U.S. Court of International Trade

Slip Op. 16–93

SUNPREME INC., Plaintiff, v. UNITED STATES, Defendant, and SOLARWORLD AMERICAS, INC., Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Court No. 16–00171
PUBLIC VERSION

[Denying Plaintiff's motion for a preliminary injunction in part and granting in part.]

Dated: October 5, 2016

John Marshall Gurley, Diana Dimitriuc-Quaia, and *Nancy Aileen Noonan*, Arent Fox LLP, of Washington, DC, for plaintiff.

Justin Reinhart Miller, Senior Trial Counsel, International Trade Field Office, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With him on the brief were *Tara Kathleen Hogan*, Senior Trial Counsel, U.S. Department of Justice, Commercial Litigation Branch – Civil Division, of Washington, DC, *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and Reginald T. Blades, Assistant Director. Of counsel on the brief was *Rebecca Cantu*, Senior Counsel, Office of the Chief Counsel for Enforcement and Compliance, U.S. Department of Commerce of Washington, DC.

Timothy C. Brightbill and *Maureen Elizabeth Thorson*, Wiley Rein LLP, of Washington DC, for defendant-intervenor.

OPINION AND ORDER

Kelly, Judge:

This matter is before the court on Plaintiff's motion, pursuant to USCIT Rule 65(a), for a preliminary injunction ("PI") seeking to enjoin Defendant, together with its delegates, officers, agents, servants and employees of the United States Customs and Border Protection ("Customs" or "CBP") from requiring it to pay cash deposits and enter its solar modules as subject to antidumping and countervailing duty orders on crystalline silicon photovoltaic ("CSPV") cells from the People's Republic of China after the U.S. Department of Commerce ("Commerce") issued a scope ruling to the effect that Plaintiff's merchandise falls within the scope of those orders. *See* Pl.'s Mot. Prelim. Inj. and Mem. P. & A. Supp. Thereof Confidential Version,

Sept. 8, 2016, ECF. No. 20 ("PI Mot."); *see also Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People's Republic of China*, 77 Fed. Reg. 73,017 (Dep't Commerce Dec. 7, 2012) (countervailing duty order) ("*CVD Order*"); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People's Republic of China*, 77 Fed. Reg. 73,018 (Dep't Commerce Dec. 7, 2012) (amended final determination of sales at less than fair value and antidumping duty order) ("*AD Order*"); Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Ruling in the Sunpreme Scope Inquiry, Sept. 14, 2016, ECF No. 28–4 ("Final Scope Ruling"). Additionally, Plaintiff avers that Commerce lacked authority to issue instructions to CBP that permit the collection of cash deposits and suspension of liquidation on entries entered prior to the initiation of the scope inquiry and that Commerce's instructions to CBP are otherwise contrary to law. PI Mot. 46–47; *see also* Sunpreme Corrected Customs Instructions, AD PD 75, bar code 3505144–01 (Sept. 12, 2016); Sunpreme Corrected Customs Instructions, CVD PD 81, bar code 3505147–01 (Sept. 12, 2016).[1] Therefore, even if the court allows the collection of cash deposits on entries after the initiation of the scope inquiry to continue, Plaintiff requests an injunction to prevent CBP from collecting cash deposits and suspending liquidation on entries entered or withdrawn from warehouse prior to the initiation of the scope inquiry. *See* PI Mot. 46–47. Plaintiff brought the underlying action to challenge Commerce's determination that Plaintiff's solar modules are subject to antidumping and countervailing duty orders covering certain crystalline silicon photovoltaic cells, whether or not assembled into modules, from the People's Republic of China (collectively "Orders"). *See* Compl., Aug. 26, 2016, ECF No. 2; *see also* Final Scope Ruling; *CVD Order*, 77 Fed. Reg. 73,017; *AD Order*, 77 Fed. Reg. 73,018.

On September 9, 2016, Plaintiff requested expedited briefing on its motion for a PI. *See* Req. for Order to Show Cause Why Time to Respond to Pl.'s Mot. Prelim. Inj. Should Not Be Shortened, Sept. 9, 2016, ECF No. 23. After a telephone conference held the same day, *see* Teleconference, Sept. 9, 2016, ECF No. 24, the court granted Plaintiff's request for expedited briefing. *See* Order, Sept. 9, 2016, ECF No. 25. On September 23, 2016, Defendant and Defendant-Intervenor filed response briefs opposing Plaintiff's motion.[2] *See* Def.'s Mem. Resp. Pl.'s Mot. Prelim. Inj. Confidential Version, Sept. 23, 2016, ECF No. 33 ("Def.'s Resp. Br."); Def.-Intervenor SolarWorld Americas,

[1] On September 14, 2016, Commerce submitted indices to the confidential and public administrative records for its antidumping and countervailing duty scope proceedings. Those administrative records can be found at ECF Nos. 28–2 and 28–3, respectively. All further documents from the administrative records may be located in those appendices.

[2] On September 8, 2016, the court granted Defendant-Intervenor's consent motion to intervene as of right pursuant to USCIT Rule 24(a). *See* Order, Sept. 8, 2016, ECF No. 18; Consent Mot. Intervene as a Matter of Right, Sept. 7, 2016, ECF No. 13.

Inc.'s Opp'n Pl. Sunpreme Inc.'s Mot. Prelim. Inj. Confidential Version, Sept. 23, 2016, ECF No. 36 ("SolarWorld Br."). On September 28, 2016, Plaintiff filed a motion for leave to file a reply brief to the responses of Defendant and Defendant-Intervenor. *See* Pl.'s Mot. For Leave To File A Reply To Resps. of United States & SolarWorld Americas Inc. To Pl.'s Mot. Prelim. Inj., Sept. 28, 2016, ECF No. 50. Briefing on the motion concluded on September, 29, 2016 when the court granted Plaintiff's motion. *See* Order, Sept. 29, 2016, ECF No. 52; *see also* Pl.'s Reply to Resps. of Def. United States & SolarWorld Americas Inc. to Pl.'s Mot. Prelim. Inj. Confidential Version, Sept. 29, 2016, ECF No. 53 ("Sunpreme Reply Br.").

For the reasons that follow, the court denies Plaintiff's motion to enjoin Commerce from requiring it to pay cash deposits and enter its solar modules as subject to the antidumping and countervailing duty orders on entries entered or withdrawn from warehouse on or after the initiation of the scope inquiry. However, the court enjoins Commerce from ordering CBP to collect and CBP from collecting cash deposits on entries entered or withdrawn from warehouse prior to the initiation of the scope inquiry.

BACKGROUND

Plaintiff, Sunpreme Inc. ("Sunpreme"), is a U.S.-based importer of solar modules manufactured in the People's Republic of China. PI Mot. 7; *see also* Compl. ¶6. Plaintiff describes its solar modules as containing bi-facial solar cells with "an innovative thin film technology, the Hybrid Cell Technology, developed and owned by Sunpreme." Compl. ¶22; PI Mot. 7. Plaintiff alleges that it manufactures its cells at its facility in Jiaxing, China. Compl. ¶20; PI Mot. 7. Plaintiff avers that all of its solar modules that are the subject of the Final Scope Ruling

> consist of solar cells made with amorphous silicon thin films and are certified by an [industry certification body] as thin film modules under the international standard IEC 61646: 2008 which covers "Thin film terrestrial photovoltaic (PV) modules. Design qualification and type approval."

Compl. ¶21; PI Mot. 7. Plaintiff alleges that its cells are "made of several layers of amorphous silicon less than one micron in thickness, deposited on both sides of a substrate consisting of a crystalline silicon wafer." Compl. ¶23; PI Mot. 7.

Plaintiff alleges its cells have a p-i-n junction consisting of "thin film p-i-(wafer substrate)-i-n junctions, formed by four amorphous silicon thin film depositions." Compl. ¶24; PI Mot. 8—9. Plaintiff asserts that "the junction is made by the layers of p/i and i/n amorphous silicon on both the front and the back of the substrate, such

that the junction is formed on the wafer and inside the thin film layers." Compl. ¶25; PI Mot. 9. Plaintiff claims it uses a

> blank crystalline silicon wafer as a substrate for the thin films in order to improve the mechanical reliability of the modules. That wafer is not processed by doping, does not contain a p/n junction, nor is it otherwise processed to become a[ ] CSPV cell. Without the amorphous silicon layers, the substrate is a blank silicon wafer, not a CSPV cell.

Compl. ¶26; PI Mot. 9.

On December 7, 2012, Commerce published the Orders. *See CVD Order*, 77 Fed. Reg. at 73,017; *AD Order*, 77 Fed. Reg. at 73,018. The scope language of the Orders is identical and provides:

> The merchandise covered by this order is crystalline silicon photovoltaic cells, and modules, laminates, and panels, consisting of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including, but not limited to, modules, laminates, panels and building integrated materials.
>
> This order covers crystalline silicon photovoltaic cells of thickness equal to or greater than 20 micrometers, having a p/n junction formed by any means, whether or not the cell has undergone other processing, including, but not limited to, cleaning, etching, coating, and/or addition of materials (including, but not limited to, metallization and conductor patterns) to collect and forward the electricity that is generated by the cell.
>
> Excluded from the scope of this order are thin film photovoltaic products produced from amorphous silicon (a-Si), cadmium telluride (CdTe), or copper indium gallium selenide (CIGS).

CVD Order, 77 Fed. Reg. at 73,017; *AD Order*, 77 Fed. Reg. at 73,018.

On December 11, 2012, Commerce notified Customs of the *CVD Order* and instructed Customs, effective December 6, 2012, to require cash deposits equal to the subsidy rates in effect at the time of entry. *See* Pl.'s Mot. Prelim. Inj. and Mem. P. & A. Supp. Thereof Confidential Version Att. 1 at Ex. 7, Sept. 8, 2016, ECF No. 20–1 ("Exs. Pl Mot."). On December 21, 2012, Commerce notified Customs of the *AD Order* and instructed Customs, effective December 7, 2012, to require a cash deposit or the posting of a bond equal to the dumping margins in effect at the time of entry. *See* Exs. Pl Mot. Att. 1 at Ex. 6. The messages to Customs contain, respectively, the antidumping duty and countervailing rates applicable to Plaintiff's entries. *See* Exs. Pl Mot.

Att. 1 at Exs. 6, 7. Those rates are 13.94% and 15.24%, respectively. *See* Exs. Pl Mot. Att. 1 at Exs. 6, 7.

It is undisputed that Plaintiff had been filing its entries as type "01" ordinary consumption entries without depositing antidumping or countervailing duties prior to April 2015. *See* Def.'s Resp. Br. 4; *see also Sunpreme Inc. v. United States*, 40 CIT __, __, 145 F. Supp. 3d 1271, 1279 (2016). CBP instructed Plaintiff to file its entries as type "03," the type of entries subject to antidumping and countervailing duties. *See* Def.'s Resp. Br. 4; *see also Sunpreme*, 40 CIT at __, 145 F. Supp. 3d at 1279. Although Plaintiff ultimately challenged CBP's action as contrary to law, Plaintiff complied with CBP's instructions. *See* PI Mot. 12; *see also Sunpreme*, 40 CIT at __, 145 F. Supp. 3d at 1280. This resulted in the suspension of liquidation and the collection of cash deposits. *See* 19 C.F.R. § 144.38(d)–(e) (2015);[3] *see also* Sections 484 and 592 of the Tariff Act of 1930,[4] as amended, 19 U.S.C. §§ 1484, 1592; *Sunpreme*, 40 CIT at __, 145 F. Supp. 3d at 1292. Plaintiff challenged CBP's determination to collect cash deposits prior to the initiation of a scope inquiry as in excess of its statutory authority in a separate action.[5] *See Sunpreme*, 40 CIT at __, 145 F. Supp. 3d at 1271. In that separate action, the court issued a temporary restraining order, *see id.*, and then a preliminary injunction halting CBP's collection of cash deposits on its entries.[6] *Id.*, 40 CIT at __, 145 F. Supp. 3d at 1298–99.

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[3] Further citations to the Code of Federal Regulations are to the 2015 edition.

[4] Further citations to the Tariff Act of 1930, as amended, are to the relevant provision of the U.S. Code, 2012 edition.

[5] Plaintiff challenged as ultra vires CBP's determination requiring it to enter its merchandise as subject to the Orders, which had the following consequences for Plaintiff's entries: (1) CBP required Plaintiff to enter its goods as type "03" entries, the type required for goods subject to AD and CVD orders; (2) CBP collected cash deposits; and (3) CBP suspended liquidation. *See Sunpreme*, 40 CIT at __, 145 F. Supp. 3d at 1280 n. 4, 1281.

[6] The preliminary injunction issued by the court

> expire[d] upon the earlier of: (1) the entry of a final and conclusive court decision in this matter; or (2) Commerce's issuance of a preliminary or final scope determination to the effect that entries of solar modules containing bi-facial thin film cells made with amorphous silicon from the People's Republic of China that are the subject of this action are included within the scope of *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People's Republic of China*, 77 Fed. Reg. 73,018 (Dep't Commerce Dec. 7, 2012) (amended final determination of sales at less than fair value, and antidumping duty order) and *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People's Republic of China*, 77 Fed. Reg. 73,017 (Dep't Commerce Dec. 7, 2012) (countervailing duty order).

Sunpreme, 40 CIT at __, 145 F. Supp. 3d at 1299.

While the preliminary injunction remained in effect, Plaintiff was importing its merchandise without posting cash deposits for antidumping duties and countervailing duties. Plaintiff acknowledges that the preliminary injunction "provided some relief to Sunpreme and allowed it to continue to do business." PI Mot. 4. However, the preliminary injunction, by its terms, expired on July 29, 2016, when Commerce issued its Final Scope Ruling to the effect that Plaintiff's goods are subject to the Orders. *See Sunpreme*, 40 CIT at __, 145 F. Supp. 3d at 1299; *see also* Final Scope Ruling at 19.

On November 16, 2015, Plaintiff filed an application for a scope ruling pursuant to 19 C.F.R. § 351.225(c), requesting that Commerce find Plaintiff's solar modules outside the scope of the Orders. *See* Sunpreme Scope Ruling Request, AD PD 1–6, bar codes 3417556–01–06 (Nov. 16, 2015); Sunpreme Scope Ruling Request, CVD PD 1–6, bar codes 3417582–01–06 (Nov. 16, 2015). Plaintiff alleges it requested that Commerce issue a scope ruling on an expedited basis due to financial difficulties the company was experiencing.[7] Compl. ¶28; PI Mot. 10. On December 30, 2015, Commerce initiated a formal scope inquiry pursuant to 19 C.F.R. § 351.225(e). *See* Scope Inquiry Initiation on Photovoltaic Modules Imported by Sunpreme, AD PD 9, bar code 3428728–01 (Dec. 30, 2015); Scope Inquiry Initiation on Photovoltaic Modules Imported by Sunpreme, CVD PD 15, bar code 3428730–01 (Dec. 30, 2015).

On June 17, 2016, Commerce placed a final ruling in a scope inquiry involving the applicability of the Orders to Triex photovoltaic cells manufactured by Silevo, Inc. on the record of this scope proceeding. *See* Memo re: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People's Republic of China: Request for Additional Factual Information and Comments in Sunpreme Scope Inquiry at Att., AD PD 29, bar code 3479321–01 (June 17, 2016); Memo re: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People's Republic of China: Request for Additional Factual Information and Comments in Sunpreme Scope Inquiry at Att., CVD PD 35, bar code 3479320–01 (June 17, 2016) (collectively "Triex Scope Ruling"). In that determination, Commerce found the Triex solar cell to be covered by the scope of the Orders. *See id.* Commerce invited interested parties to submit additional factual information and comments to distinguish the relevant Sunpreme product from the Triex product. Memo re: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People's Republic of China: Request for Additional Factual Information and Comments in Sunpreme Scope Inquiry at 1, AD PD 29, bar code 3479321–01 (June 17, 2016); Memo re: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People's Republic of China: Request for Additional Factual Information and Comments in Sunpreme Scope Inquiry at 1, CVD PD 35, bar code 3479320–01 (June 17, 2016)

In its Final Scope Ruling, Commerce determined that Plaintiff's solar modules fall within the scope of the Orders based on the language of the Orders and the criteria in 19 C.F.R. § 351.225(k)(1). Final Scope Ruling at 19. On August 1, 2016, Commerce notified CBP that Plaintiff's merchandise was within the scope of the Orders and in-

[7] Plaintiff alleges these financial difficulties are being caused by the cash deposit requirement, which Plaintiff contends is causing its [[
]] and threatening Sunpreme's [[ ]]. *See* PI Mot. 4.

structed Customs to "[c]ontinue to suspend liquidation of entries of solar cells from the PRC, including the bifacial solar products imported by Sunpreme . . . subject to the antidumping [and countervailing] duty order[s] on solar cells from the PRC." Sunpreme Customs Instructions, PD 74, bar code 3505143–01 (Sept. 12, 2016); Sunpreme Customs Instructions, PD 80, bar code 3505146–01 (Sept. 12, 2016). On September 2, 2016, Commerce issued messages to Customs correcting its prior instructions regarding suspension of liquidation. The corrected messages instruct Commerce to

> [c]ontinue to suspend liquidation of entries of merchandise subject to the antidumping [and countervailing] duty order[s] on solar cells from the PRC. Accordingly, because the bifacial solar products imported by Sunpreme, described above, are subject to the antidumping [and countervailing] duty order[s] on solar cells from the PRC, for entries of such merchandise that are currently suspended from liquidation, continue to suspend those entries from liquidation. For entries of bifacial solar products imported by Sunpreme, described above, that are not already suspended from liquidation, begin suspension and collect cash deposits at the applicable rate for entries that entered or were withdrawn from warehouse for consumption on or after 12/30/2015.

