* at 1365 (Dyk, J., concurring) (citing *Processed Plastics*, 473 F.3d at 1169–70). In *Processed Plastics*, the importer challenged Customs' classification of children's backpacks (decorated with children's characters) and beach bags (filled with sand toys), claiming that they should be classified as other toys rather than as traveling bags, knapsacks and backpacks. *Processed Plastics*, 473 F.3d at 1170. The Court of Appeals agreed with Customs' classification of the merchandise and adopted the standard established in *Minnetonka Brands*, which held that "an object is a toy only if it is designed and used for amusement, diversion or play, rather than practicality." *See id.* (citing *Minnetonka Brands*, 24 CIT at 651, 110 F. Supp. 2d at 1026).

Alternatively, the Court of Appeals noted the tariff term may suggest an intended use of a product, which may be considered in addition to its physical characteristics, such as its size, shape, and construction.[14] *See GRK II*, 761 F.3d at 1358 (citing *United States v. Quon Quon Co.*, 46 C.C.P.A. 70, 73–74 (1959) ("under certain circumstances use may be of 'paramount importance'" in understanding the commercial meaning of a term)). In *GRK II*, the Court of Appeals relied on *Quon Quon* for the proposition that, in certain circumstances, intended use should be considered in determining whether merchandise is properly classified under an eo nomine provision.[15]

preparations therefor," is a use provision insofar as it covers preparations for sauces and therefore more specific than the competing eo nomine provision because "[i]nherent in the term 'preparation' is the notion that the object involved is destined for a specific use." *Orlando Food*, 140 F.3d at 1441.

[13] *See, e.g.*, *Hartz Mountain Corp. v. United States*, 19 CIT 1149, 1150, 903 F. Supp. 57, 59 (1995) (holding that "[w]hen 'household' is used in conjunction with the term 'articles' in subheading 3924.90.50, HTSUS, a use provision is created.").

[14] The relevant terms for the framework laid out by the Court of Appeals for this case require: (i) consideration of actual or principle use if this court determines either provision is controlled by use; or (ii) consideration of intended use (*i.e.*, how the item is designed and marketed to a typical user) if necessary to decide between two seemingly applicable eo nomine provisions. To consider principal or actual use in a case where only intended use is implicated would be inconsistent with the governing interpretive framework. Nothing in the Court of Appeals' analysis indicates principal or actual use are considerations in an eo nomine provision where intended use is implicated.

[15] The Court of Appeals also relied upon its previous decision in *CamelBak Prods., LLC v. United States*, which cited *Quon Quon* to support the proposition that the design and function of merchandise under an eo nomine provision may be an important aspect of the merchandise's identity. *GRK II*, 761 F.3d at 1358 (citing *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1368–69 (Fed. Cir. 2011)). While *CamelBak* undeniably spoke of the "principal intended use of the product," it did so not in the context of an analysis under GRI

See id. at 1358, 1361 (citing *Quon Quon*, 46 C.C.P.A. at 73–74). The Court explained that

> [t]he use of goods may be an important aspect of the distinction of certain eo nomine provisions, in particular, where, as here, the name of the provisions refers directly to the use of subject articles. This is why, even within the context of the HTSUS, we should not be "so trusting of our own notions of what things are as to be willing to ignore the purpose for which they were designed and made and the use to which they were actually put."

Id. at 1361 (quoting *Quon Quon*, 46 C.C.P.A. at 73).

In *Quon Quon*, the physical characteristics of the product implicated more than one tariff term. *See Quon Quon*, 46 C.C.P.A. at 72–73. The Court of Customs and Patent Appeals held that the tariff heading for baskets, while an eo nomine heading, connoted an article that not only had the shape and appearance of a basket, but also would be used as a basket. *Id.* The Court noted that, while the imported articles had the "size, shape, and construction of baskets," they were to be assembled with an iron base and only function as coffee table tops. *Id.* at 73–74. As a result, the Court found that it would be legal error to ignore the intended use of the product.[16] *Id.* at 72–73 ("To hold otherwise would logically require the trial court to rule out

1, but rather, under GRI 3(b) to identify the essential character of the product. *CamelBak*, 649 F.3d at 1369. Thus, the case provides guidance where function and design are important considerations for determining the essential character of a product to decide under which of two headings the merchandise is prima facie classifiable, not for determining the meaning of a tariff term under GRI 1. The Court of Appeals also invoked *Casio, Inc. v. United States*, 73 F.3d 1095 (Fed. Cir. 1996), but, similar to *CamelBak*, the issue in that case implicated use in a different manner than is presented here. In *Casio*, the Court of Appeals considered whether the plaintiff's merchandise possessed "features *substantially in excess* of those within the common meaning of the term." *Id.* at 1098. The Court of Appeals looked to the primary design and function of the additional features and concluded that they did not remove the product from the eo nomine classification at issue. *Id.*

Finally, the Court of Appeals cites to *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1311 (Fed. Cir. 2003). In *Len-Ron*, the Court of Appeals initially undertook an analysis to determine whether certain cosmetic bags are prima facie classifiable under the eo nomine provision for "vanity case," but then eschewed this analysis for one reserved for provisions that are controlled by use, stating that "for a handbag or case to be classified as a vanity case, containing, carrying, or organizing cosmetics must be its predominant use, rather than simply one possible use." *Id.; see also GRK III*, 773 F.3d at 1287 n.1 (Wallach, J., dissenting). It is unclear what principle from *Len-Ron* the Court of Appeals would have the court adhere to in its analysis of the eo nomine provisions at issue here. *Len-Ron* appeared to have determined that the term "'vanity case' was controlled by use but it did not declare the provision as such.

[16] Other cases have implicitly or explicitly considered design and intended use to analyze and define the scope of a tariff term. In two past decisions, the Court of Appeals eschewed

evidence of what things actually are every time the collector thinks an article, as he sees it, is specifically named in the tariff act.").

Despite the fact that *Quon Quon* was decided under the predecessor to the HTSUS, the Tariff Schedules of the United States ("TSUS"), the Court of Appeals relied upon *Quon Quon* in *GRK II* for the proposition that the court would err by ignoring intended use in the unique case where the physical characteristics of certain merchandise may suggest multiple eo nomine classifications (*i.e.*, baskets and parts of furniture).[17] *GRK II*, 761 F.3d at 1358 (providing that "[i]n such a case, the court's inquiry includes the subject article's physical characteristics, as well as what features the article has for typical users, how it was designed and for what objectives, and how it is marketed.").

II. The Meaning of "Other Wood Screws" and "Self-Tapping Screws"

The court defines the common and commercial meaning of "Other wood screws" and "Self-tapping screws" based upon the language of the headings, the Section and Chapter Notes, the Explanatory Notes, and the available lexicographic sources. Neither tariff term at issue here is controlled by use such that the court must consider either actual use or principal use under ARI 1. While the subheadings for both wood screws and the self-tapping screws and the applicable Explanatory Notes implicate use to some degree, in neither case is use the controlling factor. However, here the physical characteristics

a reading of the tariff term which would impose a utilitarian limitation on the festive articles provision and instead considered how various articles with holiday motifs were designed, marketed, and used. *See Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 929 (Fed. Cir. 2003); *Midwest of Canon Falls, Inc. v. United States*, 122 F.3d 1423, 1429 (Fed. Cir. 1997).

[17] The dissents in both *GRK II* and *GRK III* criticized the majority's reliance on *Quon Quon*. *See GRK II*, 761 F.3d at 1363 ("The majority thus fails to base its analysis in the current interpretative framework–the GRIs; it also provides an inaccurate and incomplete analysis of the now-defunct TSUS framework") (Reyna, J., dissenting); *GRK III*, 773 F.3d at 1286 (Wallach, J., dissenting) ("Thus, beyond its inapplicability to this case, *Quon Quon* stands only for the narrow proposition that, as a limited exception, use can sometimes be considered in the eo nomine analysis.").

Quon Quon suggests that where a product's physical characteristics arguably fall under two separate eo nomine provisions that it would be error to not consider intended use in defining the meaning of a tariff term. *See Quon Quon*, 46 C.C.P.A. at 72–73. Understandably, in most cases, the physical characteristics embodied in a tariff term will not overlap with the physical characteristics of another tariff term such that intended use of the tariff term will come into play. One can *see* how, as a conceptual matter, use is implicit in many eo nomine tariff terms. To say something is a centerpiece, a walking stick, a tie, or a handbag suggests both certain physical characteristics and an assumption that the product will have been designed and marketed for that purpose. In the ordinary case though, the physical characteristics embodied by the tariff terms for such merchandise will not overlap with another eo nomine provision.

of the putative tariff terms coincide to such an extent that the court must consider the intended use or design implicated by the tariff terms in addition to the physical characteristics that are part of the common and commercial meaning of the terms to distinguish between them. *GRK II*, 761 F.3d at 1360–61. The relevant sources indicate that a "wood screw" is a screw intended to be used and able to produce its own thread in wood, while "a self-tapping screw" is a screw made of hardened steel, intended to be used and able to cut its own thread through non-fibrous material.[18]

The language of the tariff terms at issue here does not indicate that either term is controlled by use. *See, e.g.*, *StoreWALL*, 644 F.3d at 1365. The subheadings offered by each party are both in the same Section, Chapter and heading. The relevant portion of the HTSUS reads:

7318	Screws, bolts, nuts, coach screws, screw hooks, rivets, cotters, cotter pins, washers (including spring washers) and similar articles, of iron or steel:	
	--Threaded articles:	
	. . .	
7318.12.00	Other wood screws	12.5%
. . .		
7318.14	Self-tapping screws:	
7318.14.10	Having shanks or threads with a diameter of less than 6 mm	6.2%

HTSUS heading 7318.

The phrase "Other wood screws" in HTSUS subheading 7318.12.00 suggests that screws classifiable in this subheading will be used in wood. However, nothing in the Section Notes, the Chapter Notes, or the heading indicates that classification within that subheading requires a certain principle or actual use. The phrase "Self-tapping screws" in HTSUS subheading 7318.14.10 also suggests screws classifiable in this heading will be used for tapping,[19] but nothing in the term suggests that a tapping use controls whether the merchandise is

[18] Fibrous building materials, such as wood, are made up of cells that are long and thin. Exs. Supp. Mot. Summ. J. Pl. GRK Canada, Ltd. Ex. 19 at 2, Feb. 29, 2016, ECF No. 71–11. Non-fibrous building materials include metal, melamine, plastics, medium-density fiberboard, cement fiberboard, particle board (also known as oriented strand board, an engineered product consisting of wood chips glued together with a bonding agent), modern composite wood decking made of recycled plastics with wood chips mixed in, capstock decking, steel studs and other man-made composite materials. Exs. Supp. Mot. Summ. J. Pl. GRK Canada, Ltd. Ex. 2 at 75–81, Feb. 29, 2016, ECF No. 71–4; Exs. Supp. Mot. Summ. J. Pl. GRK Canada, Ltd. Ex. 6 ¶ 13(a), Feb. 29, 2016, ECF No. 71–5; Exs. Supp. Mot. Summ. J. Pl. GRK Canada, Ltd. Ex. 11 at 23–31, Ex. 12 at 20–29, Feb. 29, 2016, ECF No. 71–8.

[19] Female (internal) threads may be formed by cutting and/or by compressing material. Exs. Supp. Mot. Summ. J. Ex. 19 at 1, Feb. 29, 2016, ECF No. 71–11 ("Bohnhoff Suppl. Rep.").

covered by the provision.[20] Moreover, there is nothing inherent in the terms "wood screws" or "self-tapping screws" that suggests classification is controlled by use such that the court should declare either term a provision that is controlled by use, as a matter of law. *See GRK III*, 773 F.3d at 1287 (Wallach, J., dissenting); *see also Processed Plastics*, 473 F.3d at 1169–70. The concurring opinion in *StoreWALL*, which the Court of Appeals relied upon in *GRK II*, and the cases the concurring opinion in *StoreWALL* cites make clear that it is not enough for use to be implicated for a provision to be controlled by use, rather classification must "turn[] on the manner of use." *StoreWALL*, 644 F.3d at 1366 (Dyk, J., concurring).

The Explanatory Notes for these provisions also do not indicate a particular use that controls these provisions.[21] They state:

> Screws for wood differ from bolts and screws for metal in that they are tapered and pointed, and they have a steeper cutting thread since they have to bite their own way into the material. Further, wood screws almost always have slotted or recessed heads and they are never used with nuts.
>
> Coach screws (screw spikes) are large wood screws with square or hexagonal unslotted heads. They are used to fix railway lines to the sleepers and to assemble rafters and similar heavy woodwork.
>
> The heading includes self-tapping (Parker) screws; these resemble wood screws in that they have a slotted head and a cutting thread and are pointed or tapered at the end. They can therefore cut their own passage into thin sheets of metal, marble, slate, plastics, etc.

While the ANSI/ASME Standard reference both thread forming and thread cutting operations as tapping, it appears that the industry identifies tapping as thread cutting. Thus, the cutting of female threads is referred to as "tapping." *Id.* Although a special tool may be used to cut internal threads, screws that cut their own threads are called "thread-cutting screws," "tapping screws," or "self-tapping screws." *Id.* When screws are installed, those that push outward to a high degree on surrounding material (*i.e.* compress) are referred to as "thread-forming screws." *Id.* Thread forming screws are distinguished from thread cutting screws by "[t]he extent to which a screw is designed to form threads by compressing surrounding material versus forming threads by cutting surrounding material." Exs. Supp. Mot. Summ. J. Ex. 7 at 9, Feb. 29, 2016, ECF No. 71–11. Compression and cutting are not necessarily mutually exclusive, however, because thread forming screws cut material to a certain extent, and thread cutting screws involve some compression of material. Bohnhoff Suppl. Rep. 1.

[20] Neither the Section nor the Chapter Notes indicate that the respective subheadings are controlled by use.

[21] The Explanatory Notes, while not controlling, provide interpretive guidance. *E.T. Horn Co. v. United States*, 367 F.3d 1326, 1329 (Fed. Cir. 2004) (citing *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003)).