Corrected Sunpreme Customs Instructions, AD PD 75, bar code 3505144–01 (Sept. 12, 2016); Corrected Sunpreme Customs Instructions, CVD PD 81, bar code 3505147–01 (Sept. 12, 2016).

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a (a)(2)(B)(vi) and 28 U.S.C. § 1581(c) (2012).

A preliminary injunction is an extraordinary form of equitable relief that is only appropriate where the moving party establishes that: (1) it will suffer irreparable harm absent the requested relief; (2) it is likely to succeed on the merits of its underlying claim; (3) the balance of hardships favors the movant; and (4) the public interest would be better served by granting the relief. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citations omitted); *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983) (citations omitted). While "'no one factor, taken individually, is necessarily dispositive,'" *Ugine & Alz Belg. v. United States*, 452 F.3d 1289, 1292–93 (Fed. Cir. 2006) (quoting *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993)), "irrespective of relative or public harms, a movant must establish both a likelihood of success on the merits *and*

irreparable harm." *Reebok Int'l Ltd. v. J. Baker, Inc.*, 32 F.3d 1552, 1556 (Fed. Cir. 1994). "If a preliminary injunction is granted by the trial court, the weakness of the showing regarding one factor may be overborne by the strength of the others." *FMC Corp.*, 3 F.3d at 427.

Therefore, "'the more the balance of irreparable harm inclines in the plaintiff's favor, the smaller the likelihood of prevailing on the merits he need show in order to get the injunction.'" *Qingdao Taifa Grp. Co. v. United States*, 581 F.3d 1375, 1378—79 (Fed. Cir. 2009) (quoting *Kowalski v. Chi. Tribune Co.*, 854 F.2d 168, 170 (7th Cir. 1988)). That said, "a showing on one preliminary injunction factor does not warrant injunctive relief in light of a weak showing on other factors." *Wind Tower Trade Coalition v. United States*, 741 F.3d 89, 100 (Fed. Cir. 2014) (citing *Winter*, 555 U.S. at 22).

DISCUSSION

I. Irreparable Harm

A plaintiff seeking a preliminary injunction must demonstrate that irreparable injury is likely in the absence of the injunction. *Winter*, 555 U.S. at 22. Harm is irreparable when "no damages payment, however great," could address it. *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012). In addition to alleging that the injury is irreparable, Plaintiff must demonstrate the injury is immediate. *See Zenith*, 710 F.2d at 809. However, the injury complained of need not have been inflicted when the application is made, or be certain to occur. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (holding that the movant must show a "cognizable danger of recurrent violation, something more than a mere possibility which serves to keep the case alive"). Therefore, to evaluate whether the harm is sufficient to warrant the requested relief, the court analyzes the magnitude of the injury, the immediacy of the injury, and the inadequacy of future corrective relief.

Generally, an allegation of financial loss alone, however substantial, which is compensable with monetary damages, is not irreparable harm if such corrective relief will be available at a later date. *See Sampson v. Murray*, 415 U.S. 61, 90, 94 (1974). Nonetheless, irreparable harm may take the form of "[p]rice erosion, loss of goodwill, damage to reputation, and loss of business opportunities." *Celsis In Vitro*, 664 F.3d at 930 (citing *Abbott Labs. v. Sandoz, Inc.*, 544 F.3d 1341, 1362 (Fed. Cir. 2008)). Bankruptcy or substantial loss of business is sufficiently grave and irreparable to demonstrate the inadequacy of corrective relief because, in addition to the obvious economic injury, loss of business renders a final judgment ineffective, depriving the movant of meaningful judicial review. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975); *McAfee v. United States*, 3 CIT 20, 24, 531 F. Supp. 177, 179 (1982).

Here, Plaintiff has demonstrated in the form of an affidavit from a key executive with knowledge of its financial position as well as financial documentation that it is likely to suffer grave, immediate, and irreparable harm if an injunction is not granted.[8] Exs. Pl Mot. at Ex. 9. Plaintiff has also demonstrated the immediacy of the potential harm through the seriousness of its [[

]][9] *See Id*. at Ex. 9.

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[8] Plaintiff has submitted an affidavit supporting its claims that continuing to post cash deposits during the pendency of its challenge to Commerce's scope determination would [[ ]] because it would [[ ]] and [[ ]]. *See* Exs. Pl Mot. at Ex. 9. The Sunpreme executive's affidavit includes a chart documenting that the company's [[

]]. *Id.*Ex. 9 at ¶¶9–10. In fact, the affidavit indicates that, as of July 31, 2016, the company [[ ]]. *Id.*at ¶10. Sunpreme has also included bank statements, audited financial statements for 2013–2014 and 2014–2015, unaudited financial statements for 2016, the company's 2014 U.S. tax return and correspondence with [[ ]]. *See id.*Ex. 10–14. Sunpreme points to [[ ]] as well as a [[ ]] and its inability to [[ ]] as raising serious doubts about [[ ]] *Id*. Ex. 9 at ¶12. Sunpreme alleges that sales of solar modules to the United States represented [[ ]]% of its revenue in 2015 and [[ ]]% of its 2016 revenue year-to-date. *See id.* Ex. 9 at ¶16. Therefore, Sunpreme has provided documentary support for its allegations that it is likely that: (1) it lacks [[ ]]; and (2) its non-U.S. markets [[ ]] while the scope issue is adjudicated. *Id.* Moreover, Sunpreme alleges that it [[ ]]. *Id.* Ex. 9 at ¶21. Sunpreme has also demonstrated that it would suffer a loss of goodwill, damage to its reputation, and substantial loss of business opportunities if it is [[ ]] solar modules to customers in the United States. *Id.* Ex. 9 at ¶21. It is unlikely customers [[ ]] if the company cannot [[ ]]. Sunpreme also references the [[ ]] between November 13, 2015 and March 31, 2016. *Id.* Ex. 9 at ¶26.

[9] Although Defendant-Intervenor questions the sufficiency of the evidence submitted by Plaintiff to support its allegation that it [[ ]], Defendant-Intervenor's points serve to undercut the immediacy of the harm, not its magnitude or the inadequacy of future corrective relief. For example, Defendant-Intervenor highlights that Sunpreme does not mention that it recently received a $5 million "SunShot" award from the U.S. Department of Energy, SolarWorld Resp. Br. 5 (citing *id.* at Ex. 2), or that it secured additional financing in 2016, including [[ ]]. *Id.* at 8 (citing Pl.'s Supp. Exs. Ex. 11 at 47). Plaintiff responds that it did not receive the "SunShot" award until September 14, 2016, seven days after it filed its motion for a PI. Sunpreme Reply Br. 2. Plaintiff also contends that the parameters of the "SunShot" award do not provide Plaintiff any relief from its financial situation because the terms of the award require it to initially cover the costs of research projects, and the contract does not allow for any profit and forbids the company from using the award for its general business operations. *See id.* (citing *id*. at Ex. 2).

Given the volume and value of Plaintiff's anticipated imports, which it estimates at approximately [[ ]] through the end of 2016, *see* Exs. Pl Mot. Ex. 9 at ¶16, the size of the anticipated antidumping and countervailing duty cash deposits it would be forced to post (*i.e.*, 13.94% ad valorem and 15.24% ad valorem, respectively), and the company's account of its [[ ]] circumstances, *see id.* Ex. 9 at ¶12, Defendant-Intervenor's speculation that the "SunShot" award or the additional financing would materially affect Plaintiff's longer term [[ ]] is likely unfounded.

Without a preliminary injunction to limit Plaintiff from suffering further harm in the form of loss of goodwill, damage to its reputation, and loss of business opportunities from the continued collection of cash deposits until the case is resolved on the merits, the harm to Plaintiff's business will only grow more severe. In addition, Plaintiff provides sufficient documentary support to demonstrate that the continued collection of cash deposits will cause irreparable harm to Plaintiff because it will either force Plaintiff [[ ]] or cause serious and substantial disruption to [[ ]] of the company [[ ]].

II. Likelihood of Success on the Merits

The party seeking injunctive relief "must demonstrate at least a 'fair chance of success on the merits.'" *Qingdao Taifa*, 581 F.3d at 1381 (quoting *U.S. Ass'n of Imps. of Textiles & Apparel v. Dep't of Commerce*, 413 F.3d 1344, 1347 (Fed. Cir. 2005)). Where a plaintiff has shown that a strong threat of irreparable harm exists, "the burden to show a likelihood of success [on the merits] is necessarily lower." *Id.* Unlike preliminary injunctions to suspend liquidation, which preserve a plaintiff's legal options and allow for a full and fair review of duty determinations before liquidation and are contemplated by the statute, *see* 19 U.S.C. § 1516a(c)(2); *see also Qingdao Taifa*, 581 F.3d at 1382, paying deposits pending court review of a Commerce scope ruling is an ordinary consequence of the statutory scheme. *See* 19 U.S.C. §§ 1673d(c)(1)(B)(ii), 1673e(a)(3), 1675(a)(1), 1675(a)(2)(B)(iii), 1675(a)(2)(C); *see also Shree Rama Enterprises v. United States*, 21 CIT 1165, 1169, 983 F. Supp. 192, 196 (1997). While the need to demonstrate the likelihood of success may be lessened where there is a strong showing of irreparable harm, it is not extinguished altogether. *See Qingdao Taifa*, 581 F.3d at 1381.

Defendant-Intervenor also points to several deficiencies in documentation submitted by Plaintiff to back up certain allegations in the affidavit from a Sunpreme senior executive. For example, Defendant-Intervenor contends that Plaintiff has failed to provide Master Supply Agreements that Plaintiff alleges oblige it to [[ ]] and to return customer deposits if it cannot deliver contracted goods. SolarWorld Resp. Br. 6. Defendant-Intervenor also highlights a lack of documentary evidence of the [[ ]], to substantiate the [[ ]] if it is unable to deliver on a large customer contracts, and to substantiate [[ ]]. *See id.*at 6–8. Defendant-Intervenor also speculates that Plaintiff's financial harm is not the result of the cash deposit requirements because the financial statements submitted indicate the company [[ ]]. *See id.* at 8. Whether the company was in [[ ]] prior to the collection of cash deposits does not undermine the notion that the continued collection of cash deposits would cause Plaintiff irreparable harm. Moreover, Plaintiff need only show likely irreparable harm, not certain irreparable harm. *See Winter*, 555 U.S. at 22.

Finally, Defendant-Intervenor argues that the court should not ameliorate the consequences of Plaintiff's failure to develop markets outside of the United States and otherwise manage its risk. Def.'s Resp. Br. 9. However, Defendant-Intervenor does not relate this point to the irreparable harm standard. Defendant-Intervenor points to no authority requiring a movant to show harm was avoidable in order to be entitled to a preliminary injunction.

Plaintiff challenges the scope determination as both contrary to law and unsupported by substantial evidence. PI Mot. 21. Specifically, Plaintiff first argues that Commerce's interpretation of the thin film exclusion is contrary to law because it added conditions not supported by the scope language or the sources Commerce may consult under 19 C.F.R. § 351.225(k)(1). *Id.* at 22–29. Second, Sunpreme argues Commerce failed to consider evidence demonstrating that its merchandise falls within the thin film exclusion in the Orders. *Id.* at 30–33. Third, Sunpreme argues Commerce's determination is based on factual misstatements. *Id.* at 34–45.

Plaintiff argues that Commerce failed to ground its conclusion that Plaintiff's merchandise are CSPV cells with a p/n junction not entitled to the thin film exclusion in the scope language or any of the (k)(1) sources. PI Mot. 23–29. Defendant responds that Plaintiff fails to show that Commerce unreasonably concluded, based upon its consultation of the (k)(1) sources, that Sunpreme's cells were CSPVs notwithstanding the addition of thin films of amorphous silicon. Def.'s Resp. Br. 17–21.

The language of an order dictates its scope. *See Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002) (citing *Ericsson GE Mobile Commc'ns, Inc. v. United States*, 60 F.3d 778, 782 (Fed Cir. 1995)). Commerce's regulations provide that, where Commerce issues scope rulings to clarify the scope of an order with respect to particular products, in addition to the scope language, Commerce will take into account descriptions of the merchandise contained in: (1) the petition; (2) the initial investigation; (3) and past determinations by Commerce, including prior scope determinations (collectively "(k)(1) sources"). 19 C.F.R. § 351.225(k)(1). Commerce has broad authority "to interpret and clarify its antidumping duty orders." *Ericsson GE Mobile*, 60 F.3d at 782 (citing *Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990)), *as corrected on reh'g* (Sept. 1, 1995); *see also King Supply Co., LLC v. United States*, 674 F.3d 1343, 1349 (Fed. Cir. 2012). However, Commerce may not interpret an order "so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms." *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001) (citing *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1370 (Fed. Cir. 1998)). Furthermore, "[s]cope orders may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it." *Duferco*, 296 F.3d at 1089. Although the petition and the investigation proceedings may aid in Commerce's interpretation of the final order, the order itself "reflects the decision that has been made as to which merchandise is within the final scope of the investigation and is subject to the order." *Id.* at 1096.

The Orders at issue provide:

> The merchandise covered by this order is crystalline silicon photovoltaic cells, and modules, laminates, and panels, consisting of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including, but not limited to, modules, laminates, panels and building integrated materials.
>
> This order covers crystalline silicon photovoltaic cells of thickness equal to or greater than 20 micrometers, having a p/n junction formed by any means, whether or not the cell has undergone other processing, including, but not limited to, cleaning, etching, coating, and/or addition of materials (including, but not limited to, metallization and conductor patterns) to collect and forward the electricity that is generated by the cell.
>
> Excluded from the scope of this order are thin film photovoltaic products produced from amorphous silicon (a-Si), cadmium telluride (CdTe), or copper indium gallium selenide (CIGS).

CVD Order, 77 Fed. Reg. 73,017; *AD Order*, 77 Fed. Reg. 73,018.

In its scope ruling Commerce considered the plain language of the Orders and determined that the scope language calls upon it to consider whether Sunpreme's products: "(1) are CSPV cells, (2) are at least 20 micrometers [("μm")] thick, (3) contain a p/n junction, and (4) are excluded thin film products." Final Scope Ruling at 13. Commerce consulted the (k)(1) sources to interpret the relevant scope language, and it concluded that Sunpreme's products were in scope. Sunpreme has not shown that it is likely the court will find that Commerce lacked substantial evidence to find that its merchandise met all of these criteria or that Commerce could not reasonably have interpreted the Orders to include Plaintiff's merchandise.

1. CSPV Cells

In considering whether Plaintiff's products are CSPV cells, Commerce clarified that "CSPV cells," as used in the Orders, include wafers and freestanding cells made of crystalline silicon that rely on the crystalline silicon wafer to generate electricity. Final Scope Ruling at 13. Moreover, Commerce read the scope language as not "preclude[ing] the use of other materials, such as amorphous silicon or metal oxides, in CSPV cell production." Final Scope Ruling at 13. Commerce also noted that the Orders did not "stipulate that the crystalline silicon *within* subject CSPV cells must be able to independently function as a solar cell even before it is incorporated into the relevant photovoltaic product." Final Scope Ruling at 13. The court

cannot say that Sunpreme has raised a serious question as to the reasonableness of Commerce's interpretation.

Relying upon its prior scope determination in the Triex Scope Ruling, a (k)(1) source, Commerce noted that CSPV cells rely upon crystalline silicon to generate electricity. Final Scope Ruling at 13 (citing Triex Scope Ruling at 30). Commerce determined that the scope language does not require that the crystalline silicon component within a CSPV cell be able to independently function as a solar cell even before it is incorporated into the photovoltaic product. Final Scope Ruling at 13. Crediting Sunpreme's acknowledgment that the doped crystalline silicon substrates in its cells are the primary solar absorber over conflicting statements regarding the function of the crystalline silicon wafer in its cells, Commerce concluded that Sunpreme's cells rely upon the crystalline silicon to generate electricity.[10] Final Scope Ruling at 14 (citing Petitioner Comments on Sunpreme Scope Ruling Request at Ex. 21, AD PD 15–16, bar codes 3434369–01–02 (Jan. 20, 2016) and Petitioner Comments on Sunpreme Scope Ruling Request at Ex. 21, CVD PD 21–22, bar codes 3434365–01–02 (Jan. 20, 2016) (collectively "SolarWorld Comments on Scope Ruling Request"); Sunpreme Additional Factual Information at Ex. 7, AD PD 32–48, bar codes 3481978–01–12 (June 27, 2016), Sunpreme Additional Factual Information at Ex. 7, CVD PD 38–54, bar codes 348199101–17 (June 27, 2016) (collectively "Sunpreme Triex Comments")); Sunpreme Response to Petitioner's Letter at Ex. 4, AD PD 24–25, bar codes 3440093–01–02 (Feb. 8, 2016), Sunpreme Response to Petitioner's Letter at Ex. 4, CVD PD 30–31, bar codes 344010101–02 (Feb. 8, 2016) (collectively "Sunpreme Rebuttal Comments"). Plaintiff fails to raise a significant question as to the reasonableness of Commerce's interpretation.

Commerce also grounded its determination that Sunpreme's cells rely on crystalline silicon to generate electricity in the fact that the crystalline silicon in Sunpreme's product is slightly doped. Final Scope Ruling at 14. In reaching this conclusion, Commerce referenced its finding in the Triex Scope Ruling, to the effect that the doping (*i.e.*, processing) of the wafer enhances the wafer's ability to absorb light.

[10] Commerce explained its decision to credit information that the silicon wafer in Sunpreme's cell plays a role in electricity generation over conflicting statements that indicate the wafer is inert and does not interact with the thin film layers by referencing the patent for the technology, which Commerce found specifies the crystalline silicon substrate is part of the cell's electricity generating p/i/n/ junction. Final Scope Ruling at 14 (citing Petitioner Comments on Sunpreme Scope Ruling Request at Ex. 6, AD PD 15–16, bar codes 3434369–01–02 (Jan. 20, 2016) and Petitioner Comments on Sunpreme Scope Ruling Request at Ex. 6, CVD PD 21–22, bar codes 343436501–02 (Jan. 20, 2016)). It would be inappropriate for the court to reweigh the evidence.

See Triex Scope Ruling at 30. Finally, Commerce found that the presence of thin film layers does not undermine the fact that the crystalline silicon is essential to the cell's electricity generating function. *See* Final Scope Ruling at 14 (citing Triex Scope Ruling at 30). Given the words of the orders and the descriptions of the merchandise relied upon by Commerce, Plaintiff fails to raise a significant question as to the reasonableness of Commerce's conclusion that Sunpreme's products are CSPV cells. *See* SolarWorld Comments on Scope Ruling Request at Ex. 21; Sunpreme Triex Comments at Ex. 7; Sunpreme Rebuttal Comments at Ex. 4; Triex Scope Ruling at 30.

Plaintiff claims that Commerce "effectively expands the scope language to include any cells containing crystalline silicon substrates/wafers despite the multiple express statements during the investigations, by Petitioner and Commerce, that wafers are not covered by the investigations." PI Mot. 35. Commerce concluded, relying in part on its prior Triex Scope Ruling, that where the crystalline silicon component performs a key role in electricity generation, the cell is a CSPV cell. Final Scope Ruling at 13—14. In reaching the conclusion that Plaintiff's cells are CSPV cells, Commerce relied upon descriptions of the product contained in the application, the petition, and prior scope determinations to conclude that the crystalline silicon played an active role in the cell's electricity generating function. *See* Final Scope Ruling at 13—14. Therefore, Commerce relied upon the function of the substrate/wafer within the cell to determine that the cell was a CSPV cell. *See* Final Scope Ruling at 13–14. Commerce found that a photovoltaic cell containing crystalline silicon performing the function of electricity generation is a CSPV cell, not that any photovoltaic cell containing crystalline silicon is a CSPV cell. *See id.* Although Plaintiff's arguments focus on the wafers' inability to generate electricity on their own, they do not refute Commerce's implicit finding that the crystalline silicon interacts with other elements in the cell to generate electricity or that the crystalline silicon component is critical to the cell's ability to do so. *See* PI Mot. 35; *see also* Final Scope Ruling at 13–14.

Plaintiff contends that a cell where the p/n junction is formed outside of the wafer used for its substrate is not a CSPV. PI Mot. 37. However, Plaintiff points to no language in the Orders indicating that the p/n junction formation must occur within the crystalline silicon component.

Plaintiff also argues that Commerce's finding that the crystalline silicon in Sunpreme's cell is "active," "doped" or "functional" is unsupported by the record. PI Mot. 38. Plaintiff maintains that Commerce lacked record evidence to conclude that its raw silicon wafer is doped, by which Plaintiff means having a slight positive or negative

orientation.[11] *Id.* Plaintiff focuses on the fact that its own production of the wafers does not achieve the slight positive or negative orientation, but rather that this orientation is present prior to its manufacturing process. *See id.*at 38, 39 n.18. However, Defendant underscores that while Sunpreme understands the meaning of the term "doped" as having a positive or negative orientation, Commerce uses "doped" to mean "processed" to enhance light absorption (*i.e.*, making the substrate an active component of the cell). Def.'s Resp. Br. 20 (citing Final Scope Ruling at 14; Triex Scope Ruling at 30). Plaintiff points to no evidence undermining Commerce's use of the term doped as enhancing light absorption. Sunpreme focuses on the fact that the wafers themselves are "incapable of converting light to electricity." PI Mot. 41. However, as already discussed, Commerce did not find that the wafers generate electricity without interacting with other parts of the cell. *See* Final Scope Ruling at 14. Nor did Commerce find that Sunpreme's production process imparts the positive negative orientation to its crystalline silicon substrates. *See id.* at 13. Rather Commerce found that the cells "rely on crystalline silicon to generate electricity."[12] *Id.* Sunpreme offers no record evidence detracting from this finding.[13]

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[11] Sunpreme argues that Commerce mischaracterizes its statements that its products are "'monocrystalline silicon cell[s]' with a doped crystalline silicon component." PI Mot. 43 (citing Final Scope Ruling at 14, 14 n.139). However, Commerce did not rely upon Sunpreme's statements to make its determination. Rather, Commerce merely noted these statements and credited patent information, not Sunpreme's statements, to find that Sunpreme's products rely upon the crystalline silicon component to generate electricity. Final Scope Ruling at 14. As already noted, the court sees no reason to reweigh the evidence on this issue.

[12] In fact Commerce explicitly acknowledges that crystalline silicon may not "be able to independently function as a solar cell even before it is incorporated into the relevant photovoltaic product." Final Scope Ruling at 13.

[13] Sunpreme concedes that its raw silicon wafers can absorb sunlight, but focuses on their inability to convert sunlight to electricity on their own. PI Mot. 41–42. Sunpreme mischaracterizes Commerce's determination as treating the wafers' capacity to absorb sunlight as equivalent to their ability to generate electricity. *Id.* Commerce explicitly found that nothing in the scope language indicates that the crystalline silicon component must be able to function as a solar cell before it is incorporated into the relevant photovoltaic product. Final Scope Ruling at 13. It is clear from that statement that Commerce recognizes that the silicon wafer cannot generate electricity on its own. *See id.* Rather, Commerce relied upon the interaction of the silicon wafer with other components of the cell to conclude that the crystalline silicon component was critical to its electricity generating function. *See id.* at 14.

Sunpreme further argues that Commerce's focus on the function of the crystalline silicon substrate is not based on any (k)(1) sources, but rather is based upon a statement by a third party in the Triex Scope Inquiry. PI Mot. 42 (citing Final Scope Ruling at 13 n.137 (citing Triex Scope Ruling at 30)). However, Commerce's regulation permits it to rely upon prior scope determinations. 19 C.F.R. § 351.225(k)(1). Sunpreme does not allege that Commerce relied upon its prior scope determination for facts about Sunpreme's product, but rather for the notion that the substrate's involvement in electricity generation determines whether it is a CSPV cell within the context of the Orders. *See* PI Mot. 42.

As the court stated earlier, Commerce credited patent information on the record over other statements in the record to reach its conclusion regarding the function of the crystalline silicon component within Sunpreme's cells. *See* Final Scope Ruling at 14. Although Sunpreme argues that the products subject to this scope ruling represent a cell developed

2. Cells At Least 20 Micrometers Thick

Having concluded that Plaintiff's products are CSPV cells, Commerce also clarified that the language of the Orders requiring "cells of thickness equal to or greater than 20 micrometers" requires it to consider the thickness of the entire cell, including the crystalline silicon component. Final Scope Ruling at 14. Plaintiff points to no evidence or rationale to suggest that this interpretation is unreasonable. Since Commerce concluded the substrate plays an active role in the cell, Plaintiff fails to point to any language or (k)(1) sources that indicate that the measurement contained in the scope language was not intended to measure the thickness of the components that make up the active parts of the cell. Plaintiff fails to raise a significant question as to the reasonableness of Commerce's determination that Sunpreme's cells are 20 µm thick.

3. Contain a P/N Junction Formed By Any Means

Commerce relied on its prior scope ruling to the effect that "a p/i/n junction and other arrangements of positive, negative, and intrinsic/neutral layers within a photovoltaic cell can be understood to be types of p/n junctions" within the meaning of the scope language. Final Scope Ruling at 15 (citing Triex Scope Ruling at 18, 32). In the Triex Scope Ruling, Commerce found that the language "formed by any means" in the Orders indicates "that the type, location, and method by which the p/n junction is formed are irrelevant." Triex Scope Ruling at 17.[14] In its Triex Scope Ruling, Commerce focused on the words "formed by any means," and Commerce determined this language indicates that the function determines whether a p/n junction has been formed, not the specific architecture of the p/n junction. Triex Scope Ruling at 17. Commerce determined that "some type of p/n junction is essential to the creation of an electrical field" in photovoltaic cells; and therefore, the scope language does not imply photovoltaic cells can be categorized into those with p/n junctions and those lacking them. *See id.* at 17–18. Commerce resolved that a p/i/n junction is a type of p/n junction formed by any means because the intrinsic (*i.e.*, inert or "i") layer in the Triex cells merely extends the electrical field over an additional layer of material. *Id.* at 18.

well after the issuance of the patent, PI Mot. 42 n.21, Sunpreme does not point to any record information indicating that the crystalline silicon component functions materially differently in this product. Therefore, the court defers to Commerce's weighing of the evidence.

[14] Commerce referenced its determination in its Triex Scope Ruling that, based upon its consultation of (k)(2) sources, a p/n junction "'can be interpreted as an umbrella term, covering different combinations of positive and negative regions and various means of transferring an electrical charge therein.'" Final Scope Ruling at 15 n.150 (citing Triex Scope Ruling at 31).

Here, Commerce found that none of the (k)(1) sources consulted indicate that the positive and negative layers in a p/n junction must be adjacent or that they must be within a crystalline silicon wafer. Final Scope Ruling at 15. Commerce referenced its consultation to pre-initiation versions of the scope language in its prior Triex Scope Ruling in which Commerce found that the petitioner intended to include p/n junctions not within the crystalline silicon component in the scope deliberately because Commerce believed a detailed description of the architecture of junction formation to be unnecessary to defining a p/n junction. *See id.* (citing Triex Scope Ruling at 13, 31). Therefore, Commerce concluded Plaintiff's product "can be understood to contain a 'p/n junction formed by any means.'" *Id.* Plaintiff has failed to raise a significant issue with the reasonableness of Commerce's reliance on a (k)(1) source or its reasoning to determine that the p/i/n junction in Plaintiff's merchandise is a p/n junction "formed by any means."

Plaintiff contends that Commerce ignored substantial evidence on the record of the distinctions between p/n junctions and p/i/n junctions and reached its conclusion without any citation to scientific evidence about Sunpreme's products. PI Mot. 44. However, Commerce made reference to materials published by the U.S. Department of Energy and by CBP as well as the expert opinions and declarations submitted by Plaintiff to support its position that p/n junctions are distinct from p/i/n junctions. Final Scope Ruling at 16. Commerce explained that it reached its determination based upon a textual interpretation and the (k)(1) sources it consulted, which do not include factual assertions made by individuals or entities who were not involved in drafting the scope language (*i.e.*, 19 C.F.R. § 351.225(k)(2) sources).[15] *Id.* Commerce found that the (k)(1) sources were dispositive and allowed it to interpret the scope language without resort to these (k)(2) sources. *See id.* Plaintiff points to nothing in the scope language or in the (k)(1) sources consulted by Commerce that contradicts Commerce's conclusions.

Sunpreme also claims that Commerce lacked any scientific evidence to conclude that a p/i/n junction is a form of p/n junction and ignored evidence on the record regarding the distinctions between p/n junctions and p/i/n junctions. PI Mot. 43–44. However, Commerce

[15] Commerce's regulation provides that when the (k)(1) sources (*i.e.*, the descriptions of the merchandise contained in the petition, the initial investigation, and prior scope determinations) are not dispositive, Commerce will further consider:

(i) The physical characteristics of the product;
(ii) The expectations of the ultimate purchasers;
(iii) The ultimate use of the product;
(iv) The channels of trade in which the product is sold; and
(v) The manner in which the product is advertised and displayed.

19 C.F.R. § 351.225(k)(2).

relied upon its prior Triex Scope Ruling, and incorporated its reasoning, for the proposition that the positive and negative layers need not be adjacent to one another to form a p/n junction. Final Scope Ruling at 15 (citing Triex Scope Ruling at 32). Plaintiff does not attack the underlying reasoning in the Triex Scope Ruling. *See* PI Mot. 43–44. Sunpreme takes issue with Commerce's reliance on the Triex Scope Ruling altogether because Commerce's determination that a p/i/n junction is a type of p/n junction relied upon (k)(2) factors. PI Mot. 45. However, Commerce may rely upon prior determinations in interpreting the scope of an antidumping or countervailing duty order. 19 C.F.R. § 351.225(k)(1). Plaintiff points to no reason why such reliance is unreasonable.[16]

Plaintiff argues Commerce was unwilling to consider differences in its technology and that of the Triex cell, which it argues reflects "Commerce's foregone conclusion that Sunpreme's product must be identical to the Triex product." PI Mot. 44. However, Commerce acknowledged the differences highlighted by Plaintiff, but it found those differences did not undercut the formation of a p/n junction because the electrical field generating function or nature of the p/n junction in the cell is unchanged by the addition of an insulating material.[17] Final Scope Ruling at 15 (citing Triex Scope Ruling at 32, 39). Plaintiff points to no difference in its technology that raises a significant question as to the reasonableness of Commerce's determination.

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[16] Neither of the two cases Plaintiff cites supports the proposition that Commerce may not rely upon its conclusions in another scope ruling where Commerce determines that the same products are involved. *See* PI Mot. 45 (citing *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 29 CIT 1216, 1225, 394 F. Supp. 2d 1369, 1377—78) (2005); *Shenyang Yuanda Aluminium Industry Eng'g Co. v. United States*, 40 CIT __, ___, 146 F. Supp. 3d 1331, 1346—47 (2016). In *Tianjin Mach.*, the court held merely that a prior scope ruling regarding a different product is not controlling, even if it is a (k)(1) source. *Tianjin Mach.*, 29 CIT at 1225, 394 F. Supp. 2d at 1377–78. There is no indication that Commerce blindly relied upon its reasoning its Triex Scope Ruling, nor does Plaintiff focus on any obvious difference between its products and the Triex cell. In *Shenyang Yuanda*, the court held that Commerce misconstrued a prior scope determination as precluding consideration of any exclusionary language where that prior scope determination limited its analysis of the scope language's exclusion of the products under consideration. *Shenyang Yuanda*, 146 F. Supp. 3d at 1346. Here, Commerce considered the differences between the products highlighted by Plaintiff, and it determined that those differences were not material. Final Scope Ruling at 15.