Explanatory Notes for HTSUS heading 7318. The phrases "screws for wood" and "sel-ftapping (Parker) screws" in the Explanatory Notes each suggest a use for the screws, but the Explanatory Notes also offer physical characteristics for each type of screw and no language suggests that the subheadings are controlled by use.

Although neither provision is controlled by use, use may still be implicated in the court's interpretive analysis because, in limited circumstances, the intended use of the product may be implicated by the tariff terms. *See GRK II*, 761 F.3d at 1360–61. The court defines those terms relying upon its own understanding of the terms and may "consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Carl Zeiss*, 195 F.3d at 1379.

The tariff terms themselves indicate that self-tapping screws are not a form of wood screws. The Explanatory Notes describe self-tapping screws as resembling wood screws. *See* Explanatory Notes for HTSUS heading 7318. The Explanatory Notes shed light on the difference between the two by clarifying that wood screws "bite their own way into the material" while self-tapping screws "cut their own passage into thin sheets of metal, marble, slate, plastics, etc." *See* Explanatory Notes for HTSUS heading 7318. Nothing about these descriptions suggests they are both forms of wood screws. Thus, these two subheadings are distinct and mutually exclusive.[22]

The parties have offered a number of dictionary definitions for the court to consider in defining the two competing provisions. For wood screws, Defendant cites to definitions which emphasize a screw with

[22] Heading 7318 contains a subheading for "Coach screws," which the Explanatory Notes describe as a type of wood screw. *See* Explanatory Notes for HTSUS heading 7318. The Explanatory Notes do not describe self-tapping or Parker screws as a type of wood screw. The Explanatory Notes reinforce this point as they indicate that a self-tapping screw is similar to a wood screw while it describes the coach screw as a type of wood screw. Explanatory Notes for HTSUS heading 7318. Plaintiff's expert suggests that the categories have always been mutually exclusive and offers some insight into why the seemingly broad phrase "wood screw" was used:

> If indeed (1) those drafting the original version of the HTSUS saw categories of "other wood screws" and "self-tapping screws" as mutually exclusive, and (2) some self-tapping fastener can be used in wood, then the only conclusion that can be reached is that the category "other wood screws" was not a category developed for screws used in wood, but rather a category developed for a very specific type of non-self-tapping screw commonly referred to in the industry as a "wood screw". That these particular fasteners were called wood screws is not surprising given the fact that at the time of their development, they were used almost exclusively in wood.

Exs. Supp. Mot. Summ. J. Pl. GRK Canada, Ltd. Ex. 19 at 6, Feb. 29, 2016, ECF No. 71–11. Moreover, logically it would appear that in most cases two subheadings under the same heading in a chapter would necessarily be mutually exclusive of each other as each would be defined not only by its terms, but also by what it is not as indicated in the other subheading's terms.

a sharp thread that is used in wood.[23] *See* Def. Br. 18–19. All of the definitions cited by Defendant define a wood screw as being used in wood. Certain definitions indicate that the screw is used for wood only,[24] while others indicate that these screws may be used with wood or to join wood with metal or other resilient materials.[25] Plaintiff does not provide any definitions for a wood screw.

The dictionary definitions offered by Plaintiff for a self-tapping screw emphasize the screw's hardened material[26] and its ability to

[23] For example, Defendant defines a wood screw as a "pointed metal screw formed with a sharp thread of comparatively course pitch **for insertion in wood**." Def. Br. 18 (quoting *Webster's Third New International Dictionary* 2631 (Philip Babcock Gove, Ph. D. and Merriam-Webster Editorial Staff eds. 1993)).

[24] Defendant cites to the following definitions for wood screws which suggest that wood screws are only used in wood:

> *Wood Screw*: a threaded fastener with a pointed shank, a slotted or recessed head, and a sharp tapered thread of relatively course pitch for use only in wood. *McGraw-Hill Dictionary of Scientific and Technical Terms* 2302 (6th ed. 2003).
>
> *Wood Screw*: a metal fastener used for wood, usually having a flat, slotted head, a pointed shank, and a course thread. *Academic Press Dictionary of Science and Technology* 2378 (Christopher Morris ed., 1992).

Def. Br. 18–19. The court notes that its survey of other dictionaries also uncovered the following definitions suggesting the same:

> *Wood screw*: [*Des Eng*] A threaded fastener with a pointed shank, a slotted or recessed head, and a sharp tapered thread of relatively coarse pitch for use only in wood. *McGraw-Hill Dictionary of Scientific and Technical Terms* 2302 (6th ed. 2003)
>
> *Wood screw*: *Mechanical Devices*, a metal fastener used for wood, usually having a flat, slotted head, a pointed shank, and a coarse thread. *Academic Press Dictionary of Science and Technology* 2378 (Christopher Morris ed., 1992).

[25] Defendant cites to a definition defining a wood screw as "a metallic screw specifically adapted for fastening together parts of woodwork or wood and metal." Def. Br. 18 (quoting *Oxford English Dictionary* 504 (2d ed. 1989)). The court has uncovered at least one other dictionary definition suggesting that wood screws may be used in wood and other materials, which defines a wood screw as "a helically threaded metal fastener having a pointed end; forms its own mating thread when driven into wood or other resilient materials." *Dictionary of Architecture & Construction* 1017 (Cyril. M. Harris ed., 3rd ed. 2000).

[26] Plaintiff offers the following definitions for a self-tapping screw that emphasize the screw's hardened material:

> *Self-Tapping Screw*: have a specially hardened thread that makes it possible for the screws to form their own internal thread in sheet metal and soft materials when driven into a hole that has been drilled, punched, or punched and reamed. The use of self-tapping screws eliminates costly tapping operations and saves time in assembling parts. *McGraw-Hill Encyclopedia of Science and Technology* 146 (9th ed. 2002).
>
> *Self-Tapping Screw*: a specially hardened screw used in wood and soft metals that self-cuts its own thread into the material being worked on. Also, Tapping Screw, Sheet Metal Screw. *Academic Press Dictionary of Science and Technology* 1951 (Christopher Morris ed., 1992).

GRK Br. 14. According to Plaintiff, the latter definition provides that a self-tapping screw can be used in both wood and soft metals. *Id.* at 14 n.4.

cut its own thread.[27] GRK Br. 13–14. Defendant does not offer any dictionary definitions for self-tapping screws.

The parties have also offered three industry standards published by ANSI/ASME for the court to consider in construing the meaning of the tariff terms: (i) Glossary of Terms for Mechanical Fasteners ASME B18.12–2001 ("ANSI/ASME Standard B18.12"); (ii) Wood Screws ANSI B18.6.1–1981 ("ANSI/ASME Standard B18.6.1"); (iii) Thread Forming and Thread Cutting Tapping Screws and Metallic Drive Screws (Inch Series) ASME B18.6.4–1998 ("ANSI/ASME Standard B18.6.4").[28] Exs. Supp. Mot. Summ. J. Pl. GRK Canada, Ltd. Exs. 8–10, Feb. 29, 2016, ECF No. 71–7.

The terms in the ANSI/ASME Standards do not mirror those of the HTSUS subheadings. In particular, ANSI/ASME Standard B18.12 and B18.6.4, when read in conjunction, define wood screws as a type

Other definitions uncovered by the court also emphasize the hardened nature of the self-tapping screw and the fact that it cuts its own thread:

Self-tapping: a. *Mech.*Designating a hardened screw that will cut its own thread in a hole in metal that would otherwise need tapping. 14 *The Oxford English Dictionary* 932 (J.A. Simpson and J.S.C. Weiner eds., 2nd ed. 1989).

Self-tapping screw: a hardened steel screw with a special, partially slotted shank which, as it is screwed into a plain hole, will cut or form its own threads. Hugh Brooks, *Encyclopedia of Building and Construction Terms* 317 (1983).

Self-tapping screw: [*Des Eng.*] A screw with a specially hardened thread that makes it possible for the screw to form its own internal thread in sheet metal and soft materials when driven into a hole. Also known as sheet-metal screw; tapping screw. *McGraw-Hill Dictionary of Scientific and Technical Terms* 1893 (6th ed. 2003).

Self-tapping screw: *Mechanical Devices,* a specially hardened screw used in wood and soft metals that self-cuts its own threads into the material being worked on. Also, TAPPING SCREW, SHEET METAL SCREW. *Academic Press Dictionary of Science and Technology* 1951 (Christopher Morris ed., 1992).

Sheet-metal screw, tapping screw: a coarse-threaded tapered screw with a slotted head for driving with a screwdriver; used for fastening sheet metal and other materials, without a tapped hole and without a nut. *Dictionary of Architecture & Construction* 826 (Cyril. M. Harris ed., 3rd ed. 2000).

[27] Plaintiff points to the following definition emphasizing the thread cutting aspect of self-tapping screws:

Tapping Screw : a hardened screw that cuts threads in the pieces it secures and that is used in materials which would otherwise require a separate tapping operation or the use of a nut. *Webster's Third New International Dictionary of the English Language, Unabridged* 2340 (Philip Babcock Gove, Ph. D. and Merriam-Webster Editorial Staff eds. 1981).

GRK Br. 13.

[28] Defendant does not rely on the standard for wood screws under ANSI/ASME Standard B18.6.1 "because it is a limited product specification, not a definition, and thus cannot constitute the common meaning of the tariff term 'other wood screws.'" Def. Resp. & Reply 11. The court may consult any source that contains reliable information in defining the tariff terms. *Carl Zeiss*, 195 F.3d at 1379. Notwithstanding the fact that ANSI/ASME Standard B18.6.1 does not cover all wood screws, it is a reliable source that helps distinguish wood screws from self-tapping screws.

of tapping screw, *i.e.*, a thread forming tapping screw.[29] ANSI/ASME Standard B18.12 defines a tapping screw as one with "a slotted, recessed, or wrenching head and . . . designed to form or cut a mating thread in one or more of the parts to be assembled."[30] ANSI/ASME Standard B18.12 ¶ 3.1.2.22. ANSI/ASME Standard B18.6.4 describes two types of tapping screws, thread forming and thread cutting screws:

> 1.3.1 Thread Forming Tapping Screws. Thread forming tapping screws are generally for application in materials where large internal stresses are permissible, or desirable, to increase resistance to loosening.[31]
>
> 1.3.2 Thread Cutting Tapping Screws. Thread cutting tapping screws are generally for application in materials where disruptive internal stresses are undesirable or where excessive driving torques are encountered with thread forming screws.[32]

ANSI/ASME Standard B18.6.4 ¶¶ 1.3.1, 1.3.2. Under the ANSI/ASME Standard, any screw that either cuts or forms its own thread is a tapping screw. Therefore, under the ANSI/ASME Standards a wood screw would be a type of thread forming tapping screw.

Although the ANSI/AME Standards do not mirror the HTSUS subheadings, a careful examination of the relevant standards aids in distinguishing between the HTSUS subheadings at issue. In particular, ANSI/ASME Standard B18.12 defines a wood screw as:

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[29] Reading ANSI/ASME Standards B18.12 and B18.6.4 in isolation would not aid our inquiry as they do not categorize screws along the same lines as the HTSUS.

[30] HTSUS subheading 7318.14.10 refers to "Self-tapping screws." The relevant ANSI/ASME Standards speak of tapping screws and make no reference to self-tapping screws. A review of the relevant sources as well as expert testimony indicates that both phrases refer to screws that cut their own threads. The ANSI/ASME Standard refers to two types of tapping screws, thread forming and thread cutting. ANSI/ASME Standard B18.12. While Plaintiff and Defendant disagree as a factual matter regarding whether GRK's screws can bore (initiate) their own hole in all applications, none of the relevant sources require a self-tapping screw or a tapping screw to be able to bore its own hole. A self-tapping screw that bores its own hole is referred to as a self-drilling or self-piercing screw depending on whether it is a thread forming or thread cutting screw. *See* ANSI/ASME Standard B18.12; Exs. Supp. Mot. Summ. J. Pl. GRK Canada, Ltd. Ex. 7 at 9, Feb. 29, 2016, ECF No. 71–6; Exs. Supp. Mot. Summ. J. Pl. GRK Canada, Ltd. Ex. 19 at 1, 3, Feb. 29, 2016, ECF No. 71–11.

[31] The ANSI/ASME Standard provides that the different types of thread forming tapping screws are intended to be used in materials such as thin metal, resin impregnated plywood, asbestos compositions, nonferrous castings, and plastics. ANSI/ASME Standard B18.6.4 ¶ 1.3.1.

[32] The ANSI/ASME Standard provides that the different types of thread cutting tapping screws are intended to be used in materials such as aluminum, zinc, lead die castings, steel sheets and shapes, cast iron, brass, plastics, and asbestos. ANSI/ASME Standard B18.6.4 ¶ 1.3.2.

> a thread forming screw having a slotted or recessed head, gimlet point, and a sharp crested, coarse pitch thread, and generally available with flat, oval, and round head styles. It is designed to produce a mating thread when assembled into wood or other resilient materials.

ANSI/ASME Standard B18.12 ¶ 3.1.2.30. Further, ANSI/ASME Standard B18.6.4 states that another type of tapping screw is the thread cutting tapping screw and is "generally for application in materials where disruptive internal stresses are undesirable or where excessive driving torques are encountered with thread forming screws." ANSI/ASME Standard B18.6.4 ¶ 1.3.2. Therefore, while the ANSI/ASME Standards do not mirror the language of the HTSUS subheadings, they do recognize a wood screw as a thread forming screw and a tapping screw as a thread cutting screw used "where disruptive internal stresses are undesirable or where excessive driving torques are encountered." *Id.*

The amount of torque a screw is able to withstand is a defining characteristic of tapping screws according to the ANSI/ASME Standard. The ANSI/ASME Standard provides that tapping screws must meet certain performance requirements. ANSI/ASME Standard B18.6.4 ¶¶ 2.6, 2.9. Among these performance requirements, a tapping screw must satisfy a torsional strength test, which requires that a tapping screw be able to withstand a minimum level of torque. ANSI/ASME Standard B18.6.4 ¶ 2.9.1.2. The minimum torsional strength requirements for tapping screws vary depending on the type and size of the tapping screw. *See* ANSI/ASME Standard B18.6.4 at Table 4. The minimum requirements specified in the standard "shall apply to all types of carbon steel tapping screws only." ANSI/ASME Standard B18.6.4 ¶ 2.9.1. However, the ANSI/ASME Standard further provides that tapping screws made from other materials, including corrosion resistant steel, must also satisfy the torsional strength requirements of a tapping screw.[33] *See* ANSI/ASME Standard B18.6.4 ¶ 2.9.1.