[17] Commerce acknowledged Plaintiff's argument that its cells are distinguishable from those of Triex by noting that Triex cells contain "'a silicon dioxide insulator between the crystalline silicon wafer and the intrinsic and p-type and n-type amorphous thin film layers,' which contributes to its generation of electricity by 'quantum mechanical tunneling.'" Final Scope Ruling at 15 (citing Sunpreme Triex Comments at 13). However, Commerce found both differences irrelevant to the formation of a p/n junction in Sunpreme's products. *See id.* Plaintiff points to no record evidence indicating that this conclusion is unreasonable or unsupported by the record.

4. Applicability of Thin Film Photovoltaic Products Exclusion

Since the scope language does not define the term "thin film photovoltaic products," Commerce interpreted the thin film product exclusion to apply only to those products where the crystalline silicon component of the cell did not actively contribute to the electricity generating function of the cell. *See* Final Scope Ruling at 17. Commerce clarified that the term "thin film photovoltaic products" did not mean "any" photovoltaic products containing thin films produced of amorphous silicon. *Id.* Commerce supported its interpretation by referencing the petition (k)(1) sources, which indicate that "'[t]hin film products do not use crystalline silicon.'" *Id.* (citing Petitioner Additional Factual Information at Att. 26, AD PD 49–50, bar code 3481990–01–02 (June 27, 2016); Petitioner Additional Factual Information at Att. 26, AD PD 55–70, bar code 3482071–01–16 (June 27, 2016) (collectively "CVD Petition")).

Plaintiff argues that Commerce's interpretation of the exclusion for thin film products is inconsistent with the language of the Orders and contradicted by record evidence. PI Mot. 23–29. Specifically, Plaintiff argues that the scope language of the Orders excludes all thin film products made of specified materials and does not limit the Orders' thin film product exclusion to products of a particular substrate.[18] *Id.* at 24–25. However, this argument ignores that the Orders do not define the term "thin film photovoltaic products." *CVD Order*, 77 Fed. Reg. 73,017; *AD Order*, 77 Fed. Reg 73,018. Commerce looked to the underlying petitions, a (k)(1) source, to define this phrase. *See* Final Scope Ruling at 17. Plaintiff points to no (k)(1) source that contradicts Commerce's interpretation that thin film products do not use crystal-

[18] Plaintiff also argues that it would be illogical to provide an exclusion for "thin film products" in the scope language if thin film products cannot contain crystalline silicon as there would be no possibility of overlap between CSPVs and thin film products. PI Mot. 22–23. Therefore, Plaintiff argues that Commerce's interpretation, even if it is supported by the petitions, is contradicted by the plain language of the Orders. *See id.*However, exclusionary language does not merely function as an exception to affirmative scope language. It is an integral component of the scope language, and it defines the scope. The exclusion, as clarified by Commerce, provides that only those thin films that do not contain crystalline silicon are excluded. Even if Commerce's interpretation of the exclusion may render it unnecessary to defining the scope in some instances, that does not make Commerce's interpretation unreasonable. Plaintiff points to no (k)(1) source indicating that thin film products containing crystalline silicon as the electricity generating component were meant to be excluded from the Orders.

Moreover, Commerce necessarily writes scope language in general terms. 19 C.F.R. § 351.225(a); *Duferco*, 296 F.3d at 1096. Although the (k)(1) sources cannot substitute for the language of the order itself, *see Duferco*, 296 F.3d at 1097, the scope language here does not define the term "thin film products." *See CVD Order*, 77 Fed. Reg. 73,017; *AD Order*, 77 Fed. Reg. 73,018. Commerce's interpretation clarifies the Orders in a way that does not contradict the plain language or any (k)(1) source.

line silicon.[19] Moreover, Commerce found not only that Sunpreme's products incorporate a crystalline silicon substrate, but that the crystalline silicon substrate in its cells is essential to the functioning of the complete cell because it has electrical properties.[20] *Id.* Plaintiff points to no plain language contradicting this interpretation.[21]

Commerce reasons that neither the CSPV product nor the thin film product certification standards provides a definitive means of determining whether or not an imported product is subject to the Orders.

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[19] Plaintiff argues that Commerce's reliance on the petition for the notion that thin film products do not use crystalline silicon is misplaced and referenced out of context. Sunpreme Reply Br. 4–5 (citing Final Scope Ruling at 17). Plaintiff references the language of the petition relied upon by Commerce, which states:

> CSPV cells and modules are made from crystalline silicon. Thin-film products do not use crystalline silicon and instead use a thin layer of a compound, such as cadmium telluride, copper indium gallium selenide, or amorphous silicon, which is sputtered or otherwise applied onto a substrate like glass.

Id. at 4 (citing CVD Petition at 17).

Plaintiff argues:

> When read in context, the clause "Thin-film products do not use crystalline silicon" is an introductory clause, intended as a counterpoint to the previous declarative sentence "CSPV cells and modules are made from crystalline silicon." However, the affirmative description of [thin] film products, omitted from the Government's quote, includes the positive elements of thin film products: "instead use a thin layer of a compound, such as cadmium telluride, copper indium gallium selenide, or *amorphous silicon*, which is sputtered or otherwise applied onto a substrate . . . ."

Id. at 5 (citations omitted). Plaintiff's argument only demonstrates that excluded thin film products are defined by both positive and negative attributes. Commerce found that, according to the petition, one of the negative attributes is that they do not contain crystalline silicon. *See* Final Scope Ruling at 17 (citing CVD Petition).

Plaintiff also argues that the same sentence in the petitions cannot mean that thin film products consist entirely of non-crystalline silicon materials because that reading would require Commerce to read the next sentence in a nonsensical way. *See* Sunpreme Reply Br. 5. Plaintiff contends that reading the sentence "CSPV cells and modules made from crystalline silicon" as requiring CSPV modules to contain exclusively crystalline silicon components makes no sense because modules include other components that are part of the module but not the cell (*i.e.,* aluminum frame, backsheet, silver paste, etc.). *See id.* That argument is misplaced because it ignores a key difference in the sentences. A CSPV module can be "made from crystalline silicon" without being made exclusively from crystalline silicon. A thin film product that "does not use crystalline silicon" cannot contain any crystalline silicon.

[20] Plaintiff argues that Commerce's determination to limit the thin film exclusion to products with substrates other than crystalline silicon is arbitrary because it treats some thin film products as covered by the scope of the orders while treating other thin film products with a different substrate as outside the scope. PI Mot. 29. However, the Orders themselves distinguish between CSPV cells and other photovoltaic products. *See CVD Order*, 77 Fed. Reg. 73,017; *AD Order*, 77 Fed. Reg. 73,018. The Orders do not include non-CSPV cells and they explicitly exclude thin film products. *See CVD Order*, 77 Fed. Reg. 73,017; *AD Order*, 77 Fed. Reg. 73,018. Therefore, Commerce's focus on the crystalline silicon component and its functioning within the cell is not arbitrary but is an interpretation of the language of the Orders based upon permissible sources under 19 C.F.R. § 351.225(k)(1).

[21] Plaintiff also argues that there is no indication that thin film products using crystalline silicon substrates were at any time part of the investigations. PI Mot. 27–28. Commerce, however, bases its interpretation on the language and (k)(1) sources. Plaintiff does not marshall language of the Orders or (k)(1) sources indicating Commerce's interpretation of the ambiguous phrase "thin film photovoltaic products" is unreasonable.

Id. at 17. Moreover, Commerce acknowledged the fact that the petition, a (k)(1) source, referenced industry standards to define the category of thin film products, but found that these sources are not dispositive to define the terms of the exclusion, but rather are merely illustrative. *Id.* at 16–17. Plaintiff points to nothing in the petitions, or any other (k)(1) source, indicating that such product certification standards were meant to be dispositive of whether a product falls within the thin film product exclusion. Therefore, Plaintiff has not raised a serious question that Commerce's interpretation is unreasonable.[22]

Next, Plaintiff claims that its cells precisely meet the definition of thin film solar products used by the International Trade Commission during the investigation because they "are formed by depositing four different layers of ultra-thin amorphous silicon . . . on a crystalline silicon wafer." PI Mot. 30 (citing Exs. PI Mot. Ex. 4. at I-23 (stating that the thin film production process varies by company technology, but, "general[ly], a thin layer of the photosensitive material (a-Si, CdTe, CIGS, etc.) is deposited directly onto a glass, stainless steel, or plastic substrate via physical vapor deposition, chemical vapor deposition, electrochemical deposition, or a combination of methods."). Plaintiff argues that Commerce ignored the scientific evidence about its products and its production process that established that its products meet these characteristics of thin film products and reached its determination based on unrebutted evidence that Sunpreme's products possessed the physical characteristics of thin film products. PI Mot. 32. However, this argument fails to call into question the reasonableness of Commerce's interpretation of the undefined terms "thin film products" and "CSPV cells." Commerce explained that its determination is based on an interpretation of the scope language as well as the relevant (k)(1) sources. Final Scope Ruling at 16. Commerce determined that it was able to interpret the language in the Orders without needing to consider (k)(2) sources, which include physical characteristics of the product. Where Commerce may interpret the scope language based upon consulting the text as well as the relevant (k)(1) sources, its regulation permits it to do so without consulting the (k)(2) sources. Commerce did not dispute the similarities between thin-film products and CSPV cells, but rather inter-

[22] Plaintiff highlights Commerce's assertion that Sunpreme's products are certified as CSPV modules as well as thin film products according to industry standards, *see* PI Mot. 25 (citing Final Scope Ruling at 16–17), which Plaintiff argues is contradicted by record evidence indicating that none of the modules at issue in this scope proceeding were certified under the CSPV standard. *Id.* at 25–26 (citing Sunpreme Reply to SolarWorld Comments at 34–35, CVD PD 77, bar code 3486320–01 (July 13, 2016)). However, since Commerce found both the CSPV and thin film product industry standards not dispositive of the meaning of the thin film product exclusion, *see* Final Scope Ruling at 16–17, Commerce did not rely upon this finding.

preted the term "thin film photovoltaic products" to mean cells where a crystalline silicon component does not contribute to the electricity generating function of the cell. The record evidence cited by Plaintiff about the characteristics of its products fails to raise a significant question as to the reasonableness of that interpretation.

Finally, Plaintiff maintains that Commerce improperly based its interpretation of the scope language on anti-circumvention concerns. PI Mot. 33–34 (citing Final Scope Ruling at 17). Specifically, Plaintiff argues that such concerns "do not control a scope analysis and those concerns impermissibly narrowed [Commerce's interpretation of] the scope exclusion for thin film products." *Id.* at 34. However, although Commerce referenced the point that excluding all products containing amorphous silicon without further analysis could create circumvention issues, Commerce's interpretation was based on the statement in the petitions that thin film products do not use crystalline silicon, not based upon such anti-circumvention concerns. *See* Final Scope Ruling at 17. Therefore, Commerce referenced circumvention concerns in the context of its interpretive analysis. Commerce did not rely upon such concerns to interpret the scope language.

III. Balance of the Hardships

Before granting a preliminary injunction, the court must "balance the competing claims of injury and consider the effect" of granting or denying relief on each party. *Winter*, 555 U.S. at 24. To do so, the court must "determine which party will suffer the greatest adverse effects as a result of the grant or denial of the preliminary injunction." *Ugine-Savoie Imphy v. United States*, 24 CIT 1246, 1250, 121 F. Supp. 2d 684, 688 (2000).

The balance of the hardships tips decidedly in the government's favor here. The court acknowledges that Plaintiff faces likely irreparable harm without a preliminary injunction. Nonetheless, the balance of the hardships is a separate and distinct inquiry. In balancing the hardships, harm to Plaintiff must be measured against harm to the government. *See Ugine-Savoie*, 24 CIT at 1250, 121 F. Supp. 2d at 688. The government faces a significant risk that Plaintiff will not be able to pay duties that Plaintiff might owe without collecting cash deposits on Plaintiff's entries. *See* Exs. PI Mot. Ex. 9 at ¶16.[23] Plaintiff claims that the government can be protected by a bond, PI Mot. 15, 49, but Plaintiff has not even attempted to show that it would be able to obtain such a bond given its financial condition.

Weighing the prospect that either Sunpreme may suffer [[ ]] or the government will have to forgo [[ ]]

[23] Plaintiff estimates it will owe approximately [[ ]] in cash deposits on the merchandise the company intends to import between mid-September and December 2016. Exs. PI Mot. Ex. 9 at ¶16. Plaintiff asserts that [[ ]] should its goods be found to be subject to the Orders. *See* PI Mot. 4.

in duties should Commerce's scope determination be upheld, the balance of the hardships favors Defendant in this case because Congress has already spoken to how this balance should be struck. Commerce here is acting pursuant to a statutory regime that protects the revenue of the United States where goods are found to be subject to the terms of an antidumping or countervailing duty order even where the extent of any potential liability for the importer is uncertain. *See* 19 U.S.C. § 1673b(d)(1)(B) (requiring collection of cash deposits, a bond, or other security upon affirmative preliminary determination in antidumping duty investigation); 19 U.S.C. § 1671b(d)(1)(B) (requiring collection of cash deposits, bond, or other security upon affirmative preliminary determination in countervailing duty investigation); 19 U.S.C. § 1673d(c)(1)(B) (requiring the continuation of cash deposits upon issuance of an affirmative final determination for antidumping duty investigations); 19 U.S.C. § 1671d(c)(1)(B) (requiring the continuation of cash deposits upon issuance of an affirmative final determination for countervailing subsidy investigations). Commerce's regulations reflect this same balancing of hardships where Commerce makes a determination that goods are subject to antidumping or countervailing duties. *See* 19 C.F.R. § 351.205(d) (instructing Commerce that the provisional measures established in the statute is to take the form of cash deposits, rather than bond or other security). The statutory and regulatory antidumping and countervailing duty regime envisions that importers may have to pay cash deposits in excess of what is ultimately determined to be owed. *See* 19 U.S.C. §§ 167lf, 1673f, 1677g; 19 C.F.R. § 351.205(d). The fact that payment of those deposits may cause irreparable harm due to the fact the company is a "start-up," and may not be in as strong a financial position as a more established company, only goes to one factor in the court's analysis.[24]

Although this Court previously enjoined cash deposits upon the showing of irreparable harm in Plaintiff's action against CBP, it did so in a case brought under 28 U.S.C. §1581(i) challenging agency action was claimed to have been contrary to the statutory and regulatory scheme. *See Sunpreme*, 40 CIT at __, 145 F. Supp. 3d at 1286. It is an entirely different matter to balance the hardships created where Commerce has acted within that scheme. Therefore, the balancing of the hardships tips decidedly differently in this case.

[24] Plaintiff contends that, due to its limited markets in other countries, the company could not support itself financially unless it is able to import the solar modules without making the statutorily required cash deposits. PI Mot. 19. Even accepting Plaintiff's statements regarding the consequences of compliance on its business as true, any such consequences are not appropriate to consider in balancing the equities of either granting or denying the injunction. The government cannot be put in a worse position simply because of Plaintiff's business model or the financial immaturity of its business. Moreover, Plaintiff filed its scope ruling request on November 16, 2015. Therefore, Plaintiff has known for over ten months that its goods could be subject to the Orders. It could have taken steps during that time in anticipation of these hardships to lessen their impact.

IV. The Public Interest

For the same reasons that the balance of the hardships tips in the government's favor, the public interest is served by denying the injunction. *See Union Steel v. United States*, 33 CIT 614, 622, 617 F. Supp. 2d 1373, 1381 (2009) ("Accurate and effective enforcement of the trade laws serves the public interest"). Congress has, through the statutory scheme, provided for the imposition, assessment, and collection of antidumping and countervailing duties prior to a final determination by Commerce. 19 U.S.C. §§ 167lf, 1671d(c)(1)(B), 1673d(c)(1)(B), 1673f, 1677g. Congress has charged Commerce with implementing that scheme, and Commerce has specifically provided for the protection of the revenue of the United States. *See* 19 C.F.R. § 351.205(d). The public interest is served by allowing the system devised by Congress and implemented by the agency to operate without disruption where, as here, Commerce acts within its authority and Plaintiff has failed to demonstrate a likelihood of success on the merits.

Sunpreme contends that the requested injunction is in the public interest because the company is unlawfully being required to make cash deposits on products that are excluded from the scope of the Orders. PI Mot. 50. However, this situation is contemplated by the statute and the regulations. It speaks more to the issue of likelihood of success on the merits. The public interest would not be served by enjoining the collection of cash deposits in this case, as those deposits were properly requested pursuant to the statutory and regulatory scheme in place.[25] *See* 19 U.S.C. §§ 1671d(c)(1)(B), 167lf, 1673d(c)(1)(B), 1673f, 1677g; 19 C.F.R. § 351.205(d).

V. The Collection of Cash Deposits with Respect to Entries Prior to the Initiation of the Scope Inquiry

Plaintiff claims that Commerce's instructions effectively embody two separate decisions. *See* PI Mot. 46–47. First, Plaintiff argues Commerce instructed CBP to collect cash deposits and suspend liquidation on entries on or after the initiation of the scope inquiry. *See id.* Second, Plaintiff argues Commerce's instructions, by failing to specify that CBP should not be collecting cash deposits or suspending liquidation on entries before initiation of the scope inquiry, unlaw-

[25] Sunpreme also argues that the injunction is required "to preserve its opportunity to litigate its meritorious claim." PI Mot. 50. Plaintiff cites *Kwo Lee, Inc. v. United States*, 38 CIT __, 24 F. Supp. 3d 1322 (2014), to support its position that the public interest tips in its favor. *See* PI Mot. 50 (citing *Kwo Lee, Inc. v. United States*, 38 CIT __, __, 24 F. Supp. 3d 1322, 1332 (2014)). In *Kwo Lee*, the court implicitly relied in part upon its finding of likelihood of success on the merits to find that the public interest favored the proper execution of and compliance with the antidumping laws. *See Kwo Lee*, 38 CIT at __, 24 F. Supp. 3d at 1332. Here, Plaintiff has failed to demonstrate that the public interest will not be served by denying the injunction because Plaintiff does not demonstrate likelihood that Commerce erred in its determination.

fully direct CBP to collect cash deposits on entries predating the initiation of the scope inquiry in violation of Commerce's regulations. *See id.* The court has already found that the Plaintiff has failed to make a sufficient showing to enjoin the former. However, Defendant argues that, when entries are already suspended, "Commerce has the authority to order that suspension continue, regardless of when the scope inquiry was initiated." Def.'s Resp. Br. 25–28 (citing 19 C.F.R. §§ 351.225(l)(1), (3)). Here, Plaintiff has demonstrated that, in addition to it suffering likely irreparable harm, it is likely to succeed on the merits of this portion of its claim, and the balance of the hardships and public interest favor an injunction. Therefore, the court grants Plaintiff's motion and enjoins only the collection of cash deposits, but not the suspension of liquidation, on Plaintiff's entries prior to the initiation of the scope inquiry.

In *Sunpreme*, the court concluded that Sunpreme was likely to succeed on its claim that CBP acted in excess of its authority when it interpreted the Orders to include Sunpreme's merchandise. *Sunpreme*, 40 CIT at __, 145 F. Supp. 3d at 1296. The court held:

> Plaintiff has shown that it is very likely to succeed on the merits because it has demonstrated that the Court has jurisdiction and that CBP acted beyond the scope of its authority in interpreting the scope of the Orders. Plaintiff has successfully demonstrated that it is challenging CBP's ultra vires interpretation of Commerce's Orders. It is clear that CBP interpreted ambiguous scope language rather than relying solely upon factual information that the scope language explicitly called on CBP to consider. CBP lacks the authority to interpret ambiguous scope language in the Orders. Since the language of the Orders is insufficient to permit CBP to determine if goods are in or out of scope based upon factual determinations alone, CBP cannot interpret goods as falling within the Orders until Commerce says they are included within the scope.

Id. (citations omitted).

If the court were to decide that CBP did act ultra vires on Plaintiff's motion for judgment on the agency record in *Sunpreme Inc. v. United States*, Court No. 15–00315, any suspension of liquidation would be void ab initio.[26] Therefore, Plaintiff has demonstrated that it is likely

[26] In *Sunpreme*, the court did not decide that any conceivable ambiguity identified by an importer would prevent CBP from collecting cash deposits on its merchandise. Rather, the court's decision that Plaintiff was likely to succeed on the merits was based upon the narrow ground that CBP acted ultra vires by interpreting ambiguous language in the Orders. *See Sunpreme*, 40 CIT at __, 145 F. Supp. 3d at 1296. Where merchandise is covered by the plain language of an order, nothing prevents CBP from collecting cash deposits even in a case where a party claims there is ambiguity in the order. *See Xerox Corp. v. United States*, 289 F.3d 792, 794 (Fed. Cir. 2002). However, the plain language of the Orders includes both

that Defendant's reliance on its regulations to permit the suspension of liquidation and collection of cash deposits for all entries on which there is a continuation of a suspension of liquidation is misplaced.

Turning to Defendant's argument, Commerce's regulations allowing the continuation of suspension of liquidation on entries that are already suspended and allowing the collection of cash deposits on those entries must presume that the suspension of liquidation is lawful. *See* 19 C.F.R. §§ 351.225(l)(1), (3). Plaintiff has demonstrated it is likely to succeed on its claim that Commerce's regulation cannot reasonably be read to permit an ultra vires suspension of liquidation to continue.

When Commerce conducts a scope inquiry,

> and the product in question is already subject to suspension of liquidation, that suspension of liquidation will be continued, pending a preliminary or final scope ruling, at the cash deposit rate that would apply if the product were ruled to be included within the scope of the order.

19 C.F.R. § 351.225(l)(1). Once Commerce issues a final scope ruling to the effect that the product is included within the scope of the order,

> Any suspension of liquidation under paragraph (l)(1) . . . of this section will continue. Where there has been no suspension of liquidation, [Commerce] will instruct [CBP] to suspend liquidation and to require a cash deposit of estimated duties, at the applicable rate, for each unliquidated entry of the product entered, or withdrawn from the warehouse, for consumption on or after the date of initiation of the scope inquiry.

19 C.F.R. § 351.225(l)(3).

Plaintiff argues here that the suspension of liquidation and imposition of antidumping cash deposits may only take effect on or after

inclusionary and exclusionary language. In this case the exclusionary clause, on its face, would not include Sunpreme's merchandise because they contain thin films of amorphous silicon. Without a definition of the term "thin film products" in the scope language, CBP could not have given effect to the exclusionary language without concluding some products with thin films were not thin film products. It is this interpretation of the exclusion that allowed CBP to conclude Plaintiff's merchandise fell within the scope of the Orders.

Where CBP cannot act to collect cash deposits because the plain scope language does not encompass the merchandise, Commerce has numerous routes available to resolve ambiguity and protect potential duties on merchandise that it believes are subject to an order. First, nothing prevents CBP from bringing scope issues to the attention of Commerce, which can self-initiate a scope inquiry. *See* 19 C.F.R. § 351.225(b). In addition, interested parties that are harmed by CBP's inability to apply an order containing language that appears not to reach merchandise on its face may bring an application for a scope inquiry under 19 C.F.R. § 351.225(c). Moreover, in either circumstance, Commerce's regulations permit it to act quickly to determine that a product falls within the scope of an order based solely upon the application or based on the (k)(1) factors where the ambiguity in scope language may be easily resolved. *See* 19 C.F.R. § 351.225(d).

the date of initiation of the scope inquiry. PI Mot. 46 (citing *AMS Assocs., Inc. v. United States*, 737 F.3d 1338, 1344 (Fed. Cir. 2013)). In *AMS Assocs.*, the Court of Appeals for the Federal Circuit held that, where an unclear order renders a product not subject to an existing order and Commerce clarifies ambiguous scope language to determine that the merchandise is subject to the antidumping order, "the suspension of liquidation and imposition of antidumping cash deposits may not be *retroactive* but can only take effect 'on or after the date of the initiation of the scope inquiry.'" *AMS Assocs.*, 737 F.3d at 1344 (citing 19 C.F.R. § 351.225(l)(2), which has identical language to that quoted above in 19 C.F.R. § 351.225(l)(3)). Although in *AMS Assocs.*, Commerce issued corrected liquidation instructions explicitly instructing CBP to suspend liquidation retroactively, *see id.* at 1341, the Court of Appeals' holding did not depend upon that affirmative act. *See id.* at 1344. Defendant points to no authority other than CBP's determination to require Plaintiff to enter its merchandise as subject to the Orders for the collection of cash deposits and suspension of liquidation. Since Commerce initiated its scope inquiry on December 30, 2015, *see* Final Scope Ruling at 2, Plaintiff has demonstrated that it is likely that Commerce's regulations only permit Commerce to order the suspension of liquidation and collection cash deposits prospectively from the date of initiation of the scope inquiry. 19 C.F.R. § 351.225(l)(3); *AMS Assocs.*, 737 F.3d at 1344.

Defendant argues that, unlike in *AMS Assocs.*, here Sunpreme's entries were already suspended prior to the date Commerce initiated its scope inquiry. Def.'s Resp. Br. 27–28. Therefore, Defendant interprets 19 C.F.R. §§ 351.225(l)(1) and (3) to permit the suspension of liquidation to continue and the collection of cash deposits on all entries for which liquidation was suspended. *Id.* (citing 19 C.F.R. §§ 351.225(l)(1), (3)). Plaintiff has demonstrated that it is likely that Commerce acted contrary to law because Commerce's regulation cannot reasonably be interpreted to permit the suspension of liquidation and collection of cash deposits to continue where they resulted from CBP's ultra vires interpretation of the scope language. Such an interpretation is unreasonable because it would permit the circumvention of Commerce's regulations by allowing CBP to require a party to enter goods as subject to the Orders before Commerce has interpreted ambiguous scope language to the effect that goods are subject to the Orders. Nor can either portion of Commerce's regulation reasonably be interpreted to permit Commerce to require cash deposits prior to the date of initiation of the scope inquiry merely because CBP suspended liquidation before that date without authority to do so. Plaintiff has therefore demonstrated that it is likely that CBP's purported suspension of liquidation was void ab initio.

Defendant argues that Commerce may liquidate all unliquidated entries pursuant to its final scope ruling regardless of when Commerce issued its final scope ruling. *See* Def.'s Resp. Br. 28 (citing

Ugine & ALZ Belgium v. United States, 551 F.3d 1339, 1349 (Fed. Cir. 2009) ("*Ugine II*")). *Ugine II* is inapposite, and Defendant misconstrues its holding. In *Ugine*, the Court of Appeals held that Commerce may not impose antidumping duties on unliquidated entries it determined were not subject to an antidumping duty order merely because no objection was raised during the course of a subsequent administrative review. *See Ugine II*, 551 F.3d at 1349. In *Ugine II*, the Court of Appeals for the Federal Circuit did not confront an ultra vires interpretation by CBP nor did it interpret Commerce's scope regulations to permit retroactive suspension of liquidation and collection of cash deposits on entries that were suspended by CBP acting contrary to law. *See id.* at 1349.

Therefore, the combination of the court's prior ruling in *Sunpreme Inc. v. United States*, Court No. 15–00315, and Commerce's regulations make it likely that Plaintiff will succeed in demonstrating that Commerce was without authority to order the suspension of pre-initiation entries or to collect cash deposits on such entries.[27] Commerce may not continue CBP's suspension of liquidation pursuant to its regulation where Plaintiff has demonstrated it is likely CBP acted contrary to law. The court likewise already found that the public interest and the balance of the hardships favor Plaintiff on this portion of its claim. *See Sunpreme*, 40 CIT at __, 145 F. Supp. 3d at 1296–1298. Accordingly, since Plaintiff has demonstrated that all four factors favor granting a preliminary injunction preventing Commerce from collecting cash deposits on entries prior to initiation of the scope inquiry, this portion of Plaintiff's motion is granted.

However, the court does not enjoin the continuation of suspension of liquidation on all entries whose liquidation is suspended on or after Commerce's initiation of the scope inquiry because Plaintiff has made no showing that suspension of liquidation will cause it irreparable harm or that the balance of the hardships or public favor such an injunction.

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[27] Commerce's liquidation instructions, *see* Corrected Sunpreme Customs Instructions, AD PD 75, bar code 3505144–01 (Sept. 12, 2016); Corrected Sunpreme Customs Instructions, CVD PD 81, bar code 3505147–01 (Sept. 12, 2016), permit CBP to collect cash deposits on entries prior to December 30, 2015 that were enjoined by the temporary restraining order and PI given by the court in Plaintiff's action challenging CBP's collection of cash deposits, which is no longer in effect. *See* Sunpreme Inc. v. United States, 40 CIT at __, 145 F. Supp. 3d at 1299.

USCIT Rule 65(c) requires that the court may issue a PI "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by a party found to have been wrongfully enjoined." USCIT R. 64(c). The court considers a bond of [[ ]] appropriate security to protect Defendant in the event it has been wrongfully enjoined from collecting cash deposits on Plaintiff's entries from the date between the date the temporary restraining order and December 30, 2015.

CONCLUSION

Although Plaintiff has shown that it is likely to suffer irreparable harm without an injunction, it has failed to raise a serious challenge to the reasonableness of Commerce's interpretation of the scope language. Moreover, the balance of hardships and the public interest tip decidedly against enjoining the collection of cash deposits on entries subsequent to the initiation of the scope inquiry in this case. However, Plaintiff has shown that it is likely that Commerce lacks the authority to suspend liquidation on entries or to collect cash deposits on entries prior to the initiation of its scope inquiry. Therefore, Plaintiff's motion for an injunction prohibiting Commerce from instructing CBP to collect and prohibiting CBP from collecting cash deposits prior to the initiation of the scope inquiry is granted. Therefore, it is

ORDERED that Plaintiff's motion for a preliminary injunction is denied in part and granted in part; and it is further

ORDERED that Defendant, United States, together with its delegates, officers, agents, servants, and employees of the International Trade Administration of the U.S. Department of Commerce and the U.S. Department of Homeland Security, U.S. Customs and Border Protection, shall be enjoined during the pendency of this action from requiring Plaintiff to pay cash deposits on entries of solar modules containing bi-facial thin film cells made with amorphous silicon from the People's Republic of China that are the subject of this action entered or withdrawn from warehouse on or before December 30, 2015; and it is further

ORDERED that, as a condition to the grant of preliminary injunctive relief, Plaintiff shall provide assurity that it will furnish a bond in the amount of [[ ]] subject to the approval of the Clerk of the Court, to pay the costs or damages as may be incurred or suffered in the event that Defendant has been wrongfully enjoined; and it is further

ORDERED that this preliminary injunction shall expire upon the entry of a final and conclusive court decision in this matter.

Dated: October 5, 2016
New York, New York

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

Slip Op. 16–94

SHENYANG YUANDA ALUMINUM INDUSTRY ENGINEERING CO., Plaintiff, v. UNITED STATES, Defendant.

Before: Donald C. Pogue,
Senior Judge
Consol. Court No. 14–00106[1]

[Redetermination remanded for further consideration in accordance with this opinion.]

Dated: October 6, 2016

James R. Cannon, Jr., John D. Greenwald, and *Thomas M. Beline*, Cassidy Levy Kent, LLP, of Washington, DC, for Plaintiff Yuanda.

Kristen S. Smith, Arthur K. Purcell, and *Michelle L. Mejia*, Sandler, Travis, & Rosenberg, P.A., of Washington, DC, for Consolidated Plaintiff Jangho.

William E. Perry, Emily Lawson, and *Kate Kennedy*, Dorsey & Whitney LLP, of Seattle, WA, for Consolidated Plaintiff Permasteelisa.

Douglas G. Edelschick, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel was *Scott D. McBride*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

David M. Spooner and *Christine J. Sohar Henter*, Barnes & Thornburg, LLP, of Washington, DC, for Defendant-Intervenor, the Curtain Wall Coalition.

OPINION AND ORDER

Pogue, Senior Judge:

This action comes again before the court following a second remand and redetermination.

In prior proceedings, the Plaintiffs Shenyang Yuanda Aluminum Industry Engineering Co., Ltd. and Yuanda USA Corporation (collectively "Yuanda"); Jango Curtain Wall Americas Co. ("Jangho"); and Permasteelisa North America Corp., Permasteelisa South China Factory, and Permasteelisa Hong Kong Ltd. (collectively "Permasteelisa"), challenged the scope determination,[2] made by the Defendant, the U.S. Department of Commerce ("Commerce"), that Yuanda's unitized curtain wall, i.e., a complete curtain wall, unitized and imported in phases pursuant to a sales contract, was within the scope of the antidumping and countervailing duty orders (the

[1] This action is consolidated with court numbers 14–00107 and 14–00108. Order, July 16, 2014, ECF No. 28.

[2] Compl., ECF No. 9 (Yuanda's complaint); Compl., Ct. No. 1400107, ECF No. 8 (Jangho's complaint); Compl., Ct. No. 14–00108, ECF No. 8 (Permasteelisa's complaint).