At first blush, the torsional requirements would seem to apply to both thread cutting and thread forming tapping screws. However, the ANSI/ASME Standard for wood screws does not provide for a torsional strength requirement. *See* ANSI/ASME Standard B18.6.1; Exs. Supp. Mot. Summ. J. Pl. GRK Canada, Ltd. Ex. 5 at 82–83, Feb. 29, 2016, ECF No. 71–5 ("Greenslade Dep."). Therefore, the ANSI/

[33] The ANSI/ASME Standard does not specify the minimum torsional strength requirements for tapping screws made from materials other than carbon steel and leaves it to manufacturers and purchasers to determine the appropriate minimum requirement for these other materials. ANSI/ASME Standard B18.6.4 ¶ 2.9.1.

ASME Standard indicates there are wood screws, which are thread forming screws, and there are thread cutting tapping screws, which have higher performance requirements than wood screws. The language of the ANSI/ASME Standard for a wood screw tracks that of the HTSUS subheading 7318.12.00, suggesting that HTSUS subheading 7318.14.10 covers thread cutting tapping screws as that term is used under the ANSI/ASME Standard.

The court next considers intended use, *i.e.*, how a typical user would use the product, and its impact on defining the tariff term. *GRK II*, 761 F.3d at 1358. The tariff terms and Explanatory Notes suggest that self-tapping screws are meant to be used to fasten a non-fibrous material (*i.e.*, "sheets of metal, marble, slate, plastics") to some other material. *See* Explanatory Notes for HTSUS heading 7318. Nearly all dictionary definitions suggest that wood screws are intended to be used to affix wood to wood or to other fibrous materials. In contrast, the ANSI/ASME Standards indicate that tapping screws are intended to be used to fasten non-fibrous materials to either non-fibrous or fibrous material. ANSI/ASME Standard B18.6.4 ¶ 1.3.

The parties disagree as to whether the intended use of a self-tapping screw is limited to fastening non-fibrous material to other non-fibrous material or whether the self-tapping screw may also be intended to be used to fasten non-fibrous material to fibrous material (*i.e.*, wood). Def. Br. 10, 22–23; Def. Resp. & Reply 4, 15; GRK Br. 36–37; GRK Resp. 29–30. Nothing in the relevant sources suggests that a self-tapping screw's intended use is only to fasten non-fibrous materials. Indeed, industry standards and dictionary definitions support the conclusion that the tariff term self-tapping screw includes screws that are intended to fasten non-fibrous materials to fibrous materials as well as to non-fibrous materials. *See, e.g.*, *Academic Press Dictionary of Science and Technology* 1951 (Christopher Morris ed., 1992) (defining "*Self-Tapping Screw* as a specially hardened screw used in wood and soft metals that self-cuts its own thread into the material being worked on. Also, Tapping Screw, Sheet Metal Screw."); ANSI/ASME Standard 18.6.4 ¶¶ 1.3.1, 1.3.2. Therefore, the intended use of a self-tapping screw is to affix a non-fibrous material to any other material.

In contrast, nearly all dictionary definitions cited by the parties for wood screws suggest that classifying merchandise as a wood screw requires that the screw be used to fasten wood to wood or other fibrous materials. *See,e.g.*, *McGraw-Hill Dictionary of Scientific and Technical Terms* 2302 (6th ed. 2003) (defining *Wood Screw* as a threaded fastener with a pointed shank, a slotted or recessed head, and a sharp tapered thread of relatively course pitch for use only in

wood); *Academic Press Dictionary of Science and Technology* 2378 (Christopher Morris ed., 1992) (defining *Wood Screw* as a metal fastener used for wood, usually having a flat, slotted head, a pointed shank, and a course thread). Nearly all other dictionaries consulted by the court suggest that wood screws are used only in wood. *See, e.g.*, *McGraw-Hill Dictionary of Scientific and Technical Terms* 2302 (6th ed. 2003) (defining *Wood screw* as "[*Des Eng*] A threaded fastener with a pointed shank, a slotted or recessed head, and a sharp tapered thread of relatively coarse pitch for use only in wood."); *Academic Press Dictionary of Science and Technology* 2378 (Christopher Morris ed., 1992) (defining *Wood screw* as "*Mechanical Devices*, a metal fastener used for wood, usually having a flat, slotted head, a pointed shank, and a coarse thread.").

To sum up, based on the words of the subheadings, the Explanatory Notes, the relevant standards, the dictionary definitions of the terms as well as the intended use, the court finds that (1) the common and commercial meaning of a wood screw is a screw that forms its own thread by compressing surrounding material designed to fasten wood to wood or other fibrous material, and (2) the common and commercial meaning of a self-tapping screw is a specially hardened screw,[34] that meets minimum torsional strength requirements, that can cut away material to form a mating thread in non-fibrous material, and is designed to fasten non-fibrous materials, such as metal, to either fibrous or non-fibrous materials.

One authority offered in this case confirms these definitions of the tariff terms at issue. As already discussed, in construing tariff terms "a court may rely upon its own understanding of the terms used and may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Carl Zeiss*, 195 F.3d at 1378. Among the other reliable information sources, courts may also look to expert testimony, although such testimony is advisory, not binding, and the weight to be given to such testimony depends on various factors. *See United States v. Crosse & Blackwell, Inc.*, 22 C.C.P.A. 214, 217–218 (1934) (while opinions of witnesses as to common meanings of terms may properly be considered as advisory, the usual rule is to consult standard lexicographers to determine the common meaning of

[34] Defendant argues that Plaintiff cannot establish that wood screws are not case-hardened because the ANSI/ASME Standard provides that a wood screw may be case-hardened. Def. Br. 22. The ANSI/ASME Standard states that a "[w]ood screw shall be supplied in steel, corrosion resistant steel, brass, aluminum alloy, or other materials as designated by the purchaser." ANSI/ASME Standard B18.6.1 ¶ 2.6. While the ANSI/ASME Standard does not foreclose the possibility that a wood screw may be case-hardened, the material of the screw is only one of the physical characteristics that define a self-tapping screw. A self-tapping screw must also meet minimum torsional requirements, be able to cut a mating thread in non-fibrous materials, and be able to fasten non-fibrous materials to other materials.

statutory words); *United States v. John B. Stetson Co.*, 21 C.C.P.A. 3, 9 (1933) (a court may ascertain the common understanding of a tariff term by reference to works of standard lexicographers, scientific authorities, the testimony of witnesses, which is advisory only, or by other means available); *Kahrs Int'l, Inc. v. United States*, 35 CIT __, __, 791 F. Supp. 2d 1228, 1241 (2011) (opinions of expert witnesses pertaining to the common meaning of tariff terms may be considered to the extent they are supported, and not contracted, by reliable textual sources).

Here, both Plaintiff and Defendant have offered expert authorities' opinions relevant to the meaning of the tariff terms. *See* Greenslade Dep.; Exs. Supp. Mot. Summ. J. Pl. GRK Canada, Ltd. Ex. 7, Feb. 29, 2016, ECF No. 71–6 ("Bohnhoff Rep."); Exs. Supp. Mot. Summ. J. Pl. GRK Canada, Ltd. Ex. 19, Feb. 29, 2016, ECF No. 71–11 ("Bohnhoff Suppl. Rep."). Dr. Bohnhoff's description of a self-tapping screw coincides with the court's definition. He provides the following explanation of what constitutes a tapping or self-tapping screw:

> [I]t is important to understand that female (internal) threads are formed by cutting and/or by ***compressing*** material. The cutting of female threads is referred to as tapping. A special tool used to cut internal threads is called a "tap". Screws that cut their own threads are called *"thread-cutting screws"*, *"tapping screws"* or *"self-tapping screws"*. Tapping is an irreversible operation as once a material is cut, it remains cut. Whereas some cutting operations remove material, other cuts (e.g. a single slit) may not.

Bohnhoff Suppl. Rep. 1. This explanation indicates it is the ability to cut material, as opposed to the ability to compress material, which makes a screw a tapping screw or self-tapping screw. Dr. Bohnhoff further clarifies that:

> Self-tapping should not be confused with self-drilling. Self-tapping is the cutting of female threads. This cutting may or may not result in the removal of material. Additionally, some self-tapping screws require a borehole (i.e., a pre-drilled hole). Self-tapping screws that require a borehole are not considered self-drilling.

Bohnhoff Suppl. Rep. 4. Thus, not all self-tapping screws are capable of tapping without need for a borehole, only a sub-class known as self-drilling screws.

Mr. Greenslade, Defendant's expert, states that self-tapping screws must meet minimum torsional strength requirements. Greenslade

Dep. 81, 89. No other expert testimony contradicts this statement. Mr. Greenslade agrees that torsional strength determines the ability of the screw to resist being twisted into two pieces and that to increase torsional strength you need to have a harder screw. *Id.* Defendant's expert acknowledges that there is no such requirement for wood screws. *See id.* Therefore, expert testimony confirms that the common and commercial meaning of self-tapping screws are screws made of hardened steel, meeting minimum torsional strength requirements, capable of cutting their own thread, and intended to be used with at least one non-fibrous material.

Defendant's arguments that a self-tapping screw, by definition, is intended only for use in fastening non-fibrous materials to other non-fibrous materials is not borne out by the sources. Defendant's expert comments that a screw designed to pass through composite materials, even sheet metal, is still a wood screw if it is designed to anchor into wood in accordance with the ANSI/ASME definition of wood screw. *Id.* at 156–158. The ANSI/ASME definitions only address the ability of self-tapping screws to cut or form mating threads in whatever material they are being applied to. The Explanatory Notes, although they speak of the ability of self-tapping screws to "cut their own passage into thin sheets of metal, marble, slate, plastics, etc.," do not indicate screws transform into wood screws when those materials are used in conjunction with wood. Explanatory Notes for HTSUS heading 7318. Defendant's interpretation is further belied by the fact that the Explanatory Notes explain the differences between screws for wood and those for metal based upon physical characteristics, not based upon the fact they are used in wood. *Id.* No dictionary definition offered by either party or consulted by the court limits self-tapping screws to use in non-fibrous materials.

The court has considered use, and there is no authority to suggest that a self-tapping screw is limited to use with non-fibrous materials. The Explanatory Notes specifically provide that self-tapping screws resemble wood screws, but with additional features that wood screws may not possess. Explanatory Notes for HTSUS heading 7318. Therefore, sharing features or applications with wood screws does not disqualify a screw from being a self-tapping screw nor does the fact that self-tapping screws may have features that make them also suitable to be used in wood.

III. GRK's Steel Screw Fasteners

There is no genuine issue of a material fact and the court determines as a matter of law that GRK's screws are self-tapping screws classified under HTSUS subheading 7318.14. The term self-tapping

screw under HTSUS subheading 7318.14 refers to screws that are made of hardened steel, meet minimum torsional strength requirements, cut their own mating thread into non-fibrous materials, and are intended to be used to fasten non-fibrous materials to other materials.

It is uncontroverted that GRK's R4 and Trim Head screws are capable of cutting a mating thread in non-fibrous materials such as sheet metal, melamine, plastics, medium-density fiberboard, cement fiberboard, particle board (also known as oriented strand board, an engineered product consisting of wood chips glued together with a bonding agent), modern composite wood decking made of recycled plastics with wood chips mixed in, capstock decking, steel studs and other man-made composite materials. GRK Facts ¶ 30; Def. Facts Resp. ¶ 30; Exs. Supp. Mot. Summ. J. Pl. GRK Canada, Ltd. Ex. 2 at 75–81, Feb. 29, 2016, ECF No. 71–4 ("Walther Dep."); Exs. Supp. Mot. Summ. J. Pl. GRK Canada, Ltd. Ex. 6 ¶ 13(a), Feb. 29, 2016, ECF No. 71–5 ("Walther Aff."); Exs. Supp. Mot. Summ. J. Pl. GRK Canada, Ltd. Ex. 11 at 23–31, Feb. 29, 2016, ECF No. 71–8 ("Ryan Dep."); Exs. Supp. Mot. Summ. J. Pl. GRK Canada, Ltd. Ex. 12 at 20–29, Feb. 29, 2016, ECF No. 71–8 ("Morlock Dep."). It is also undisputed that the R4 and Trim Head screws are made of either case-hardened carbon steel or stainless steel. Def. Facts ¶¶ 11, 12, 18, 19; GRK Facts Resp. ¶¶ 11, 12, 18, 19; GRK Facts ¶¶ 16–17; Def. Facts Resp. ¶¶ 16–17. It is likewise undisputed that the R4 and Trim Head screws meet minimum torsional strength requirements.[35] GRK Facts ¶¶ 22, 24; Def. Facts Resp. ¶¶ 22, 24. Therefore, GRK's screws satisfy the physical characteristics of a self-tapping screw.

The intended use of GRK's screws supports their classification as self-tapping screws. It is undisputed that the R4 and Trim Head screws are intended for fastening non-fibrous materials to other materials. Def. Facts ¶ 35; GRK Facts Resp. ¶ 35; GRK Facts ¶¶ 30–31; Def. Facts Resp. ¶¶ 30–31. GRK has offered testimony that GRK screws are recommended for and intended to be used in applications that require a screw that can cut its threads through non-fibrous materials. Walther Dep. 75–81; Walther Aff. ¶ 13(a); Morlock Dep.

[35] Defendant argues that wood screws, in particular wood screws that are covered under ANSI/ASME Standard B18.6.1 are also manufactured to meet minimum torsional strength requirements. GRK Facts ¶ 36; Def. Facts Resp. ¶ 36. The ANSI/ASME Standard provides that a wood screw "may be heat treated at the option of the purchaser or the manufacturer to develop adequate torsional strength for the intended application." ANSI/ASME Standard B18.6.1 ¶ 2.6. Of course, in order for any screw to be merchantable it must have adequate torsional strength for the applications the screw is well-suited for. However, that does not mean that wood screws are required to meet a certain standardized minimum torsional strength requirement. It is undisputed that GRK's screws meet a minimum requirement, and Defendant's expert states that there is no such requirement for wood screws. *See* Greenslade Dep. 82–83.

20–29; Ryan Dep. 23–31. That same testimony indicates GRK's R4 and Trim Head screws can be used in non-fibrous materials such as sheet metal, melamine, plastics, medium-density fiberboard, cement fiberboard, particle board (also known as oriented strand board, an engineered product consisting of wood chips glued together with a bonding agent), modern composite wood decking made of recycled plastics with wood chips mixed in, capstock decking, steel studs, and other man-made composite materials. Walther Dep. 75–81; Walther Aff. ¶ 13(a); Morlock Dep. 20–29; Ryan Dep. 23–31. Defendant does not refute these capabilities, but rather cites GRK's sales documentation that certain features of the same screws make them suitable for a variety of uses in wood, such as wood decking, fine carpentry, or to mate certain non-wood materials like plastics or composite materials to wood. Def. Facts Resp. ¶ 31 (citing Def. Br. Ex. F at 141). That the screws are also capable of being used with wood or to fasten fibrous and non-fibrous materials does not undermine the intended use of the screws.

Further, additional available features of GRK's screws confirm their intended use with non-fibrous material. The Climatek coating, which is available for the case-hardened carbon steel screws, includes a water-based lubricant specifically intended to reduce the torque needed to drive the screws and allow them to be driven into "even very, very dense materials." GRK Br. 35 (citing Walther Dep. 59–61); GRK Facts ¶ 62; Def. Facts Resp. ¶ 62. That Climatek is intended to reduce torque signals GRK's screws are intended for applications that require high amounts of torque. Since only the standards for self-tapping screws require a minimum torsional strength, it follows that GRK's screws are specifically designed for use in dense materials requiring higher amounts of torque to drive the screws. Defendant does not dispute the availability of the Climatek coating on the casehardened carbon steel screws or that the coating is a lubricant intended to reduce torque for driving. Def. Facts ¶¶ 11, 18; Def. Facts Resp. ¶ 62. In fact, Defendant concedes the purpose of Climatek coating is to reduce torque, stating that the Climatek coated case-hardened steel allows the screws to be anchored in pressure treated lumber, which is a hard, dense material that would require more torque for driving screws. Def. Br. 6, 7, 19, 20.

Both the R4 and RT screws also have features that are designed to help prevent the occurrence of mushrooming. The R4 screw possesses a self-countersinking head that is able to penetrate "hard, brittle, or thin plasticized surfaces veneered onto lumber or composite woods" without causing mushrooming. Def. Facts ¶ 24; GRK Facts Resp. ¶ 24. The RT screws have been specifically designed to avoid mush-

rooming with its secondary reverse threading, which pulls any displaced material rising to the surface back into the screw hole. GRK Facts ¶ 63; Def. Facts Resp. ¶ 63; *see also* Morlock Dep. 34– 35; Ryan Dep. 34–35. Without these features, non-fibrous material that the screw cuts and removes as it is driven would rise and create a mushroom on the surface. GRK Facts ¶ 63; Def. Facts Resp. ¶ 63. Mushrooming is not a concern for wood and fibrous material applications. *See* GRK Facts ¶ 63; Def. Facts Resp. ¶ 63; *see also* Morlock Dep. 34– 35; Ryan Dep. 34–35.

Likewise, the special points and threading patterns available on many of the screws facilitate the self-tapping function through dense non-fibrous material. All the screws have a gimlet point. GRK Facts ¶ 25; Def. Facts Resp. ¶ 25. R4 screws that are 1¼ inches and longer and all RT and Fin/Trim screws have a Type 17 point. Def. Facts ¶¶ 6, 14; GRK Facts Resp. ¶¶ 6, 14. The Type 17 point "allows the screw to get started more easily and reduces the torque needed to drive the screw," GRK Facts ¶ 28; Def. Facts Resp. ¶ 28. It is undisputed that GRK screws over 1¼ inches and longer also have W-Cut threading which act like a sawblade as it cuts through material.[36] Def. Facts ¶¶ 8, 15; GRK Facts Resp. ¶¶ 8, 15. None of these features are requirements for self-tapping screws. However, these features better enable the screws at issue to be used in materials such as "sheet metal, plastics, medium-density fiberboard, polyvinyl chloride (PVC) board, cement fiberboard, melamine, arborite, and other man-made composite materials," and thus the intended uses of GRK's screws support that they are self-tapping screws. GRK Facts ¶ 30; Def. Facts Resp. ¶ 30.

Therefore, GRK's R4 and Trim Head screws are self-tapping screws.

CONCLUSION

For the foregoing reasons, the steel screw fasteners at issue in this case are properly classifiable as "Self-tapping screws" under HTSUS

[36] That GRK's screws that are 1¼ inches or shorter do not have a Type 17 point, W-Cut, or CEE threading is a result of concerns about the fastening function of the screw, not their tapping function. GRK's president explained that the reason these screws lack W-Cut threading is because "when you remove material from the thread by carving notches into it, then you also lose holding power, you don't have enough fully formed threads anymore in whatever you're going into with the screw to give it a lot of holding power, prevent it from pulling out." Walther Dep. 20. Likewise, GRK's president explained that there would be no purpose of putting CEE threads, which widen the screw hole, because doing so would "probably take away one or two of the actual holding threads and diminish the holding power again." *Id.* at 66.

subheading 7318.14.10. Therefore, Plaintiff's motion for summary judgment is granted, and Defendant's motion for summary judgment is denied. Judgment will be entered accordingly.

Dated: July 15, 2016
New York, New York

/s/ *Claire R. Kelly*
CLAIRE R. KELLY, JUDGE

Slip Op. 16–71

MERIDIAN PRODUCTS, LLC, Plaintiff, and WHIRLPOOL CORPORATION, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and ALUMINUM EXTRUSIONS FAIR TRADE COMMITTEE, Defendant-Intervenor.

Before: Timothy C. Stanceu, Chief Judge
Court No. 13–00246

[Affirming an agency's conclusion, presented in a determination issued in response to a previous court order, that an imported good is not within the scope of antidumping and countervailing duty orders on imported aluminum extrusions]

Dated: July 18, 2016

Daniel J. Cannistra, Crowell & Moring, LLP, of Washington, D.C., for plaintiff. With him on the brief was *Alexander Schaefer*.

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Tara K. Hogan, Senior Trial Counsel, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Jessica M. Link*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

Alan H. Price and *Robert E. DeFrancesco, III*, Wiley Rein LLP, of Washington, D.C., for defendant-intervenor.

OPINION

Stanceu, Chief Judge:

In this action, plaintiff Meridian Products, LLC ("Meridian") contested a 2013 "Final Scope Ruling" in which the International Trade Administration, United States Department of Commerce ("Commerce" or "the Department") construed the scope of antidumping and countervailing duty orders (the "Orders") on aluminum extrusions from the People's Republic of China ("China" or the "PRC") to include three types of kitchen appliance door handles.

Before the court is the decision (the "Remand Redetermination") Commerce issued following the court's order remanding the Final

Scope Ruling for reconsideration. *Final Results of Redetermination Pursuant to Court Remand* Meridian Products, LLC v. United States (Mar. 23, 2016), ECF No. 67 ("*Remand Redetermination*"). In its earlier opinion and order, the court affirmed the Department's decision that two types of handles are within the scope of the Orders but ordered reconsideration of the Department's decision as to the third. *Meridian Products, LLC v. United States*, 39 CIT __, 125 F. Supp. 3d 1306 (2015) ("*Meridian I*"). In response to the court's order, Commerce determined, under protest, that this third handle type was outside the scope of the Orders. The Aluminum Extrusions Fair Trade Committee ("AEFTC"), a trade association of U.S. producers of aluminum extrusions and a petitioner in the antidumping and countervailing duty investigations, opposes the Remand Redetermination. The court affirms the Department's conclusion that the third handle type does not fall within the scope of the Orders.

I. BACKGROUND

The court's earlier opinion contains background material on this case, which is supplemented herein. *See Meridian I*, 39 CIT at __, 125 F. Supp. 3d at 1308–09.

Commerce issued the antidumping and countervailing duty orders on aluminum extrusions from China in May 2011. *Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650 (Int'l Trade Admin. May 26, 2011) ("*AD Order*"); *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653 (Int'l Trade Admin. May 26, 2011) ("*CVD Order*"). Meridian filed with Commerce a request for a scope ruling ("Scope Ruling Request") on January 11, 2013, in which it sought a ruling excluding from the scope of the Orders the three types of appliance door handles at issue in this case. *Letter Requesting a Scope Ruling Regarding Kitchen Appliance Door Handles* (Jan. 11, 2013) (A.D.R.Doc. No. 1, C.V.D.R.Doc. No. 1) ("*Scope Ruling Request*").[1] After conducting an administrative proceeding, Commerce issued the Final Scope Ruling on June 21, 2013. *Final Scope Ruling on Meridian Kitchen Appliance Door Handles*, C-570–968, A-570–967 (June 21, 2013) (A.D.R.Doc. No. 34, C.V.D.R.Doc. No 36), *available at* http://enforcement.trade.gov/download/prc-ae/scope/32-Meridian-

[1] Citations to the index for the administrative record for the antidumping duty order, case number A-570–967, are referenced herein as "A.D.R.Doc. No." Citations to the index for the administrative record for the countervailing duty order, case number C-570–968, are referenced herein as "C.V.D.R.Doc. No." Citations to the indices for the administrative record on remand for either of these orders, for which the remand records are identical, are referenced herein as "Remand R.Doc. No."

kitchen-door-handles21jun13.pdf (last visited July 7, 2016) ("*Final Scope Ruling*").

Meridian commenced this action on July 10, 2013, Summons, ECF No. 1; Compl., ECF No. 4, and, on May 12, 2014, Meridian filed its motion for judgment on the agency record, claiming that Commerce erred in determining that each of the three appliance door handle types was within the scope of the Orders. Pl.'s Mot. J. Agency R., ECF No. 38. The court's earlier opinion and order granted plaintiff's motion in part, and denied it in part, affirming the Department's decision as to two types of Meridian's handles (the "Type A" and "Type C" handles), each of which is a one-piece article fabricated from a single aluminum extrusion, and remanding the decision as to the remaining, "Type B," handles, each of which is an assembly consisting of a component fabricated from an aluminum extrusion and other, non-aluminum components. *Meridian I*, 39 CIT at __, 125 F. Supp. 3d at 1310–17. On February 25, 2016, Commerce provided the parties, and invited comment on, a determination in draft form, *Draft Results of Redetermination Pursuant to Court Remand*, (Feb. 25, 2016) (Remand.R.Doc. No. 1). On March 23, 2016, Commerce filed the Remand Redetermination now before the court. On April 22, 2016, AEFTC filed its comments opposing the Remand Redetermination. *Def.-Int. the Aluminum Extrusions Fair Trade Committee's Comments on Final Results of Redetermination Pursuant to Court Remand*, ECF No. 69 ("*AEFTC's Remand Comments*"). On June 3, 2016, defendant replied to these comments. *Def.'s Resp. to Def.-Int.'s Remand Comments*, ECF No. 74.[2]

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises subject matter jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), which grants jurisdiction over civil actions brought under section 516A of the Tariff Act of 1930 ("Tariff Act"). 19 U.S.C. § 1516a(a)(2)(B)(vi).[3] Section 516A provides for judicial review of a determination of "whether a particular type of merchandise is within the class or kind of merchandise described in an . . . antidumping or countervailing duty order." *Id*. In reviewing the redetermination on remand, the court must set aside "any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id*. § 1516a(b)(1)(B)(i).

[2] Plaintiff-intervenor Whirlpool Corporation has not submitted briefing in this proceeding.

[3] All statutory citations herein are to the 2012 edition of the United States Code.

B. Description of the Merchandise in Meridian's Scope Ruling Request

The only remaining appliance door handle type at issue in this litigation is Meridian's "Type B handle." *See Remand Redetermination* 1. The Type B handle, which was made for installation on oven doors, is an assembly consisting of five parts: a "middle handle bar extrusion piece" fabricated from an aluminum extrusion, two plastic injection-molded end caps (located at each end), and two screws that attach the end caps to the handle bar. *See Scope Ruling Request* 2 & Attach. 1, "Type B Handles," "Sec. A-A." Describing all three handle types, the Scope Ruling Request stated that "[a]ll of the components are fully fabricated and do not require further cutting, punching, or other processing prior to their assembly and installation to the finished oven," that the Type B handles "are in a form ready to be sold directly to, and used by, the consumer/end-user," and that "[t]he package contains the components such as bottom mount fasteners and allen wrench necessary for installation by the customer," *id.* at 3, and is "shipped to the customer with assembly instructions," *id*. at 4.

C. The Scope Language in the Orders

The scope language of the antidumping duty order and the scope language of the countervailing duty order are essentially identical. The Orders apply to "aluminum extrusions which are shapes and forms, produced by an extrusion process, made from aluminum alloys having metallic elements corresponding to the alloy series designations published by The Aluminum Association commencing with the numbers 1, 3, and 6 (or proprietary equivalents or other certifying body equivalents)." *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,653. The scope includes aluminum extrusions that are "imported with a variety of finishes" or that are "fabricated (i.e., prepared for assembly)" by "operations" that "would include, but are not limited to, extrusions that are cut-to-length, machined, drilled, punched, notched, bent, stretched, knurled, swedged, mitered, chamfered, threaded, and spun." *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,654. The scope also includes such aluminum extrusions even if they are "described at the time of importation as parts for final finished products that are assembled after importation . . ." provided they "otherwise meet the definition of aluminum extrusions." *AD Order*, 76 Fed. Reg. at 30,650–51; *CVD Order*, 76 Fed. Reg. at 30,654. The scope includes goods "identified with reference to their end use" provided "they otherwise meet the scope definition, regardless of whether they are ready for use at the time of importation." *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654.