"AD&CVD Orders" or the "Orders") on aluminum extrusions from the People's Republic of China ("PRC").[3]

In the second redetermination, however, Commerce has, under protest, found Yuanda's unitized curtain wall excluded from the scope of the Orders, resulting in a reversal of positions. Now Defendant-Intervenors, Walters & Wolf, Architectural Glass & Aluminum Company, and Bagatelos Architectural Glass Systems, Inc. (collectively the "Curtain Wall Coalition" or "CWC") challenge Commerce's determination. Def.-Intervenors' Comments in Opp'n to Commerce's Final Results of Redetermination Filed on May 13, 2016, Pursuant to Ct. Remand, ECF No. 113 ("CWC Br.").

Review of Commerce's re-determination involves consideration of prior decisions, the descriptions of the merchandise contained in the petition, and the requirements of Commerce's subassemblies test for exclusion from the Order, all of which will be discussed below.[4] The court has jurisdiction pursuant to § 516A(a)(2)(B)(vi) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(vi) and 28 U.S.C. § 1581(c) (2012).[5]

BACKGROUND

The issues presented here stem from the language of Commerce's AD&CVD Orders on aluminum extrusions from the PRC. *See Aluminum Extrusions from the [PRC]*, 76 Fed. Reg. 30,650 (Dep't Commerce May 26, 2011) (antidumping duty order) ("AD Order"); *Aluminum Extrusions from the [PRC]*, 76 Fed. Reg. 30,653 (Dep't Commerce May 26, 2011) (countervailing duty order) ("CVD Order"). The Orders cover "aluminum extrusions," defined as "shapes and forms, produced by an extrusion process, made from [certain] aluminum alloys." AD

[3] *Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce March 27, 2014) (final scope ruling on curtain wall units that are produced and imported pursuant to a contract to supply curtain wall), ECF No. 34–1 ("Yuanda Scope Ruling"); Final Results of Redetermination Pursuant to Ct. Remand, ECF No. 68–1 ("Redetermination"); *see Aluminum Extrusions from the [PRC]*, 76 Fed. Reg. 30,650 (Dep't Commerce May 26, 2011) (antidumping duty order) ("AD Order"); *Aluminum Extrusions from the [PRC]*, 76 Fed. Reg. 30,653 (Dep't Commerce May 26, 2011) (countervailing duty order) ("CVD Order"). Yuanda USA Corp is an importer and Shenyang Yuanda Aluminum Industry Engineering Co., Ltd. is a foreign producer and exporter of curtain wall units. Jangho is a foreign producer of subject merchandise. Permasteelisa North America Corp. is an importer and Permasteelisa Hong Kong Ltd. is a foreign producer of subject merchandise. Yuanda Scope Ruling, ECF No. 34–1, at 1–2.

[4] In accordance with the court's remand, Commerce provided explanation of the distinction it has drawn between curtain wall and window wall units. 2d Redetermination, ECF No. 109–1, at 32–33, 61–65. The reasonableness of this explanation has not been challenged, *see Consol. Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003) (citation omitted) ("[A]n agency action is... arbitrary and capricious" if the agency has treated similarly situated parties or products differently "without reasonable explanation."), and as such is affirmed.

[5] All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U. S. Code, 2012 edition.

Order, 76 Fed. Reg. at 30,650; CVD Order, 76 Fed. Reg. at 30,653. Aluminum extrusions "described at the time of importation as parts for final finished products" such as "window frames, door frames, solar panels, curtain walls, or furniture," to be "assembled after importation," are subject to the order if such parts "otherwise meet the definition of aluminum extrusions," AD Order, 76 Fed. Reg. at 30,650–51; CVD Order, 76 Fed. Reg. at 30,654 (emphasis added), that is, they are shapes or forms made from the covered aluminum alloys and made by an extrusion process, AD Order, 76 Fed. Reg. at 30,650; CVD Order, 76 Fed. Reg. at 30,653.[6] The Orders also cover "aluminum extrusion components that are attached (e.g., by welding or fasteners) to form subassemblies, i.e., partially assembled merchandise." AD Order, 76 Fed. Reg. at 30,651; CVD Order, 76 Fed. Reg. at 30,654.

The Orders exclude finished goods – that is, "finished merchandise containing aluminum extrusions as parts" – so long as such merchandise is "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." AD Order, 76 Fed. Reg. at 30,651; CVD Order, 76 Fed. Reg. at 30,654.[7] The Orders also exclude "finished goods containing aluminum extrusions that are entered unassembled in a 'finished goods kit.'" *Id*. A finished goods kit is "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."[8]

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[6] Commerce claims that it is significant that the "parts" language precedes the "subassembly" language (though the agency does not say why or to what effect), and asserts that the Orders provide "specific examples of parts of final finished products that are assembled after importation: window frames, door frames, solar panels, curtain walls and furniture." 2d Redetermination, ECF Nos. 109–1 & 110–1, at 24. However, this is not a plain list of example parts. At most, the list arguably includes both parts ("window frames" and "door frames")and finished goods the parts of which are covered ("solar panels, curtain walls, [and] furniture"). More likely, the list is intended to be entirely of finished goods assembled after importation. This is because it ordinarily would noy be possible to perform an extrusion process on a basic form (bar, rod, etc.) to create an entire window or door frame. To "extrude" is to push or draw the basic form through the die to obtain the desired cross section. And the Order covers only aluminum extrusions. Indeed, Commerce itself goes on to list "solar panels" as a finished (and therefore excluded) product. *Id*. at 25.

[7] Aluminum extrusions "identified with reference to their end use, such as fence posts, electrical conduits, door thresholds, carpet trim, or [certain] heat sinks . . . are subject merchandise if they otherwise meet the scope definition, regardless of whether they are ready for use at the time of importation." *Id*.

[8] *Id.* However, "[a]n 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." *Id*.

Subassemblies may also be excluded from the Orders, provided that they enter as part of a "finished goods kit."[9] Further, a subassembly may be excluded pursuant to the "subassemblies test" exclusion devised by Commerce in *Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce Sept. 24, 2012) (preliminary side mount valve controls scope Ruling) at 7 ("SMVC Scope Ruling") (adopted unchanged in *Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce Oct. 26, 2012) (final side mount valve controls scope ruling)).

The Orders have been addressed in several relevant scope proceedings. Prior to the *Yuanda Scope Ruling* at issue here, Commerce issued *Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce Nov. 30, 2012) (final scope ruling on curtain wall units and other parts of a curtain wall system) ("CWC Scope Ruling"). There, Commerce determined that "parts of curtain wall[s]," defined as curtain wall sections, that "fall short of the final finished curtain wall that envelopes an entire building structure," including, but not limited to individual curtain wall units (i.e., "modules that are designed to be interlocked with [each other], like pieces of a puzzle"), were within the scope of the Orders. *CWC Scope Ruling* at 3, 10. Both this Court and the CAFC affirmed, holding that "[a] single [curtain wall] unit" is not a whole "curtain wall," and as such, is a "part" or "subassembly" of a curtain wall. *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 776 F.3d 1351, 1357–58 (Fed. Cir. 2015) ("*Yuanda II*) (citing *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, __ CIT __, 961 F. Supp. 2d 1291, 1298–99 (2014) ("*Yuanda I*")).[10]

In the *Yuanda Scope Ruling*, Commerce determined that complete curtain wall units sold "pursuant to a contract to supply a complete curtain wall system" were within the scope of the Orders. *Yuanda Scope Ruling* at 1 (footnote omitted). Yuanda, Jangho, and Permasteelisa appealed the ruling to this Court. In their initial motions for summary judgment on appeal, Plaintiffs brought attention to the fact that Commerce had not considered the "description of the merchandise contained in the [P]etition," *see* 19 C.F.R. § 351.225(k)(1), in particular, an exhibit from that Petition that listed "unassembled unitized curtain walls" as non-subject merchandise under the "finished goods kit" exclusion. Petition, ECF No. 83–3 at Tab 10, at

[9] *Id.; see Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce Sept. 24, 2012) (preliminary side mount valve controls scope Ruling) at 7 ("SMVC Scope Ruling") (adopted unchanged in *Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce Oct. 26, 2012) (final side mount valve controls scope ruling)), *reproduced in* Def.'s App. Accompanying [Def.'s Resp.], ECF No. 86 at Tabs 3 & 4.

[10] Commerce has also issued a third scope ruling on curtain wall units with non-PRC aluminum extrusions. *See Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce March 14, 2013) (final scope ruling on Tesla curtain walls with non-PRC extrusions). However, this determination is not relevant here because, unlike there, the country of origin of Yuanda's aluminum extrusions is not at issue.

Exhibit I-5.[11] Commerce requested and was granted a voluntary remand to consider this evidence. Def.'s Consent Mot. for Voluntary Remand, ECF No. 49; Order, Dec. 9, 2014, ECF No. 50.

On redetermination, Commerce found that, based on the Petition, unassembled curtain wall units were within the scope of the AD&CVD Orders unless all necessary parts for an entire curtain wall were present "at the time of importation," i.e., in the same entry, on a single Customs and Border Protection ("CBP") 7501 Entry Summary form. Redetermination I, ECF No. 68–1, at 16. The court remanded again, finding that Commerce's determination was not in accordance with law and unreasonable. *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, __ CIT __, 146 F.Supp.3d 1331 (2016) ("*Yuanda III*"). The resultant redetermination is now at issue here. Redetermination II, ECF Nos. 109–1 (conf. ver.) & 110–1 (pub. ver.).

STANDARD OF REVIEW

The court will sustain Commerce's determination on remand if it is in accordance with law, supported by substantial evidence on the record, and complies with the court's remand order. 19 U.S.C. § 1516a(b)(1)(B)(i); *Jinan Yipin Corp., Ltd. v. United States*, 33 CIT 934, 936, 637 F. Supp. 2d 1183, 1185 (2009).

DISCUSSION

Three issues persist following the second redetermination: first, whether Commerce's determination is precluded by *stare decisis* and *res judicata*; second, whether Commerce's reading of the Orders is based on a reasonable reading of the record evidence as laid out in 19 C.F.R. § 351.225(k)(1), including specifically the descriptions of the merchandise contained in the petition; and third, whether Commerce's application of the subassemblies test exclusion is in keeping with Commerce's prior applications. Each is discussed in turn below.

I. The Effect of Stare Decisis and Res Judicata.

The CWC argues that the CAFC "in *Yuanda II*, decided that curtain wall units generally, and Yuanda's curtain wall units in particular, are subject to the scope," such that Commerce is precluded "from finding otherwise" pursuant to the doctrines of *stare decisis* and *res judicata*. Def.'s-Intervenor's Br., ECF No. 113, at 15 (citing *Yuanda II*, __ CIT at __, 776 F.3d at 1358–59). Stare decisis is "the idea that

[11] *See* Mem. of P. & A. in Supp. of Yuanda's Mot. for J. on the Agency R., ECF No. 38–1, at 4, 14; Mem. in Supp. of Pl. Jangho's Mot. for J. on the Agency R., ECF No. 37–1, at 14; [Permasteelisa's] Rule 56.2 Mot. for J. on the Agency R., ECF No. 39, at 4, 24; *see also* Mot. to Supp. the Admin. Record, ECF No. 33 (requesting that the administrative record be amended to include the Petition); Order, Sept. 18, 2014, ECF No. 36 (granting the motion to supplement the administrative record to include the Petition).

today's Court should stand by yesterday's decisions," *Kimble v. Marvel Entm't, LLC*, __ U.S. __135 S. Ct. 2401, 2409 (2015), and *res judicata* – the doctrine of claim preclusion – "bars 'repetitious suits involving the same cause of action' once 'a court of competent jurisdiction has entered a final judgment on the merits,'" *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 315 (2011) (quoting *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948)).

Here, while the CAFC and the CIT affirmed Commerce's finding, in the scope ruling requested by the CWC, that curtain wall units were parts and subassemblies for curtain walls and therefore within the scope of the Orders, *see Aluminum Extrusions from the [PRC]*, A-570–967 & C-570–968 (Dep't of Commerce Nov. 30, 2012) (final scope ruling on curtain wall units and other parts of a curtain wall system) ("CWC Scope Ruling"); *Yuanda II*, 776 F.3d at 1357–58 (citing *Yuanda I*, __ CIT __, 961 F. Supp. 2d at 1298–99)),[12] Commerce expressly declined to consider the finished goods kit exclusion and Yuanda's specific products, *CWC Scope Ruling* at 9. The CIT affirmed this decision and the CAFC did not consider the issue. *Yuanda I*, 961 F. Supp. 2d at 1301 ("The court finds that Commerce properly confined its inquiries to the request made by the CWC . . . . That is, an inquiry as to whether a particular entry, or even product, would qualify for an exception to the scope language simply goes far beyond the CWC's request."); *see also Yuanda II*, 776 F.3d 1351 (providing no discussion of the finished goods kit exclusion). As such, there is no prior decision, much less final judgment, precluding Commerce's determination here. Commerce is not precluded by *stare decisis* and *res judicata* from considering the finished goods kit exclusion and the subassemblies test as applied to Yuanda's products, or finding one way or the other on these issues.

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[12] The CWC incorrectly relies on the "parts" language, read in isolation. But curtain wall units cannot plausibly be described as "parts for final finished products that are assembled after importation" that "otherwise meet the definition of aluminum extrusions" – i.e., are "shapes and forms, produced by an extrusion process, made from [certain] aluminum alloys." AD Order, 76 Fed. Reg. at 30,650–51; CVD Order, 76 Fed. Reg. at 30, 653–54; *see Aluminum Extrusions Fair Trade Comm. v. United States*, 37 ITRD 2909 (Ct. Int'l Trade 2016) ("With respect to the first two sentences of the above-quoted language, the screen-printing frames are not plausibly described as 'parts for final finished products that are assembled after importation' that'otherwise meet the definition of aluminum extrusions.' Even were it presumed that the screen printing frames are 'parts forfinal finished products,' they would not answer to the description 'parts that otherwise meet the definition of aluminum extrusions.'As discussed above, the definition of 'aluminum extrusions' is 'shapes and forms produced by an extrusion process ...,'" *AD Order,* 76 Fed. Reg. at 30,650; *CVD Order,* 76 Fed. Reg. at 30,653, which after extrusion may be subjected to "drawing, fabricating, and finishing." *AD Order,* 76 Fed. Reg. at 30,650; *CVD Order,* 76 Fed. Reg. at 30,654."). Notably, the court of appeals did not read or rely on the 'parts' language in isolation. It follows that proper consideration of the reach of *Yuanda I* and *Yuanda II* must focus on the "subassemblies" language.

II. The (k)(1) Materials

When there is a question as to "whether a particular product is included within the scope of an antidumping or countervailing duty order," 19 C.F.R. § 351.225(a), Commerce first looks to the plain language of the underlying order, *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002). If the terms of the order are dispositive, then the order governs. *Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1383 (Fed. Cir. 2005). If the order "contains language that must be interpreted," *id*., then Commerce "consider[s] the regulatory history, as contained in the so-called '(k)(1) materials'" — named for the regulatory subsection in which they appear. *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1302 (Fed. Cir. 2013). Specifically, Commerce considers "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the [International Trade] Commission." 19 C.F.R. § 351.225(k)(1).[13]

In *Yuanda III*, the court remanded to Commerce, *inter alia*, because the agency had failed to support its determination that only single-entry, unitized curtain walls were excluded from the scope of the Orders with substantial evidence – i.e., with a reasonable reading of the (k)(1) materials. *Yuanda III*, __ CIT at __, 146 F. Supp. 3d at 1349–1354.

In its first redetermination, Commerce relied on the Petition, which listed "unassembled unitized curtain walls" as an example of a product excluded as a finished goods kit, to reach the conclusion that only single-entry, unitized curtain walls could be excluded from the scope of the Orders. Redetermination I, ECF No. 68–1, at 16; *id.* at 10. The court remanded because Commerce's reading of the Petition, and therefore Orders pursuant to 19 C.F.R. § 351.225(k)(1), was not informed by the record. Specifically, Petitioners themselves had conceded that there is no such thing as a single-entry, unitized curtain wall. *Yuanda III*, __ CIT at __, 146 F. Supp. 3d at 1349–1354.[14] It follows that Petitioners could not have intended to use a product as

[13] *Smith Corona Corp. v. United States*, 915 F.2d 683, 685 (Fed. Cir. 1990) ("The class or kind of merchandise encompassed by a final antidumping order is determined by the order, which is interpreted with the aid of the antidumping petition, the factual findings and legal conclusions adduced from the administrative investigations, and the preliminary order."). If the (k)(1) materials "are not dispositive," then Commerce "will further consider: (i) [t]he physical characteristics of the product; (ii) [t]he expectations of the ultimate purchasers; (iii) [t]he ultimate use of the product; (iv) [t]he channels of trade in which the product is sold; and (v) [t]he manner in which the product is advertised and displayed." 19 C.F.R. §351.225(k)(2).