The scope language contains an exclusion applying to certain "finished merchandise," which reads as follows:

> The scope . . . excludes finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels.

Id.

D. The Remand Redetermination Reached the Correct Conclusion that the Type B Handles Are Not Within the Scope of the Orders

1. The Court's Decision in Meridian I

In *Meridian I*, the court first analyzed what it termed the "general scope language" of the Orders, i.e., the language in the Orders that defines generally the merchandise falling within the scope, considered apart from any specific exclusions. *Meridian I*, 39 CIT at __, 125 F. Supp. 3d at 1312–13. Noting that "[t]he general scope language provides that the subject merchandise is 'aluminum extrusions'" and that "[a]n 'extrusion,' according to the general scope language, is a shape or form produced by an extrusion process," the court opined that "no scope language in the Orders is so open-ended as to sweep into the scope all assembled goods that contain one or more aluminum extrusions as parts." *Id.*, 39 CIT at __, 125 F. Supp. 3d at 1312 (citations omitted). The court observed that the general scope language expressly includes a shape or form produced by an extrusion process that has been fabricated after extrusion to make it suitable for use as a part of a final finished product, provided the fabricated part otherwise meets the definition of an aluminum extrusion. *Id.*, 39 CIT at __, 125 F. Supp. 3d at 1312–13. *Meridian I* drew a distinction between an article fabricated after extrusion and one resulting from an assembly process, opining that "[t]he conclusion that the Type B handles fall within the general scope language is unsupported by the wording of the general scope language as applied to the uncontradicted record evidence, which is that a Type B handle is not an extrusion but rather is an assembly containing an extrusion, produced by assembling an aluminum extrusion, two plastic end caps, and two screws." *Id.*, 39 CIT at __, 125 F. Supp. 3d at 1313.

The court also noted that in placing the Type B handles within the scope, Commerce did not apply the "subassemblies" provision in the

scope language. *Id.* The "subassemblies" provision states that, except for a good satisfying a specific exclusion (the "finished goods kit" exclusion),[4] "[t]he scope includes the aluminum extrusion components that are attached (*e.g.*, by welding or fasteners) to form subassemblies, *i.e.*, partially assembled merchandise . . . ."[5] *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. That Commerce did not apply the subassemblies provision was, according to the court, "understandable, as there is record evidence in this case that the Type B handles, which are the 'merchandise' under consideration, are imported in fully assembled, not 'partially assembled,' form." *Meridian I*, 39 CIT at __, 125 F. Supp. 3d at 1313. The court added that "as to all three handle types, Commerce found that 'the products at issue are ready for use "as is" at the time of importation.'" *Id.* (quoting *Final Scope Ruling* 13).

Rather than deem a Type B handle a "subassembly," Commerce concluded that the good fell within the scope definition of "extrusion." The court took issue with the Department's conclusion in the Final Scope Ruling that the Type B handles "consist entirely of aluminum extrusions, with the exception of fasteners, which, by the language of the scope, do not remove the aluminum extrusion product from the scope." *Id.*, 39 CIT at __, 125 F. Supp. 3d at 1313–14 (quoting *Final Scope Ruling* 13). The court viewed this conclusion as flawed in two respects. The court viewed as unreasonable an interpretation of the scope language under which any assembly containing an aluminum extrusion is considered an "extrusion" within the meaning of the scope language merely on the premise that non-aluminum-extrusion components within the assembly are characterized as "fasteners." *Id.*, 39 CIT at __, 125 F. Supp. 3d at 1313–14. The court added that "[a] second flaw in the Department's logic is the interpreting of the term 'fasteners' so broadly as to encompass the plastic end caps," noting that "[i]llustrations of the Type B handles in the record demonstrate

[4] The "finished goods kit" exclusion referenced in the subassemblies provision reads as follows:

> The scope also excludes finished goods containing aluminum extrusions that are entered unassembled in a "finished goods kit." A finished goods kit is understood to mean a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled "as is" into a finished product. An imported product will not be considered a "finished goods kit" and therefore excluded from the scope of the investigation merely by including fasteners such as screws, bolts, *etc*. in the packaging with an aluminum extrusion product.

AD Order, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654.

[5] Under this "subassemblies" provision, the scope includes only the components within an assembly that are aluminum extrusions and thus "does not include the non-aluminum extrusion components of subassemblies . . . ." *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654.

that the plastic end caps are specialized parts, molded to a shape necessary to their function as components of a complete handle assembly, in which they are fitted to the ends of the extruded aluminum component." *Id.*, 39 CIT at __, 125 F. Supp. 3d at 1314 (citing *Scope Ruling Request,* Attachment 1, "Type B Handles," Sec. A-A."). The court considered Commerce to have applied an "unusually broad meaning" to the term "fasteners" that differed from the common and ordinary meaning of the term. *Id.* The court summarized its holding by stating that "the Department failed to base its conclusion that the Type B handles are described by the general scope language on a reasonable interpretation of that language." *Id.*

While deciding that the Department's misinterpretation of the general scope language was sufficient by itself to require it to remand the Final Scope Ruling, the court also found fault with the Department's conclusion that the Type B handles did not qualify for the "finished merchandise exclusion." *Id.* The court noted that the Final Scope Ruling, in considering the finished merchandise exclusion, did not analyze the Type B handles separately but instead concluded generally that this exclusion did not apply to any of the three handle types. The court noted that the Final Scope Ruling found as to all three handle types that "the record is undisputed that the aluminum extrusion parts are not fully and permanently assembled with non-aluminum extrusion parts at the time of entry," *id.*, 39 CIT at __, 125 F. Supp. 3d at 1315 (quoting *Final Scope Ruling* 13), but nevertheless also found "that the Type B handles 'are made of aluminum extrusions, plus two plastic injection molded end caps at each end' that 'are used to fasten the handle to the door,'" *id.* (quoting *Final Scope Ruling* 2). The court opined that "[a]lthough it did not so state, Commerce apparently concluded, first, that the presence of 'fasteners' is to be disregarded when the question is whether a good qualifies as 'merchandise containing aluminum extrusions as parts' for purposes of the finished merchandise exclusion and, second, again concluded that the plastic end caps present in the Type B handles are 'fasteners.'" *Id.* The court identified two shortcomings in this analysis. First, the court again noted the flaw in deeming the plastic end caps "fasteners." *Id.* Second, the court identified an "interpretive difficulty with the Department's apparent reasoning that the presence of fasteners is to be disregarded for purposes of applying the finished merchandise exclusion." *Id.*, 39 CIT at __, 125 F. Supp. 3d at 1315–16. In the court's view, "[t]he difficulty is that the finished merchandise exclusion contains no reference to fasteners" and that "[t]his contrasts with the finished goods kit exclusion, under which express language instructs that the presence of fasteners in the packaging is to be disregarded."

Id., 39 CIT at __, 125 F. Supp. 3d at 1316. The court considered the Final Scope Ruling to have failed "to demonstrate the reasonableness of the Department's conclusion that the Type B handles do not satisfy the requirements of the finished merchandise exclusion when the scope language setting forth that exclusion is interpreted according to plain meaning." *Id.*

2. The Remand Redetermination

Commenting that "the Court disagreed with the Department's interpretation that Meridian's Type B door handles are covered by the plain language of the scope . . . ," Commerce stated in the Remand Redetermination that "[w]e find, therefore, under respectful protest, that Meridian's Type B door handles are outside the scope of the *Orders* because, consistent with the Court's interpretation of the scope language, there is no general scope language which covers such products." *Remand Redetermination* 8 (footnote omitted). Commerce added that it did "not need to address the issue of whether Meridian's Type B door handles are excluded under the finished merchandise exclusion" because, consistent with the Court's interpretation of the scope language, "there is no general scope language which covers Meridian's Type B door handles." *Id.*

The court affirms the Department's decision that the Type B handles are not within the scope of the Orders. However, the court does not affirm the Remand Redetermination in the entirety. In the portion of the Remand Redetermination that responds to AEFTC's comments on the draft version of the Remand Redetermination, Commerce misinterpreted the court's opinion in *Meridian I* in one respect and also appears to have misinterpreted it in a second respect, as discussed below.

The Remand Redetermination summarizes several arguments AEFTC made in commenting on the draft that pertain to the presence of the plastic end caps in the Type B handle assemblies. *See Remand Redetermination* 9–10. In response to these arguments, the Remand Redetermination states that "[w]e agree with Petitioner that both the scope language and the record evidence support a finding that the plastic end caps in question should be treated as fasteners, and, therefore, Meridian's Type B door handles consist solely of aluminum extrusions and fasteners." *Id.* at 10. The Remand Redetermination then explains that "[h]owever, the Court has made a specific finding that, based on the scope language and this same record evidence, the plastic end caps are not fasteners." *Id.* at 10–11 (footnote omitted). This statement mischaracterizes the court's holding, which did not make a "finding" as posited by the Remand Redetermination. Al-

though critical of the Department's deeming the end caps to be "fasteners" due to the unusually broad definition Commerce lent to the term, the court based its analysis on the scope language and the uncontested fact that each Type B handle is an assembly containing a component fabricated from an aluminum extrusion, two plastic end caps, and two screws. It recognized that the general scope language defines "extrusions" as "shapes and forms, produced from an extrusion process . . ." rather than define the term so broadly as to sweep into the scope all assembled articles consisting of a component fabricated from an aluminum extrusion and other, non-aluminum-extrusion components. *See Meridian I*, 39 CIT at __, 125 F. Supp. 3d at 1312–14. The Department's statements in the Remand Redetermination that the scope language and record support a finding that the end caps "should be treated as fasteners," and that the presence of the end caps and the screws fastening them to the middle handle bar should be disregarded, do not change the uncontested fact that the Type B handles are assemblies. The scope language does not provide that an assembly containing an extrusion covered by the Orders somehow *becomes* a covered extrusion should Commerce decide that all non-aluminum-extrusion components in the assembly should be "treated as" fasteners.

In addition, Commerce appears to have misinterpreted the court's ruling in *Meridian I* with respect to the "subassemblies" provision in the scope language. The Remand Redetermination responds to an argument by AEFTC "that general scope language, in particular the 'parts' and 'subassemblies' language, covers aluminum extrusions which contain non-extruded components such as Meridian's Type B Door Handles." *Remand Redetermination* 11. The Department's response is as follows:

> We agree with Petitioner that the Department's underlying scope ruling correctly determined that the Type B Door Handles are covered by the general scope language and are not excluded under either the finished merchandise or finished goods kit exclusions. However, as discussed above, the Court found that the general scope language upon which the Department relied in finding that Meridian's Type B Door Handles are subject to the *Orders* does not support Commerce's interpretation. Moreover, although the Court identified additional general scope provisions, *i.e.*, the 'parts' language and 'subassemblies' language, which also could be considered relevant, the Court ultimately found that, based on the record evidence, these provisions would not support a finding that Meridian's Type B Door Handles are covered by the *Orders*.

Remand Redetermination 13 (footnotes omitted).

The Remand Redetermination is incorrect in implying that the court reached a holding that the subassemblies provision "would not support a finding that Meridian's Type B Door Handles are covered by the *Orders*." Although the court disagreed that the "parts" language of the Orders supported the Department's conclusion that the Type B handles are within the scope (because this language is expressly limited to parts "*that otherwise meet the definition of aluminum extrusions*," *Meridian I*, 39 CIT at __, 125 F. Supp. 3d at 1313 (citing *AD Order*, 76 Fed. Reg. at 30,651, *CVD Order*, 76 Fed. Reg. at 30,654 (emphasis added))), the court did not reach any holding as to the "subassemblies" language and was not in a position to do so. The Final Scope Ruling is a determination that the entire Type B handle is an "extrusion" within the scope of the Orders and did not qualify for any exclusion; that was the only determination before the court in *Meridian I*. The Final Scope Ruling is not a determination that the extruded aluminum component (the "middle handle bar"), standing alone, is within the scope of the Orders by operation of the subassemblies provision, which played no role in the Department's analysis in the Final Scope Ruling. Accordingly, the court's comments as to why it was understandable that Commerce, on the record before it, did not apply the subassemblies provision are *dicta*. Therefore, had Commerce decided to base the *Remand Redetermination* on the subassemblies provision and thereby place the aluminum extrusion component of each Type B handle, and only the aluminum component, within the scope by operation of that provision, the holding in *Meridian I* would not have precluded Commerce from doing so. Instead, Commerce chose to protest the court's holding in *Meridian I* on the ground that its original determination as to the Type B handles was correct because, according to Commerce, each Type B handle as an entirety should have been held by the court to be an "extrusion" within the scope language and not to qualify for any exclusion. *See*, e.g.*, Remand Redetermination* 13 (agreeing with AEFTC that "the Department's underlying scope ruling correctly determined that the Type B Door Handles are covered by the general scope language and are not excluded under either the finished merchandise or finished goods kit exclusions"), 15 (" . . . we respectfully disagree with the Court that Meridian's Type B Door Handles are not covered by the plain language of the scope . . . ."). A determination by Commerce that the subassemblies provision should apply in this case would have been a different determination with a different result, under which only a component of a Type B handle, not the entire handle, could be considered to fall within the scope of the Orders.

3. AEFTC's Comments on the Remand Redetermination

In opposing the Remand Redetermination, AEFTC advances three arguments as to why the court should return the Remand Redetermination to Commerce for reconsideration. All three arguments are thinly disguised attempts to request reconsideration of the court's holding in *Meridian I*. The court declines to reconsider its holding. Even were it to do so, it would conclude that all three arguments AEFTC advances are meritless.

AEFTC argues, first, that Commerce reached a "critical and unsupported conclusion" that the end caps attached to Meridian's Type B handles are not properly classified as fasteners. *AEFTC's Remand Comments* 4. Second, AEFTC raises a related argument that Commerce reached a "critical and unsupported conclusion" that "the general language of the scope does not cover or apply to Meridian's Type B handles." *Id.* Third, AEFTC argues that Commerce erred in declining to analyze the issue of whether the Type B handles qualify under the "finished merchandise" exclusion. *Id.* at 7.

In its argument directed to the plastic end caps, AEFTC essentially is asking the court to reconsider the conclusions the court reached in *Meridian I* pertaining to the interpretive flaws in the Final Scope Ruling that relate to the presence of these plastic components. Submitting that fasteners "serve an attachment function" and that the plastic end caps "serve just such a function, much like a type of nut," *id.* at 5, AEFTC incorrectly states that "Meridian's Type B handles are comprised only of an extruded aluminum handle and fasteners (*i.e.*, plastic end-caps and screws), and so would not qualify for exclusion from the scope," *id.* at 6 (citations omitted). This argument misrepresents the evidentiary record. The uncontested record facts are that two plastic end caps are components of each Type B oven door handle and are specially designed for that purpose. The record evidence refutes any contention that the component fabricated from an aluminum extrusion was designed to serve as the oven door handle by itself. *See Scope Ruling Request* 2 & Attach. 1, "Type B Handles," "Sec. A-A." Regardless of whether the end caps can be said to "serve an attachment function," it was incorrect and misleading for AEFTC to characterize the Type B handle as comprised only of an aluminum extruded *handle* and fasteners. Contrary to AEFTC's characterizations of the record, each Type B handle is an assembly of five components: the middle handle bar (fabricated from an aluminum extrusion), two plastic end caps, and two screws that attach the end caps to the bar. *See id.* The Scope Ruling Request illustrates that the plastic end caps form part of the shape of the handle, creating the

necessary space between the middle bar and the oven door. *See id.* The Scope Ruling Request illustrates further that two additional fasteners are used to attach the assembled handle to the oven door. *See id.* at Attach. 1, "Type B Handles," "Sec. A-A."

AEFTC's second argument, which is that Commerce erred in concluding that the general language of the scope does not include Meridian's Type B handles, is also an implied request for reconsideration of the holding in *Meridian I*. In making this argument, AEFTC relies, again, on a mischaracterization of the Type B handle as "comprised only of an extruded aluminum *handle* and fasteners (*i.e.*, plastic end-caps and screws) . . . ," *AEFTC's Remand Comments* 6 (emphasis added). AEFTC also mischaracterizes the court's opinion in *Meridian I*, asserting incorrectly that "the court specifically recognized that aluminum extrusions containing non-extruded parts are covered under the scope, albeit under the description of subassemblies." *Id.* In *dicta*, the court correctly described the subassemblies provision in narrower terms. *Meridian I*, 39 CIT at __, 125 F. Supp. 3d at 1314. Under the court's analysis of the scope language in *Meridian I*, an "extrusion" is defined in terms describing a single article, not an assembly. The court recognized that the express terms of the subassemblies provision place within the scope only "aluminum extrusion components" contained within a subassembly, not the entire subassembly, and only in the circumstance in which the imported good is "partially assembled merchandise," a circumstance Commerce did not find to exist in this case. *See id.*, 39 CIT at __, 125 F. Supp. 3d at 1313.

AEFTC's final argument is that Commerce impermissibly failed "to pursue whether the handles may have been properly excluded as 'finished merchandise.'" *AEFTC's Remand Comments* 7. According to AEFTC, an "assessment of whether Meridian's Type B handles are excludable as 'finished merchandise'" is "appropriate" because, according to AEFTC, "as Commerce reasonably concluded in its Final Scope Ruling, Meridian's Type B handles are properly considered covered by the general language of the scope, as they match the physical description of the subject merchandise and consist of nothing but extruded aluminum and fasteners." *Id.* (citing *Final Scope Ruling* 12–13). The court held to the contrary in *Meridian I* for the reasons explained in that opinion. Having determined in response (albeit under protest) that the general scope language did not describe the Type B handles, the Department permissibly declined to address the application of the finished merchandise exclusion.

III. CONCLUSION

For the reasons discussed in the foregoing, the court affirms the Department's decision that the Type B handles are not within the scope of the Orders but does not agree with all of the statements in the Remand Redetermination that Commerce offers as an explanation for why it has chosen to reach that decision "under protest." Judgment will enter accordingly.

Dated: July 18, 2016
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU
CHIEF JUDGE

Slip Op. 16–72

CAPELLA SALES & SERVICES LTD. Plaintiff, v. UNITED STATES, Defendant.

Before: Donald C. Pogue,
Senior Judge
Court No. 14–00304

[Action dismissed for failure to state a claim upon which relief can be granted.]

Dated: July 20, 2016

Irene H. Chen, Chen Law Group LLC, of Rockville, MD, and *Mark B. Lehnardt*, Lehnardt & Lehnardt LLC, of Liberty, MO, for the Plaintiff.

Aimee Lee, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for the Defendant. Also on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades*, Assistant Director. Of counsel were *Jessica M. Link*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC, and *Edward N. Mauer*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs & Border Protection, of New York, NY.

OPINION

Pogue, Senior Judge:

In this action, Plaintiff Capella Sales & Services Ltd. ("Plaintiff" or "Capella")[1] challenges the assessment of countervailing duties ("CVD"), at the rate of 374.15 percent ad valorem, on four of its entries of aluminum extrusions from the PRC. The U.S. Department of Commerce ("Defendant" or "Commerce") assessed these duties by

[1] Capella is "an importer of aluminum extrusions" from the People's Republic of China ("PRC"). Am. Compl., ECF No. 32–1, at ¶ 45.

applying the all-others rate calculated in *Aluminum Extrusions from the [PRC]*, 76 Fed. Reg. 18,521 (Dep't Commerce Apr. 4, 2011) (final affirmative countervailing duty determination) ("*Final CVD Determination*"). In levying such duties, Commerce did not impose the (lower) "lawful [all-others] rate" calculated subsequently on remand and redetermination following litigation of the *Final CVD Determination* by parties other than Capella.[2] Am. Compl., ECF No. 32–1, at ¶¶ 50, 52.

Defendant moves to dismiss this action pursuant to USCIT Rule 12(b)(1) for lack of subject matter jurisdiction or, in the alternative, pursuant to USCIT Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Def.'s Mot. to Dismiss & Mot. for Summ. J., ECF No. 40 ("Def.'s Br.").[3]

Because Capella's complaint challenges Commerce's administration and enforcement of a CVD rate, the court has jurisdiction under 28 U.S.C. § 1581(i) (2012). However, because Plaintiff did not participate in, and have liquidation of its entries enjoined pursuant to, the litigation that resulted in the "lawful rate" calculated on remand and redetermination, it cannot claim entitlement to that rate. *See* 19 U.S.C. §§ 1516a(c)(1), 1516a(e) (2012); Am. Compl., ECF No. 32–1, at ¶¶ 7, 10. Plaintiff has, therefore, failed to state a claim upon which relief can be granted. USCIT Rule 12(b)(6). Accordingly, Defendant's motion to dismiss under USCIT Rule 12(b)(6) is granted.

BACKGROUND

This case arises from Commerce's CVD investigation of aluminum extrusions from the PRC. *Aluminum Extrusions from the [PRC]*, 75 Fed. Reg. 22,114 (Dep't Commerce Apr. 27, 2010) (initiation of countervailing duty investigation).[4] After investigation and comment, Commerce made a final affirmative finding and calculated an all-others rate of 374.15 percent ad valorem. *Final CVD Determination*, 76 Fed. Reg. at 18,523.

Following the International Trade Commission's final affirmative finding of injury, Commerce issued a CVD order on aluminum extrusions from the PRC. *Aluminum Extrusions from the [PRC]*, 76 Fed. Reg. 30,653 (Dep't Commerce May 26, 2011) (countervailing duty

[2] *See MacLean-Fogg Co. v. United States*, Consol. Ct. No. 1100209.

[3] Defendant also moves for summary judgment pursuant to USCIT Rule 56. Def.'s Br., ECF No. 40, at 27–35. Because Plaintiff's claim is, as explained below, dismissed pursuant to USCIT Rule 12(b)(6), the court does not reach the issue of whether summary judgment is proper. Similarly, because Plaintiff's complaint is dismissed, Plaintiff's Motion for Summary Judgement, ECF No. 54, and Defendant's Motion to Strike or Alternatively, to Suspend Defendant's Response to Plaintiff's Motion for Summary Judgment, ECF No. 56, are denied as moot.

[4] The period of investigation was January 1, 2009, through December 31, 2009. *Id.* at 22,114.

order) ("*CVD Order*"). Pursuant to this Order, Commerce instructed U.S. Customs and Border Protection ("Customs" or "CBP") to collect cash deposits for non-individually investigated companies at the all-others rate of 374.15 percent ad valorem (the investigation rate). *Id.* at 30,655.

On June 23, 2011, the plaintiffs in *MacLean-Fogg v. United States*, Consol. Ct. No. 11–00209, challenged Commerce's *Final CVD Determination* pursuant to 19 U.S.C. §§ 1516a(a)(2)(A)(i)(II), 1516a(a)(2)(B)(i).[5] The ensuing litigation generated two redeterminations from Commerce[6] and four opinions from this Court[7] – the last one affirming Commerce's calculation of an 137.65 percent ad valorem all-others rate, *MacLean-Fogg Co. v. United States*, 885 F. Supp. 2d at 1339. This Court's fourth opinion was appealed to the Court of Appeals for the Federal Circuit ("CAFC"), which reversed and remanded.[8] The CAFC's decision was followed by two more redeterminations by Commerce[9] and three additional opinions from this Court[10] – the last, issued on October 23, 2015, affirming Commerce's final redetermination. The final, redetermined all-others rate was 7.37 percent ad valorem (the post-*MacLean-Fogg* rate). [Fourth] Results of Redetermination Pursuant to Ct. Remand, Consol. Ct. 11–209, ECF Nos. 124–1 (conf. ver.) & 125–1 (pub. ver.).

While the *MacLean-Fogg* litigation was proceeding, Commerce, on May 1, 2012, published notice of the opportunity for interested parties to request administrative review of the *CVD Order* for entries made between September 7, 2010 and December 31, 2011 (the first

[5] *See* Summons, Consol. Ct. No. 11–209, ECF No. 1; Compl., Consol. Ct. No. 11–209, ECF No. 6; *see also* Order, Consol. Ct. No. 11209 ECF No. 26 (consolidation order). This Court had jurisdiction under 28 U.S.C. § 1581(c). *See MacLean-Fogg Co. v. United States*, __ CIT __, 836 F. Supp. 2d 1367, 1369–70 (Apr. 4, 2012).

[6] [First] Results of Redetermination Pursuant to Ct. Remand, Consol. Ct. No. 11–209, ECF Nos. 62–1 (pub. ver.) & 63 (conf. ver.); [Second] Results of Redetermination Pursuant to Ct. Remand, Consol. Ct. No. 11–209, ECF No. 80–1.

[7] *MacLean-Fogg Co. v. United States*, __ CIT __, 836 F. Supp. 2d 1367, *on reconsideration in part*, __ CIT __, 853 F. Supp. 2d 1253 (2012); *MacLean-Fogg Co. v. United States*, __ CIT __, 853 F. Supp. 2d 1336 (2012); *MacLean-Fogg Co. v. United States*, __CIT __, 885 F. Supp. 2d 1337 (2012).

[8] *MacLean-Fogg Co. v. United States*, 753 F.3d 1237 (Fed. Cir.2014).

[9] [Third] Results of Redetermination Pursuant to Ct. Remand, Consol. Ct. No. 11–209, ECF No. 108–1; [Fourth] Results of Redetermination Pursuant to Ct. Remand, Consol. Ct. No. 11–209 ECF Nos. 124–1 (conf. ver.) & 125–1 (pub. ver.).

[10] *MacLean-Fogg Co. v. United States*, __ CIT __, 32 F. Supp. 3d 1358 (2014); *MacLean-Fogg Co. v. United States*, __ CIT __, 100 F. Supp. 3d 1349 (2015); *MacLean-Fogg Co. v. United States*, __CIT __, 106 F. Supp. 3d 1356 (2015).

period of review). *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 77 Fed. Reg. 25,679, 25,680 (Dep't Commerce May 1, 2012) ("*AR1 Opportunity*"). Commerce indicated that, absent a timely request for review, it would instruct Customs to assess countervailing duties "on those entries [for which review was not requested] at a rate equal to the cash deposit of (or bond for) estimated [] countervailing duties required . . . at the time of entry, or withdrawal from warehouse, for consumption. . . ." *Id*. at 25,681. Commerce subsequently initiated the first administrative review. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 77 Fed. Reg. 40,565, 40,572 (Dep't Commerce July 10, 2012) ("*AR1 Initiation*"). Commerce then issued automatic liquidation instructions for subject entries made during the period of review but for which administrative review had not been requested. CBP Message No. 2209305 (July 27, 2012), *reproduced in* Compl., ECF No. 2–1 at attach. 6.

On December 14, 2012, following this Court's affirmance of Commerce's [Second] Results of Redetermination Pursuant to Court Remand, Consol. Ct. No. 11–209, ECF No. 80–1, *see MacLean-Fogg*, 885 F. Supp. 2d at 1339, but prior to the appeal of the that decision to the CAFC, *see* Notice of Appeal (Jan. 28, 2013), Consol. Ct. No. 11–209, ECF No. 89, Commerce issued a Timken Notice[11] giving effect to the [Second] Results of Redetermination Pursuant to Ct. Remand, Consol. Ct. No. 11–209, ECF No. 80–1, as affirmed in *MacLean-Fogg*, 885 F. Supp. 2d 1337. The *Timken Notice* set the all others cash deposit rate, as it was then calculated pursuant to the litigation, at 137.65 percent ad valorem with an effective date of December 10, 2012. *Timken Notice*, 77 Fed. Reg. at 74,466, 74,466–67. Commerce then instructed Customs to require, for "all others," "a cash deposit equal to the rate" of 137.65 percent ad valorem for "shipments of aluminum extrusions from the [PRC] entered, or withdrawn from warehouse, for consumption on or after December 10, 2012." CBP Message No.