[14] *CWC Scope Ruling* at 6 ("Petitioners reiterate CW[C]'s contention that it is simply not possible for a complete curtain wall to enter as a 'kit' because the entire installation process is designed to work with other parts to form a larger structure and represent a collection of individual parts that comprise a single element as opposed to complete system." (footnotes omitted)).

an example that, by Petitioners' own admission, does not exist. *Id*. By ignoring the actual nature of the product at issue, by failing to consider the evidence on the administrative record defining and explaining the product, Commerce made a counter factual reading of the Petition and then supported its interpretation of the Orders with that counter factual reading. *Id*. Commerce must contend with the actual record evidence before it and offer a reasoned explanation for its determination based on that evidence. Commerce did not do so in the first redetermination, making remand appropriate.

In its second redetermination, rather than actually address these evidentiary problems, Commerce quotes a narrow portion of *Yuanda III* out of context, and concludes:

> [I]t appears the Court's holding is clear that if the only way a particular product in a particular industry, in this case the curtain wall industry, can benefit from the "finished goods kit" exclusion, as interpreted by [Commerce], is to fulfill criteria which the evidence on the record does not suggest anyone in that industry currently fulfills, then [Commerce's] determination is flawed and unreasonable, even if other industries currently fulfill those criteria and benefit from the exclusion.

Redetermination II, ECF No. 109–1, at 103; *see id.* at 34–38. The agency thereby finds itself compelled to exclude Yuanda's unitized curtain wall from the scope of the Orders "absent evidence that any exporter or importer in the curtain wall industry ships its curtain wall units in a manner that would permit parties to benefit from the 'finished goods kit' exclusion to the [Orders]" and "[n]o such evidence is present on the record." *Id.* at 104.

Commerce's analysis here is both too broad and too narrow. Too broad in that it creates a general rule rather than choosing to follow applicable regulatory provisions, *see* 19 C.F.R. § 351.225(k), and address the specific evidentiary problem put before it on remand that prevented its determination from being supported by substantial evidence, *King Supply Co., LLC v. United States*, 674 F.3d 1343, 1349–50 (Fed. Cir. 2012) (reviewing consideration of (k)(1) materials under the substantial evidence standard); *Yuanda III*, __ CIT at __, 146 F. Supp. 3d at 1349–1354 (discussing the evidentiary problems presented by Commerce's analysis of the (k)(1) materials). Too narrow in that, while it, correctly, goes so far as to find that there is no such product as a single-entry, unitized curtain wall, *see* Redetermination II, ECF No. 109–1, at 104, it fails to address what this means in the context of the (k)(1) materials – specifically, the express exclusion of "unassembled unitized curtain wall," which, based on reality (or at least the administrative record) must be something other than a single-entry, whole curtain wall, in the Petition, *see* Petition, ECF No. 83–3 at Tab 10, at Exhibit I-5, because no such product exists.

Commerce must "consider the regulatory history, as contained in the [] '(k)(1) materials.'" *Mid Continent Nail*, 725 F.3d at 1302.[15] This includes an informed[16] and meaningful[17] assessment of the Petition. 19 C.F.R. § 351.225(k)(1).[18] Commerce has yet to do so here. Remand, accordingly, remains appropriate.

III. The Subassemblies Test

While Commerce premises its ultimate determination on its "obligat[ion] to make a conclusion on remand that is consistent with [its misinterpretation of the court's] holding [in *Yuanda III*]," in registering its "respectful[] disagree[ment] with the Court's finding," Commerce "provide[s] the reasons in [its] remand redetermination behind [this] disagreement." 2d Redetermination, ECF No. 109–1, at 103. Chief among these reasons is Commerce's application of its subassemblies test.

Specifically, Commerce asserts that "[u]nder [its] subassemblies test, [Commerce] first must determine if a subassembly is a finished good, either fully assembled or shipped in pieces as a kit, capable of installation in the ultimate downstream product upon importation." 2d Redetermination, ECF No. 109–1, at 28. And second, whether the product at issue "'require[s] no further finishing or fabrication, such as cutting or punching' to be installed in the downstream product" – whether it is "ready for installation 'as is.'" *Id.* at 30.

Commerce reasons that since the "finished good" here must be an entire curtain wall, then Yuanda's curtain wall units, being something less than an entire curtain wall, "cannot pass the subassem-

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[15] In making a scope determination, Commerce must "utilize[] and abide[] by the statutory and regulatory provisions that authorize [it] to investigate [scope issues]." *AMS Associates, Inc. v. United States*, 737 F.3d 1338, 1344 (2013).

[16] *See Universal Camera*, 340 U.S. at 488 ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."); *State Farm*, 463 U.S. at 43 ("Normally, an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency . .. ."); *see also* 19 C.F.R. § 351.225(k)(1) ("in considering whether a particular product is included within the scope of an order . . . the Secretary will take into account . . . [t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce].")

[17] *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) ("[T]he substantial evidence standard requires review of the entire administrative record" and asks, in light of that evidence, whether Commerce's determination was reasonable.); *Cf. Polites v. United States*, __ CIT __, 755 F. Supp. 2d 1352, 1357(2011) (finding that Commerce's interpretation of an order was "unreasonable" because Commerce read the express exclusion of "finished scaffolding" in an Order with "nothing in the record [to] demonstrate[] merchandise matching [its] definition is imported into the United States or is even possibly imported into the United States").

[18] Cf. *Fedmet Res. Corp. v. United States*, 755 F.3d 912, 919 (Fed. Cir. 2014) ("The (k)(1) sources are dispositive and unequivocally confirm that Fedmet's MAC bricks are not within the scope of the orders. [T]hese sources contain multiple representations made by Resco disclaiming coverage of all MAC bricks in general.").

blies test." *Id*. at 27 (citing *Yuanda I*, 961 F. Supp. 2d at 1298–99, referencing, without citation, *Yuanda II*); *see also id*. at 79 ("The [CAFC's] holding in *Yuanda II* that curtain wall units are not finished merchandise, but are parts of curtain walls subject to the Orders, is binding precedent.") (citing *Yuanda I*, 961 F. Supp. 2d at 1298; *Yuanda II*, 776 F.3d at 1358)). Commerce goes on to find that "curtain wall units are not ready to be installed upon importation 'as is.'" *Id*. at 30.

However, Commerce continues to miss the point of its own subassemblies test. To wit: The subassemblies test "revise[s] the manner in which [Commerce] determines whether a given product is a 'finished good' or 'finished goods kit.'" SMVC Scope Ruling at 6–7. It scales back the definition of 'final' and 'finished,' from a question of the "ultimate downstream product" to the subassembly itself, to allow for the exclusion of final, finished subassemblies from the scope of the Orders. *Id*.[19]

When Commerce devised the subassemblies test, it explained its reasoning as follows:

> In prior scope rulings, [Commerce] found that merchandise could not be considered a 'finished good' or 'finished good kit' if it was designed to work with other parts to form a larger structure or system. . .However, upon further reflection of the language in the scope of the Orders and for purposes of [the SMVC Scope Ruling], [Commerce] is revising the manner in which it determines whether a given product is a 'finished good' or 'finished goods kit.' [Commerce] has identified a concern with this analysis, namely that it may lead to unreasonable results. An interpretation of 'finished goods kit' which requires all parts to assemble the ultimate downstream product may lead to absurd results, particularly where the ultimate downstream product is, for example, a fire truck. This interpretation may expand the scope of the Orders, which are intended to cover aluminum extrusions.

SMVC Scope Ruling at 6–7. Given this, Commerce, reading the definition of subassemblies – "partially assembled merchandise," AD Order, 76 Fed. Reg. at 30,651; CVD Order, 76 Fed. Reg. at 30,654 – and the exclusion of subassemblies as part of a finished goods kit[20] in concert, devised a test, whereby subassemblies, in keeping with the

[19] Commerce has itself articulated this difference elsewhere in the redetermination at issue here, as a question of the "ultimate downstream product" versus "finished good/subassembly." Redetermination II, ECF No. 109–1, at 68.

[20] A subassembly may be excluded if it is a "part" of "a finished goods 'kit.'" *Id*. at 5.

intent and purpose of the Orders,[21] may be considered a discrete subunit and excluded from the scope of the Orders if finished and ready for installation in the final downstream product. Commerce explains the subassemblies test as follows:

> [T]he "subassemblies test" . . . considers whether the product subject to a scope proceeding constitutes a subassembly, i.e., "merchandise that is 'partially assembled' and inherently part of a larger whole.' The Department explained that aluminum extrusion subassemblies may be excluded from the scope of the Orders as "finished goods" or "finished goods kits" provided that they require no further "finishing" or "fabrication" prior to assembly, contain all the necessary hardware and components for assembly, and are ready for instillation at the time of entry.

[Valeo] Final Results of Redetermination Pursuant to Ct. Remand, Ct. No. 12–00381, ECF No. 20–1 ("Valeo Redetermination"), at 8 (quoting SMVC Scope Ruling at 7).

To be clear, by Commerce's own explanation, the subassemblies test requires (1) that the product at issue meets the definition of subassembly – i.e., "merchandise that is 'partially assembled' and inherently part of a larger whole" and (2) such subassemblies "require no further 'finishing' or 'fabrication' prior to assembly, contain all the necessary hardware and components for assembly, and are ready for installation at the time of entry." *Id*. If it is, then it will be considered a "finished good" or "finished good kit" irrespective of Commerce's previous definition of the finished good or finished good kit exclusions. SMVC Scope Ruling at 7; Valeo Redetermination at 10 (finding a product subject to the Orders under the standard finished good exclusion, but excluded under the subassemblies test).[22]

Commerce, to its own confusion, has shorthanded its subassemblies test both here and elsewhere as a question of whether the subassemblies "enter the United States as 'finished goods' or 'finished goods

[21] The Orders "are intended to cover aluminum extrusions." SMVC Scope Ruling at 7. Again, aluminum extrusions are "shapes and forms, produced by an extrusion process, made from [certain] aluminum alloys." AD Order, 76 Fed. Reg. at 30,650; CVD Order, 76 Fed. Reg. at 30,653.

[22] If Commerce intends to change the subassemblies test here, then it must provide a reasoned explanation for that change, rather than denying the existence thereof. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16, (2009) ("To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency maynot, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."); *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003) ("the proper mode of analysis requires comparison of Commerce's actions before this case with Commerce's actions in this case. If that analysis shows that Commerce acted differently in this case than it has consistently acted in similar circumstances without reasonable explanation, then Commerce's actions will have been arbitrary.").

kits'" and whether those "'subassemblies' require no further 'finishing' or 'fabrication.'" SMVC Scope Ruling at 7; 2d Redetermination, ECF No. 109–1, at 28. But, this summary must be read in the context of Commerce's intent to "revis[e] the manner in which [Commerce] determines whether a given product is a 'finished good' or 'finished goods kit'" from a question of the "ultimate downstream product" to focus on the subassembly itself. SMVC Scope Ruling at 6–7. Commerce's own application of the test elsewhere reflects this,[23] to the point of excluding products that had previously failed the finished goods test. *See* [Valeo] Final Results of Redetermination Pursuant to Ct. Remand, Ct. No. 12–00381, ECF No. 20–1.

This shorthand creates difficulties for Commerce here because it leads Commerce to adopt the approach that the subassemblies test expressly rejects. Commerce finds that "parts of curtain walls, such as Yuanda's curtain wall units, cannot pass the subassemblies test because the scope specifically provides that they are not a finished good under the Orders" – a determination it premises on the fact that "the scope itself states that the 'finished good' is the curtain wall." 2d Redetermination, ECF No. 109–1, at 27. That is, Commerce has simply examined whether the product at issue is "a part of a larger structure or system" (a curtain wall), rather than actually applying the subassembly test outlined above. As Commerce has already explained, "determining whether a product meets the exclusions for 'finished goods' and 'finished goods kit' simply by examining whether it is a part of a larger structure or system fails to account for the scope

[23] For example, in *Aluminum Extrusions from the [PRC]*, A-570–967& C-570–968 (Dep't of Commerce Nov. 19, 2012) (final scope ruling on motor cases, assembled and housing stators), Commerce parallel to its arguments here, explained that "[i]n the SMVC scope ruling, the Department found that 'subassemblies' (i.e. 'partially assembled merchandise') may be excluded from the scope provided that they enter the United States as 'finished goods' or 'finished goods kits' and that the 'subassemblies' require no further 'finishing' or 'fabrication.'" *Id*. at 14. However, in actual application, Commerce did not determine whether the product at issue was a "finished good" or "finished good kit" by the terms of the Orders, but rather found that the product at issue, assembled motor cases housing stators, were "analogous to the merchandise examined in the scope ruling on SMVCs" (that is, a subassembly) and "meet[] the criteria for exclusion" because they were not made entirely of aluminum and "require no further finishing or fabrication upon importation." *Id.* Commerce thus considered them "finished goods" under the subassembly test (not the standard finished goods test that requires a final, finished product). *Id. For similar applications see Aluminum Extrusions from the [PRC]*, A–570–967 & C–570–968 (Dep't of Commerce July 25, 2014) (final scope ruling on fan blade assemblies) at 16 ("We disagree with Petitioners' argument that the fan blade assemblies are not "final finished goods" because they are a component of cooling towers and because they are imported as "parts" of such larger systems. As explained above, based on our examination of the language of the scope and our determination in the SMVC Scope Rulings, we find that the product in question is a "subassembly" that meets the criteria for a "finished good" and is therefore excluded from the scope of the Orders."); *Aluminum Extrusions from the [PRC],* A–570–967 & C–570–968 (Dep't of Commerce Nov. 23, 2015) (final scope ruling on Dometic Corp.'s lateral arm assemblies) at 12 ("[T]he lateral arm assemblies satisfy the finished merchandise exclusion as subassemblies.").

language that expressly allows for the exclusion of 'subassemblies,' i.e. merchandise that is 'partially assembled' and inherently part of a larger whole." SMVC Scope Ruling at 7 (quoting AD Order, 76 Fed. Reg. at 30,651; CVD Order, 76 Fed. Reg. at 30,654).

Instead, based on its own prior explanation and application of the subassemblies test, Commerce should have determined (1) whether Yuanda's curtain wall units are a subassembly,[24] and then (2) whether Yuanda's curtain wall units require "further 'finishing' or 'fabrication' prior to assembly, contain all the necessary hardware and components for assembly, and are ready for installation at the time of entry." Valeo Redetermination at 8.

As it seems to bear repeating,[25] "parts for . . . curtain walls" are included within the scope of the Orders only insofar as 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 exclusions that inform the meaning of this definition must be considered. That is, even if a curtain wall is the final downstream product, as indicated by this Court and the CAFC,[26] that does not prevent curtain wall units from being a subassembly[27] and from being potentially excluded under the subassembly test.[28]

In its analysis, Commerce finds a number of facts suggesting that Yuanda's curtain wall units may not meet the second requirement of the subassemblies test (that the subassemblies "require no further 'finishing' or 'fabrication' prior to assembly, contain all the necessary hardware and components for assembly, and are ready for inst[a]llation at the time of entry," [Valeo] Final Results of Redetermination Pursuant to Ct. Remand, Ct. No. 12–00381, ECF No. 20–1 at 8 (quoting SMVC Scope Ruling at 7)). 2d Redetermination, ECF No.

[24] Both this Court and the CAFC have already found that curtain wall units generally are subassemblies. *See Yuanda II*, 776 F.3d at 1357–58 (citing *Yuanda I*, __ CIT __, 961 F. Supp. 2d at 1298–99).

[25] The CWC also argues again that excluding Yuanda's unitized curtain wall would render the "parts for . . . curtain walls" language in the Orders a nullity. This issue has already been addressed by the court. It does not bear further discussion. *See Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, __ CIT __, 146 F. Supp. 3d 1331, 1346 n. 105 (2016).

[26] *See Yuanda II*, 776 F.3d at 1357–58 (citing *Yuanda I*, __ CIT__, 961 F. Supp. 2d at 1298–99) ("A single [curtain wall] unit" is not a whole "curtain wall," and as such, is a "part" or "subassembly" of a curtain wall.)