[11] *See Aluminum Extrusions from the [PRC]*, 77 Fed. Reg. 74,466,74,467 (Dep't Commerce Dec. 14, 2012) (notice of court decision not in harmony with final affirmative CVD determination and notice of amended final affirmative CVD determination) ("*Timken Notice*") ("In its decision in [*Timken Co. v. United States*, 893 F.2d 337, 341 (Fed. Cir. 1990)] as clarified by [*Diamond Sawblades Mfrs. Coal. v. United States*, 626 F.3d 1374 (Fed. Cir. 2010)], the CAFC has held that, pursuant to [19 U.S.C.§ 1516a(e)], [Commerce] must publish a notice of a court decision that is not 'in harmony' with a Department determination and must suspend liquidation of entries pending a 'conclusive' court decision. The CIT's November 30, 2012, judgment in [*MacLean-Fogg*, 885 F. Supp. 2d 1337] sustaining the Department's decision to designate the all others rate as equal to the preliminary rate it calculated for the mandatory respondents (137.65 percent ad valorem), constitutes a final decision of that court that is not in harmony with the Department's Final Determination.").

2355304 (Dec. 20, 2012), *reproduced in* Compl., ECF No. 2–1 at attach. 8.

While the *MacLean-Fogg* litigation was still proceeding, on May 1, 2013, Commerce published notice of the opportunity for interested parties to request administrative review of the *CVD Order* for entries made between January 1, 2012 and December 31, 2012 (the second period of review). *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 78 Fed. Reg. 25,423, 25,424 (Dep't Commerce May 1, 2013) ("*AR2 Opportunity*"). Commerce again indicated that, absent a timely request for review, it would instruct Customs to assess countervailing duties "on those entries at a rate equal to the cash deposit of (or bond for) estimated [countervailing duties] required . . . at the time of entry, or withdrawal from warehouse, for consumption and to continue to collect the cash deposit previously ordered." *Id*. at 25,425. Commerce subsequently initiated the second administrative review. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 78 Fed. Reg. 38,924, 38,935 (Dep't Commerce June 28, 2013) ("*AR2 Initiation*"). Commerce then issued automatic liquidation instructions for subject entries made during the period of review for which administrative review had not been requested. CBP Message No. 3197305 (July 16, 2013), *reproduced in* Compl., ECF No. 2–1 at attach. 10.

Meanwhile, seemingly unaware of the various administrative proceedings and litigation surrounding aluminum extrusion from the PRC, Capella made four entries of subject merchandise – two on November 28, 2011, during the first period of review, and two, on March 20 and June 16, 2012, during the second period of review. Am. Compl., ECF No. 32–1, at ¶ 7; CF7501's, *reproduced in* Compl., ECF No. 2–1 at attach. 5; Protest, 4601–14–101149 (July 14, 2014), *reproduced in* Compl., ECF No. 2–1 at attach. 15. Capella mistakenly entered its merchandise as Type 01 (i.e., not subject to AD or CVD duties) rather than Type 03 (i.e., subject to AD or CVD duties). Am. Compl., ECF No. 32–1, at ¶¶ 7, 10.[12]

Capella did not participate in the investigation or the appeal of the *CVD Order*. Am. Compl., ECF No. 32–1, at ¶ 7 ("Capella was unaware of the *CVD Order*."). Nor did Capella participate in the first administrative review of that Order. *Id*. at ¶ 10 ("[Capella] was not aware of," the review and therefore "did not know to request a review"). And,

[12] Capella blames its customs broker for the misclassification, Am. Compl, ECF No. 32–1, at ¶¶ 7, 10, however Capella remains liable for the actions of its broker, *United States v. Fed. Ins. Co*., 805 F.2d 1012, 1013 (Fed. Cir. 1986) ("[A] licensed broker is the agent of the importer, not of the government . . . .").

despite having received, months prior to Commerce's notice of opportunity to request review, direct notice from Customs that its four entries were properly classified as Type 03 and subject to the *CVD Order, id*. at ¶ 15[13]; *see AR2 Opportunity*, 78 Fed. Reg. 25,423 (published May 1, 2013), Capella did not participate in the second administrative review of the *CVD Order*, Am. Compl., ECF No. 32–1, at ¶ 22. Accordingly, Capella's four entries, being covered by the *CVD Order* but not subject to any administrative review or injunction in the pending the *MacLean-Fogg* litigation, were subject to automatic liquidation. *Id*. at ¶¶ 13, 23.[14]

On November 18, 2014, following the CAFC's decision in *MacLean-Fogg*, 753 F.3d 1237, Capella filed a summons and complaint with this Court challenging the CVD rate assessed on its entries, Summons, ECF No. 1; Compl., ECF No. 2. Capella argues that it was "arbitrary, capricious, and [an] abuse of discretion, or otherwise not in accordance with law" for Commerce to have applied the investigation's 374.15 percent ad valorem rate rather than "the lawful rate" subsequently determined through the *MacLean-Fogg* litigation. Am. Compl., ECF No. 32–1, at ¶¶ 50, 52. Specifically, Plaintiff makes two challenges. First, Capella challenges Commerce's December 20, 2012, cash deposit instructions, arguing that Commerce failed to "us[e] its discretion" to apply the "lawful rate" retroactively, rather than only prospectively, to its entries. Am. Compl., ECF No. 32–1, at ¶ 50. Second, Capella challenges Commerce's July 27, 2012 and July 16, 2013 automatic liquidation instructions, again arguing that Commerce failed to "us[e] its discretion" to apply the "lawful rate" and for not ordering liquidation of Plaintiff's entries at the "lawful rate." *Id*. at ¶ 52.

The Defendant's motion to dismiss is now before the court. Def.'s Br., ECF No. 40.

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[13] See also Notices of Action, *reproduced in* Compl., ECF No. 2–1 at attach. 7.

[14] Three of Capella's four entries have already been liquidated. *See* Protest, 4601–14–101149 (July 14, 2014), *reproduced in* Compl., ECF No. 2–1 at attach. 15 (protesting liquidation of the November 28, 2011 and March 20, 2012 entries). The fourth, Capella's June 16, 2012, entry has had liquidation enjoined pending this litigation. Order, Feb. 6, 2015, ECF No. 20(granting consent motion for preliminary injunction).

DISCUSSION

I. Defendant's Motion to Dismiss Pursuant to USCIT Rule 12(b)(1) For Lack of Subject Matter Jurisdiction[15]

Capella claims jurisdiction under 28 U.S.C. §§ 1581(i)(2) and 1581(i)(4), Am. Compl., ECF No. 32–1, at ¶ 33, framing its action as a challenge to Commerce's decision not to apply retroactively to Capella's entries the "lawful rate" calculated pursuant to the *MacLean-Fogg* litigation, *id*. at ¶¶ 50, 52. Defendant argues that the court does not have jurisdiction under § 1581(i) because Plaintiff should have and could have, like the plaintiffs in *MacLean-Fogg*, Consol. Ct. No. 11–209, brought its claim as a challenge to the *Final CVD Determination* pursuant to § 1581(c).[16] Def.'s Br., ECF No. 40, at 16–19.[17]

Defendant correctly notes that this Court, "like all federal courts, is a court of limited jurisdiction." *Sakar Int'l, Inc. v. United States*, 516 F.3d 1340, 1349 (Fed. Cir. 2008) (citation omitted). A plaintiff "invoking that [limited] jurisdiction bears the burden of establishing it." *Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006) (citation omitted).

Moreover, § 1581(i) is a "'residual' grant," *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1371 (Fed. Cir. 2002) (citation omitted), a "'catch all'," which allows this Court to "take jurisdiction over designated causes of action founded on other provisions of law," *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992) (citation omitted). "Section 1581(i) jurisdiction 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." *Miller & Co. v.*

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[15] *See* USCIT R. 12(b)(1) ("[A] party may assert the . . .defense[] of. . . lack of subject matter jurisdiction [bymotion].").

[16] 28 U.S.C. § 1581(c) gives this Court jurisdiction over actions commenced under 19 U.S.C. § 1516a, which includes appeals of Commerce's final determinations in CVD investigations, 19 U.S.C.§ 1516a(a)(2)(B)(i).

[17] Defendant also argues that Plaintiff could and should have sought administrative review of its entries, making jurisdiction under § 1581(i) unavailable. While Plaintiff could have done so and such participation might have altered its CVD rate, this does not affect the jurisdictional analysis here. Plaintiff's claim is a challenge to the application of the CVD investigation rate, not the review rates, to its entries. It is a "fundamental premise of periodic administrative reviews that each 'administrative review is a separate exercise of Commerce's authority that allows for different conclusions based on different facts in the record.'" *Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1357 (Fed. Cir. 2016) (quoting *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378,1387 (Fed. Cir. 2014)).

United States, 824 F.2d 961, 963 (Fed. Cir. 1987).[18] The court's analysis of jurisdiction considers the "substance, not form" of the complaint, to determine the "true nature of the action," *Williams v. Sec'y of Navy*, 787 F.2d 552, 557 (Fed. Cir. 1986) (internal quotation marks and citation omitted),[19] to ensure that the plaintiff does not "expand a court's jurisdiction by creative pleading," *Norsk Hydro*, 472 F.3d at 1355.

Nonetheless, §§ 1581(i)(2) and (4) give this Court "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" the "administration and enforcement" of "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." 28 U.S.C. §§ 1581(i)(2), (4). Because countervailing duties are imposed "for reasons other than the raising of revenue," such as "protect[ing] American industries against unfair trade practices," *see Canadian Wheat Bd. v. United States*, 641 F.3d 1344, 1351 (Fed. Cir. 2011) (citation omitted), if a plaintiff challenges the cash deposit or liquidation instructions "issued by Commerce to implement a final [AD or CVD] order, review is available under 28 U.S.C. §§ 1581(i)(2), (4)," *Belgium v. United States*, 551 F.3d 1339, 1347 (Fed. Cir. 2009) (citation omitted).[20]

Here, Capella challenges Commerce's "decision in the [December 20, 2012 cash deposit instructions] to apply the lawful [cash] deposit rate" only prospectively, for entries made on or after December 10, 2012, "when there was such an extreme disparity between" the 374.15 percent investigation rate and the post-*MacLean-Fogg* rate. Am. Compl., ECF No. 32–1, at ¶ 50. Plaintiff similarly challenges "Commerce's decision in [the July 27, 2012 and July 16, 2013 automatic liquidation instructions] to order liquidation of entries [made] before December 10, 2012" at the 374.15 percent investigation rate

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[18] *See Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289,1292 (Fed. Cir. 2008); *Otter Prods., LLC v. United States*, __CIT __, 37 F. Supp. 3d 1306, 1313 (2014).

[19] *Hartford Fire*, 544 F.3d at 1293 ("Just as we must look to the true nature of the action in a district court in determining jurisdiction on appeal, the trial court was correct to look to the true nature of the action in determining jurisdiction at the outset.").

[20] *See Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002 (Fed. Cir. 2003) ("Commerce's liquidation instructions direct Customs to implement the final results of administrative reviews. Consequently, an action challenging Commerce's liquidation instructions is not a challenge to the final results, but a challenge to the 'administration and enforcement' of those final results. Thus, [plaintiff] challenges the manner in which Commerce administered the final results. Section 1581(i)(4) grants jurisdiction to such an action.").

rather than the "lawful rate," as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id*. at ¶ 52.[21]

Capella thus does not challenge the calculation of the all-others CVD rate itself, but the way Commerce administers and enforces that CVD rate – specifically, Capella seeks a change in who is retroactively entitled to the benefit of the "lawful rate" following redetermination. *See* Am. Compl., ECF No. 32–1, at ¶ 34 ("Capella challenges the failure of Commerce to set the effective date of the amended all-others rate retroactive to [the date of the preliminary determination]").[22] Whether Plaintiff is actually entitled to that "lawful rate" absent participation in the 19 U.S.C. § 1516a(a)(2)(B)(i) challenge that resulted in that redetermined "lawful rate" is another question,[23] as discussed below.

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[21] Defendant argues that Plaintiff's challenge to this first set of liquidation instructions is not timely and therefor should be dismissed. Def.'s Br., ECF No. 40, at 19–20; Def.'s Reply to Pl.'s Opp'n to Def.'s Mot. to Dismiss & Mot. for Summ. J., ECF No. 53, at 12–13.

Actions brought pursuant to 28 U.S.C. § 1581(i) are subject to a two-year statute of limitations. 28 U.S.C. §§ 2636(i),2632(a). While this statute of limitations is not jurisdictional, claims or actions that do not comply are still subject to dismissal. *Ford Motor Co. v. United States*, 811 F.3d 1371, 1376–78 (Fed. Cir. 2016). The statute of limitations begins to run when a cause of action accrues. *Hair v. United States*, 350 F.3d 1253, 1260 (Fed. Cir. 2003). A cause of action accrues "when the aggrieved party reasonably should have known about the existence of the claim." *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 978 (Fed. Cir. 1994) (internal citation and quotation marks omitted). "[A]s a general rule, a § 1581(i) cause of action begins to accrue when a claimant has, or should have had, notice of the final agency act or decision being challenged." *Ford Motor Co. v. United States*, __ CIT __,992 F. Supp. 2d 1346, 1356 (2014) (citation omitted), *aff'd*, 811 F.3d 1371 (Fed. Cir. 2016).

According to its own complaint, Plaintiff had actual notice "on August 11, 2012," via Notice of Action letters sent by Customs, that its entries were to be liquidated pursuant to the automatic liquidation instructions in the first administrative review at the investigation all-others rate, 374.15 percent, not the post-*MacLean-Fogg* rate. Am. Compl., ECF No. 32–1, at ¶ 15 (citing Notices of Action (dated Aug. 1, 2012, Oct. 3, 2012, and Oct. 16, 2012; it is unclear whether "August 11, 2012" is a clerical error) *reproduced in* Compl., ECF No. 2–1 at attach. 7). Plaintiff at that time reasonably should have known that its entries would not be liquidated at the "lawful rate" it now seeks. The November 18, 2014 summons and complaint challenging that liquidation were not filed within the two year period commencing August 1 or August 11, 2012. Plaintiff's claim against the first automatic liquidation instructions is therefore untimely and should be dismissed as such. Further, even if were timely, it would be dismissed, with the rest of Plaintiff's complaint, pursuant to USCIT Rule 12(b)(6). *See infra*.

[22] *See Hutchison Quality Furniture, Inc. v. United States*, Appeal No. 2015–1900 at 8 (Fed. Cir. July 6, 2016) ("Determining the true nature of an action under § 1581 requires us to discern the particular agency action that is the source of the alleged harm so that we may identify which subsection of § 1581 provides the appropriate vehicle for judicial review.").

[23] *Bell v. Hood*, 327 U.S. 678, 682 (1946) ("Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for

As Plaintiff's action is a challenge to the "administration and enforcement" of "[CVD] duties," *see* 28 U.S.C. §§ 1581(i)(2), 1581(i)(4), and "jurisdiction under another subsection of § 1581" is not available, this Court has jurisdiction over Plaintiff's action pursuant to 28 U.S.C. § 1581(i). *Cf. Snap-on, Inc. v. United States*, __ CIT __, 949 F. Supp. 2d 1346, 1352 (2013).

II. Defendant's Motion to Dismiss Pursuant to USCIT Rule 12(b)(6) For Failure to State a Claim[24]

A complaint must be dismissed when it fails to present a "legally cognizable right of action," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)[25] (quotation marks and citation omitted), or does not, through factual allegations, "elevate a claim for relief to the realm of plausibility," *Laguna Hermosa Corp. v. United States*, 671 F.3d 1284, 1288 (Fed. Cir. 2012) (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Twombly*, 550 U.S. at 565–71). In considering a 12(b(6) motion, all the factual allegations in the complaint are taken as true. *Hemi Grp., LLC v. N.Y.C.*, 559 U.S. 1, 5 (2010). If, however, Plaintiff alleges such facts as to defeat its own claim, "pleading itself out of court," *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 458 (6th Cir. 2007), then the complaint must be dismissed.

As noted above, Plaintiff claims that it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"[26] for Commerce to not retroactively apply the post-*MacLean-Fogg* all-others rate (the "lawful rate") to its entries, regardless of its failure to participate in that litigation, because of the "extreme disparity" between the applied all-others rate (374.15 percent ad valorem) and the post-*MacLean-Fogg* all-others rate (137.65 percent at the time of the cash deposit instructions,[27] 7.37 percent at the conclusion of the

want of jurisdiction." (citation omitted)); *Special Commodity Grp. on Non-Rubber Footwear from Brazil, Am. Ass'n of Exps. & Imps. v. Baldridge*, 6 CIT 264, 267, 575 F. Supp. 1288, 1292 (1983) ("Whether or not a complaint states a claim upon which relief may be granted should not be confused with the threshold question of the jurisdiction of the court over the subject matter.").

[24] *See* USCIT R. 12(b)(6) ("[A] party may assert the . . .defense[] [of] . . . failure to state a claim upon which relief can be granted [by motion].").

[25] *See Hutchison Quality Furniture*, Appeal No. 2015–1900 at 10 n. 4 ("[Plaintiff] fails to assert a claim for which relief could be granted because it has not based its claim for relief on a plausible legal theory.").

[26] Where the court has jurisdiction pursuant to 28 U.S.C. §1581(i), it will uphold the agency's determination unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see* 28 U.S.C. §2640(e) (Actions brought under § 1581(i) are reviewed "as provided in [§] 706 of title 5.").

[27] *See Timken Notice*, 77 Fed. Reg. at 74,467.

MacLean-Fogg litigation[28]). Am. Compl., ECF No. 32–1, at ¶¶ 34, 43, 50, 52.

Plaintiff, however, has failed to present a "legally cognizable right of action." *See Twombly*, 550 U.S. at 555 (citation omitted). Specifically, 19 U.S.C. §§ 1516a(c)(1), 1516a(e) expressly and unambiguously instruct Commerce to assess the investigation rate, not the post-*MacLean-Fogg* rate, on Plaintiff's entries.[29] This is true because Plaintiff's entries were made prior to publication of the Timken Notice and liquidation of Plaintiff's entries has not been suspended pursuant to *MacLeanFogg*, Consol. Ct. No. 11–209.

When Commerce issues a CVD order, the statute requires "the posting of a cash deposit, bond, or other security . . . for each entry of the subject merchandise in an amount based on the [applicable] estimated [rate]," here, the all-others rate, as calculated in the precipitating investigation. 19 U.S.C. § 1671d(c)(1)(B)(ii); *see also id*. at § 1671e(a)(3). This estimated rate is called the cash deposit rate.[30] The cash deposit rate is not necessarily the rate at which an entry is or will be liquidated.[31] Rather, "an interested party" who was a "party to [Commerce's investigation]," may appeal the calculation of the cash deposit rate to this Court. 19 U.S.C. § 1516a(a)(2)(A)(ii). If such an appeal results in a revised rate, then those entries for which liquidation is enjoined pursuant to that appeal will be liquidated at the revised rate. *Id.* at § 1516a(e)(2). This is what the plaintiffs in

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[28] *See* [Fourth] Results of Redetermination Pursuant to Ct. Remand, Consol. Ct. No. 11–209, ECF Nos. 124–1 (conf. ver.) &125–1 (pub. ver.).

[29] *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1307–08 (Fed. Cir. 2004) ("Thus, under [19 U.S.C. § 1516a]'s parallel liquidation and injunction provisions, subject merchandise that is entered prior to publication of the final decision of the Court of International Trade or [the CAFC] is liquidated as entered unless liquidation is enjoined. In contrast-,merchandise entered after the final decision of the Court of International Trade or [the CAFC] must be liquidated in accordance with that final decision." (citing 19 U.S.C. §§1516a(c), 1516a(e))).

[30] *See Decca Hosp. Furnishings, LLC v. United States*, 30 CIT 357,358, 427 F. Supp. 2d 1249, 1251 (2006) ("As mentioned, the cash deposit rate is merely an estimate of the eventual liability importers subject to an antidumping duty order will bear. Because the rate established by the final determination is based on past conduct, i.e., conduct occurring before the final determination, interested parties to an antidumping duty proceeding may ask Commerce to annually review the antidumping duty order in light of an importer's current practices.").

[31] *See Sioux Honey Ass'n v. Hartford Fire Ins. Co*., 672 F.3d 1041, 1047 (Fed. Cir. 2012) ("[T]he cash deposits collected upon entry are considered estimates of the duties that the importer will ultimately have to pay as opposed to payments of the actual duties.").

MacLean-Fogg, Consol. Ct. No. 11–209 accomplished for their covered entries.[32]

"Unless [] liquidation is enjoined by the court [in a pending appeal], entries of merchandise of the character covered by [Commerce's appealed] determination" entered "on or before the date of publication in the Federal Register by [Commerce] of a [Timken Notice]," are "liquidated in accordance with [Commerce's original] determination." 19 U.S.C. § 1516a(c)(1). Those entries for which "liquidation . . . was enjoined" or that were made "after the date of publication in the Federal Register" of the Timken Notice, are "liquidated in accordance with the final court decision in the action." *Id.* at § 1516a(e).[33] But entries made prior to the Timken Notice and for which liquidation has not been enjoined are subject to Commerce's original determination. This cash deposit turned liquidation rate persists unless administrative review is requested. 19 U.S.C. §§ 1675(a)(1), 1675(a)(2)(C).[34]

An interested party may challenge the cash deposit rate by requesting Commerce conduct an administrative review of its entries that were subject to that cash deposit rate – to calculate the actual rate. 19 U.S.C. § 1675(a)(1). But a review must be requested. *Id*.[35] If it is not, entries are liquidated at the cash deposit rate. *Mitsubishi*, 44 F.3d at 976–77.[36] The final determination in an administrative review is "the basis for the assessment of countervailing [] duties on entries of merchandise covered by the determination and for deposits of estimated duties," the cash deposit rate, for entries made by the party thereafter. 19 U.S.C. § 1675(a)(2)(C).

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[32] *See MacLean-Fogg*, 106 F. Supp. 3d at 1357 (ordering that "any entries covered by Section 516A(e)(1) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(e)(1) (2012), are to be liquidated in accordance with this judgment").

[33] *See Snap-on*, __ CIT __, 949 F. Supp. 2d at 1354.

[34] *See Consol. Bearings*, 348 F.3d at 1005–06 ("If the review did not examine a particular importer's transaction, then that importer's entries enjoy no statutory entitlement to the rates established by the review."); *Mitsubishi*, 44 F.3d at 976–77 ("If an interested party wants Commerce to assess duties at the actual, rather than the estimated, rate of dumping, it may request administrative review of the duties under [19 U.S.C. §1675]. If no party makes such a request, Commerce instructs Customs automatically to assess duties at the estimated rate.").

[35] *See Asociacion Colombiana de Exportadores de Flores v. United States*, 916 F.2d 1571, 1576 (Fed. Cir. 1990).

[36] *See also J.S. Stone, Inc. v. United States*, 27 CIT 1688,1698–99, 297 F. Supp. 2d 1333, 1344 (2003), *aff'd*, 111 F. App'x 611 (Fed. Cir. 2004) ("Normally, the only means an interested party has of ensuring that it receives the actual antidumping duty rate is through participation in the antidumping review. .. . If an importer decides not to participate in an administrative review, it bears the risk that Commerce may err in calculating the dumping margin.").

Plaintiff, by its own admission in its complaint, did not participate in the litigation challenging the *Final CVD Determination* rate, *MacLean-Fogg*, Consol. Ct. No. 11–209; liquidation of its entries was never enjoined pursuant to that litigation. Am. Compl., ECF No. 32–1, at ¶ 7.[37] Further, and again by Plaintiff's own admission in its complaint, Plaintiff did not participate in either administrative review relevant to its entries. Am. Compl., ECF No. 32–1, at ¶¶ 10, 22. Plaintiff has thereby "plead [it]self out of court by alleging facts that show there is no viable claim." *Pugh v. Tribune Co*., 521 F.3d 686, 699 (7th Cir. 2008) (citation omitted). Specifically, by the plain statutory language "entries of merchandise of the character covered by" the *Final CVD Determination*, entered "on or before the date of publication in the Federal Register" of the *Timken Notice*, for which "liquidation [has not been] enjoined" in the appeal of the *Final CVD Determination, MacLean-Fogg*, Consol Ct. No. 11–209, must be "liquidated in accordance with the [*Final CVD Determination*]," 19 U.S.C. §§ 1516a(c)(1), 1516a(e),[38] absent a request for administrative review, 19 U.S.C. §§ 1675(a)(1), 1675(a)(2)(C). All of Plaintiff's entries at issue here were made prior to the *Timken Notice, see Timken Notice*, 77 Fed. Reg. 74,466; CF-7501's, *reproduced in* Compl., ECF No. 2–1 at attach. 5; Protest, 4601–14–101149 (July 14, 2014), *reproduced in* Compl., ECF No. 2–1 at attach. 15, and their liquidation was not enjoined pursuant to the *MacLean-Fogg* litigation, *see* Am. Compl., ECF No. 32–1, at ¶ 7. Plaintiff did not seek administrative review of its entries. *Id*. at ¶¶ 10, 22. Accordingly, the only lawful rate for Plaintiff's entries, the rate required by statute, is the rate as calculated in the *Final CVD Determination*, 374.15 percent ad valorem. *See* 19 U.S.C. §§ 1516a(c)(1), 1516a(e), 1675(a)(1), 1675(a)(2)(C).

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[37] Plaintiff asserts that it did not know about the *Final CVD Determination, CVD Order*, and subsequent first review because its customs broker did not advise it of such. Am. Compl, ECF No. 32–1, at ¶¶ 7, 10. However, publication in the Federal Register of the *Final CVD Determination, CVD Order* and opportunity for administrative review, *see CVD Order*, 76 Fed. Reg. 30,653; *AR1 Opportunity*, 77 Fed. Reg. 25,679; *AR2 Opportunity*, 78 Fed. Reg. 25,423, is "sufficient to give notice of the contents of the document to a person subject to or affected by it," 44 U.S.C. § 1507, such as Capella, *see Deseado Int'l, Ltd. v. United States*, 600 F.3d 1377, 1380 (Fed. Cir. 2010); *Stearn v. Dep't of Navy*, 280 F.3d 1376, 1384–85 (Fed. Cir. 2002); *Royal United Corp. v. United States*, 34 CIT 756,767–68, 714 F. Supp. 2d 1307, 1318 (2010).

[38] *See Asociacion Colombiana*, 916 F.2d at 1577 ("We do not question the authority of the Administration, pursuant to its regulation, to liquidate entries for an annual review period at the rate set in the original antidumping duty order when there has been no challenge to the validity of that order and no request for an annual review."); *Snap-on*, 949 F. Supp. 2d at 1354.

"Congress has directly spoken to the precise question at issue," *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 842 (1984), and Commerce, having complied with that directive for Plaintiff's entries, has made a determination in accordance with law, that is neither arbitrary and capricious[39] nor an abuse of discretion.[40] Plaintiff has "not based its claim for relief on a plausible legal theory." *Hutchison*, Appeal No. 2015–1900 at 10 n. 4. Its complaint must be dismissed for failure to state a claim upon which relief can be granted. USCIT Rule 12(b)(6).

CONCLUSION

Because Plaintiff did not participate in the *MacLean-Fogg* litigation, and did not have liquidation of entries enjoined pursuant thereto, it cannot, claim entitlement to the rate as calculated therein on remand and redetermination. Am. Compl., ECF No. 32–1, at ¶ 7; *see* 19 U.S.C. §§ 1516a(c)(1), 1516a(e)(2). As such, Plaintiff has failed to state a claim upon which relief can be granted; Defendant's motion to dismiss under USCIT Rule 12(b)(6) is therefore granted. Judgment will be entered accordingly.

Dated: July 20, 2016
New York, NY

/s/ Donald C. Pogue
DONALD C. POGUE, SENIOR JUDGE

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[39] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins*. Co., 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

[40] *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed.Cir. 2005) ("An abuse of discretion occurs where the decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represents an unreasonable judgment in weighing relevant factors." (citation omitted)).