[27] *See id.*

[28] *Yuanda I*, __ CIT at __, 961 F. Supp. 2d at 1301; *see* CWC Scope Ruling at 9; *Yuanda I*, 961 F. Supp. 2d at 1301 ("The court finds that Commerce properly confined its inquiries to the request made by the CWC . . . . That is, an inquiry as to whether a particular entry, or even product, would qualify for an exception to the scope language simply goes far beyond the CWC's request."); *Yuanda II*, 776 F.3d 1351 (providing no discussion of the finished goods kit exclusion nor the subassemblies test); *see also* 28 U.S.C. § 2637(d) (requiring exhaustion of administrative remedies for jurisdiction).

109–1, at 29–31, 42–53. However, given that Commerce's articulated standard for organizing and evaluating those facts is incorrect, remand is appropriate. *Sec. & Exch. Comm'n v. Chenery Corp*., 332 U.S. 194, 196 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.").

CONCLUSION

For the foregoing reasons, Commerce's determination must again be remanded.

Accordingly, the court remands to Commerce for further consideration in accordance with this opinion. Commerce shall have until November 16, 2016 to complete and file its remand redetermination. Plaintiffs shall have until November 30, 2016 to file comments. Defendant and Defendant-Intervenor shall have until December 12, 2016 to file any reply.

IT IS SO ORDERED.

Dated: October 6, 2016
New York, NY

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

Slip Op. 16–96

GLYCINE & MORE, INC., Plaintiff, v. UNITED STATES, Defendant, and GEO SPECIALTY CHEMICALS, INC., Defendant-Intervenor.

Before: Timothy C. Stanceu, Chief Judge
Court No. 13–00167

[Affirming a decision of the International Trade Administration, U.S. Department of Commerce, issued in response to court order, on the withdrawal of a request for a periodic review of an antidumping duty order]

Dated: October 11, 2016

Ronald M. Wisla, Kutak Rock LLP, of Washington D.C., argued for plaintiff Glycine & More, Inc. With him on the brief was *Lizbeth R. Levinson*.

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington D.C., argued for defendant United States. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy,* Assistant Director. Of counsel on the brief was *Jessica M. Link*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

David Michael Schwartz, Thompson Hine LLP, of Washington D.C., argued for defendant-intervenor GEO Specialty Chemicals, Inc.

OPINION

Stanceu, Chief Judge:

In this litigation, plaintiff Glycine & More, Inc. ("Glycine & More") contested the final determination ("Final Results") issued by the International Trade Administration of the U.S. Department of Commerce ("Commerce" or the "Department") to conclude an administrative review of an antidumping duty order (the "Order") on glycine from the People's Republic of China ("PRC" or "China"). Glycine & More, a U.S. importer, imported glycine produced and exported by its Chinese affiliate, Baoding Mantong Fine Chemistry Co., Ltd. ("Baoding"), the sole respondent in the review. Glycine & More contested the Final Results on the ground that Commerce unlawfully refused to allow Baoding to withdraw its request that the review be conducted.

Before the court is the decision ("Remand Redetermination") Commerce issued in response to the court's opinion and order in *Glycine & More, Inc. v. United States*, 39 CIT __, 107 F. Supp. 3d 1356 (2015) ("*Glycine & More*"). The Remand Redetermination announces the Department's intention, expressed under protest, to accept Baoding's withdrawal request and rescind the review with respect to Baoding. *Final Results of Redetermination Pursuant to Court Remand* (Feb. 2, 2016), ECF No. 50–1 ("*Remand Redetermination*"). The court affirms the decision reached in the Remand Redetermination.

I. BACKGROUND

The court's prior opinion presents background information on this case, which is summarized briefly and supplemented herein with developments since the issuance of that opinion. *See Glycine & More*, 39 CIT at __, 107 F. Supp. 3d at 1358–60.

A. Administrative Proceedings

On March 30, 2012, Baoding and defendant-intervenor GEO Specialty Chemicals ("GEO") filed requests for an administrative review of the Order. *GEO Request for Admin. Review* (Admin.R.Doc. No. 1); *Baoding Mantong Request for Admin. Review* (Admin.R.Doc. No. 2). GEO requested that Commerce review sales of subject merchandise by Baoding and twenty-five other producer/exporters. *GEO Request for Admin. Review* 2. On April 30, 2012, Commerce initiated a review, covering a period of review ("POR") of March 1, 2011 to February 29, 2012, and on July 10, 2012 selected Baoding as one of two mandatory respondents. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 77 Fed. Reg. 25,401, 25,403 (Int'l Trade Admin. Apr. 30, 2012) ("*Initiation*"); *Respondent Selection Mem.* (July 9, 2012) (Admin.R.Doc. No. 18). On July 30, 2012, GEO withdrew its administrative review request as to

all twenty-six companies, including Baoding, *Pet'r's Withdrawal of Request for Admin. Review* (Admin.R.Doc. No. 37), leaving Baoding's request as the only outstanding request that the review be conducted.

On August 7, 2012, Baoding sought to withdraw its request for the review. *Baoding's Withdrawal of Admin. Review Request* (Admin.R.Doc. No. 39) ("*Baoding's Withdrawal Request*"). Under the Department's regulation, Commerce rescinds an administrative review if all requestors withdraw their requests within 90 days of initiation. 19 C.F.R. § 351.213(d)(1). The regulation provides that "[t]he Secretary may extend this time limit if the Secretary decides that it is reasonable to do so." *Id.* Because a withdrawal of a review request would not be given automatic effect unless made by July 30, 2012, Baoding requested that the Secretary extend the 90-day period.[1] *Baoding's Withdrawal Request* 2–3. On September 27, 2012, Commerce rejected Baoding's withdrawal request on the ground that Baoding had not demonstrated an extraordinary circumstance warranting an extension of the 90-day period. *Rejection of Baoding's Withdrawal of its Admin. Review Request* 1 (Admin.R.Doc. No. 47) ("*Rejection of Baoding's Withdrawal Request*").

In the Preliminary Results, Commerce determined that Baoding had failed to cooperate to the best of its ability by not responding to the Department's questionnaire and, on the basis of facts available and an adverse inference, determined that Baoding did not qualify for separate rate status. *See Glycine from the People's Republic of China, Prelim. Results of Antidumping Duty Admin. Review and Prelim. Partial Rescission of Antidumping Duty Admin. Review; 2011–2012*, 77 Fed. Reg. 72,817, 72,817 (Int'l Trade Admin. Dec. 6, 2012) ("*Prelim. Results*"). As a result, Commerce assigned Baoding a margin of 453.79%, which was the "PRC-wide" rate Commerce assigned to parties failing to demonstrate independence from the government of China. *Id.* In the Final Results, Commerce made no changes to the preliminary results, again assigning Baoding a margin of 453.79%. *See Glycine from the People's Republic of China: Final Results of Antidumping Duty Admin. Review; 2011–2012*, 78 Fed. Reg. 20,891, 20,892 (Int'l Trade Admin. Apr. 8, 2013) ("*Final Results*").

B. Proceedings Before the Court

Glycine & More initiated this action by filing a summons, (Apr. 26, 2013), ECF No. 1, and a complaint, (May 20, 2013), ECF No. 6. The court held oral argument on September 9, 2014. ECF No. 43. The court issued its previous opinion and order on November 3, 2015. *Glycine & More*, Slip Op. No. 15–124. In response, Commerce issued

[1] The court's previous opinion and order incorrectly stated this date as July 29, 2012. *See Final Results of Redetermination Pursuant to Court Remand* 6 n.20 (Feb. 2, 2016), ECF No. 50–1. As a result, the extension Baoding had sought was an eight-day, not a nine-day, extension as stated in the court's prior opinion and order.

the Remand Redetermination on February 2, 2016. *Remand Redetermination.* Commerce announced, under protest, that it intended "to extend the deadline for withdrawing a request for an administrative review pursuant to 19 CFR 351.213(d)(1), accept Baoding Mantong's untimely withdrawal request, and rescind the review with respect to Baoding Mantong." *Id.* at 1.

Glycine & More and defendant-intervenor GEO submitted comments on the Remand Redetermination on March 3, 2016. Def.-Intervenor's Comments on the Final Results of Redeterm. Pursuant to Court Remand, ECF No. 52 ("GEO's Comments"); Pl.'s Comments on Final Remand Results, ECF No. 54 ("Glycine & More's Comments"). Defendant filed a response to the comments on March 18, 2016. Def.'s Resp. to the Parties' Remand Comments (March 18, 2016), ECF No. 55 ("Def.'s Resp."). Glycine & More supports the Remand Redetermination; GEO opposes it.

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 (the "Tariff Act"), as amended, 19 U.S.C. § 1516a, including an action contesting a final determination concluding an antidumping administrative review.[2] In doing so, 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).

B. The Court's Previous Opinion and Order

In *Glycine & More*, the court held unreasonable the interpretation of the regulation, 19 C.F.R. § 351.213(d)(1), upon which Commerce rejected Baoding's attempted withdrawal of its review request. *Glycine & More*, 39 CIT at __, 107 F. Supp. 3d at 1364–67. The court noted that the regulation contains two provisions, one of which gives effect to a party's withdrawal of a request for an administrative review if the withdrawal occurs within a period of 90 days from the date of initiation of the review. *Id.*, 39 CIT at __, 107 F. Supp. 3d at 1364 (citing 19 C.F.R. § 351.213(d)(1)). The second provision, the court noted, "provides that '[t]he Secretary may extend this time limit if the

[2] All citations to the United States Code herein are to the 2012 edition and all citations to the Code of Federal Regulations are to the 2013 edition except where otherwise indicated.

Secretary decides that it is reasonable to do so.'" *Id.* (citing 19 C.F.R. § 351.213(d)(1))[3] .

Under the interpretation of § 351.213(d)(1) that Commerce applied in this case, and as first stated by Commerce in August 2011, Commerce will not extend the 90-day period provided in § 351.213(d)(1) "unless the requestor demonstrates that an extraordinary circumstance has prevented it from submitting a timely withdrawal request." *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 76 Fed. Reg. 45,773, 45,773 (Int'l Trade Admin Aug. 1, 2011). Tracing the history of the regulation, the court concluded that the "extraordinary circumstance" interpretation, as applied in this case, defeated the very purpose for which Commerce included the second provision. *Glycine & More*, 39 CIT at __, 107 F. Supp. 3d at 1367. That purpose, the court concluded, was to allow a party to know the results of the immediately preceding review before making a decision on whether to withdraw a review request. *Id.*, 39 CIT at __, 107 F. Supp. 3d at 1365 (citing *Antidumping Duties* (Final rule), 54 Fed. Reg. 12,742, 12,755 (Int'l Trade Admin. Mar. 28, 1989)). As the court stated, "[t]he Department's interpretation of § 351.213(d)(1) left no means for Baoding to obtain, or even request, an extension of the 90-day period that would have allowed it to know the final results of the immediately preceding review before making the decision to withdraw, despite the purpose for the provision that the Department stated upon promulgation." *Id.*, 39 CIT at __, 107 F. Supp. 3d at 1368. The court observed that the final results of the immediately preceding, i.e., fifth, administrative review had not been issued as of the closing of the 90-day period and instead were not published until October 18, 2012. *Id.*, 39 CIT at __, 107 F. Supp. 3d at 1368 & n.8. The court stated, further, that "Glycine & More's statements to Commerce during the administrative proceedings indicate that Baoding considered the developments in the preceding review significant to its decision whether to withdraw its request for the review at issue." *Id.*, 39 CIT at __, 107 F. Supp. 3d at 1368 (citing *Glycine & More's Comments on the Prelim. Results* 3–4 (Jan. 7, 2013) (Admin.R.Doc. No. 54)).

In *Glycine & More*, the court ordered Commerce to "decide anew the question of whether Baoding's request for a nine-day extension should be approved." *Id.*, 39 CIT at __, 107 F. Supp. 3d at 1370. The court instructed that Commerce, in doing so, is to

> consider the controlling circumstances, as shown by the record in this case, that: (1) Baoding's withdrawal of its review request

[3] Section 351.213(d)(1) reads as follows: "The Secretary will rescind an administrative review under this section, in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. The Secretary may extend this time limit if the Secretary decides that it is reasonable to do so." 19 C.F.R. § 351.213(d)(1).

> occurred only *nine days* after the close of the 90-day period;[4] (2) the review then was at an early stage, with no questionnaires having been submitted; (3) Baoding could not have known the results of the immediately preceding review during the 90-day period, which Commerce had yet to issue as of the expiration of that period; and (4) at the time Baoding submitted the withdrawal of its review request, all parties who had requested a review had expressed the position that the review not be conducted.

Id. The court added that it "envisions that it could sustain a decision reinstating the previous, negative decision only if the record were to support a finding of a new and compelling circumstance, not previously identified by Commerce . . . , that, despite the circumstances the court has identified, could justify disallowing Baoding's withdrawal." *Id*.

C. The Department's New Decision to Extend the 90-Day Period and Rescind the Review With Respect to Baoding

In the Remand Redetermination, Commerce stated that "because we have not identified any 'new and compelling circumstance,' . . . we intend to extend the deadline set forth in 19 C.F.R. § 351.213(d)(1), accept Baoding Mantong's otherwise untimely withdrawal of review request, and rescind the review with respect to Baoding Mantong." *Remand Redetermination* 6. Commerce stated that it would take these actions "under protest" and that it respectfully disagreed "with the Court's holding." *Id.* Below, the court explains why it will affirm the Department's decision to accept the withdrawal of review request and rescind the review with respect to Baoding. The court explains, further, that in doing so it does not affirm all of the Department's statements in the Remand Redetermination, some of which misinterpret the holding in *Glycine & More*.

D. Affirmance of the Department's Decision to Extend the Due Date and Rescind the Review With Respect to Baoding

The controlling circumstances shown by the record in this case, as outlined by the court in *Glycine & More*, 39 CIT at __, 107 F. Supp. 3d at 1364–70, support a decision to accept Baoding's withdrawal request and rescind the review with respect to Baoding. That the results of the immediately preceding review were not yet published as of the close of the 90-day period is important among those circumstances, for it is precisely the factual situation the Department contemplated upon originally promulgating the provision allowing extensions of the 90-day period. Also, Baoding's request was made

[4] As the court explained previously, *see* n.1, *supra*, the extension Baoding had sought was an eight-day, not a nine-day, extension as stated in *Glycine & More*.

sufficiently early that Commerce could not yet have devoted significant resources to the review. There is no record evidence that Commerce had done so, and Commerce did not rely on an expenditure of resources in its initial denial of Baoding's request. To the contrary, Commerce proceeded to expend its valuable resources, unnecessarily, by conducting a review of Baoding even though the parties at interest had expressed the intent that the review not be conducted.

Further, Commerce concluded in the Remand Redetermination that the record did not present a "new and compelling circumstance" supporting the rejection of Baoding's request. As a result, the sole factor weighing against acceptance of the request was the Department's earlier conclusion that Baoding failed to demonstrate that an extraordinary circumstance prevented it from submitting a withdrawal request within the 90-day period. That factor, according to the reasoning in *Glycine & More*, was at odds with the purpose Commerce identified when it promulgated the provision allowing the 90-day period to be extended. The decision reached in the Remand Redetermination to accept the request and rescind the review with respect to Baoding is, therefore, supported by substantial record evidence.

Below, the court explains why it does not agree with every statement Commerce made in the Remand Redetermination. However, because the decision Commerce reached, albeit under protest, is supported by substantial evidence on the administrative record, is adequately explained, and is otherwise in accordance with law, the court will affirm the Department's decision to accept the withdrawal request and, accordingly, rescind the review with respect to Baoding.

E. The Department's Interpretation of the Holding in Glycine & More

In the Remand Redetermination, Commerce construed *Glycine & More* to hold that 19 U.S.C. § 351.213(d)(1) must be interpreted to require Commerce to extend the time limit whenever the immediately preceding review is ongoing. *Remand Redetermination* 7. Commerce stated that it disagreed with such a conclusion because "an interpretation of this provision which requires the Department to extend the time limit when the immediately preceding review is ongoing would, in our view, effectively nullify the Department's 'wide discretion.'" *Id.* (citing *Glycine & More*, 39 CIT at __, 107 F. Supp. 3d at 1364). Commerce stated, further, that:

> [W]e disagree with the Court that the purpose of the regulation was to allow a party to know the final results of the immediately preceding review before having to decide whether to withdraw a review request. Rather, we find that the purpose of the regulation was, and continues to be, to ensure the Department would be able to maintain maximum discretion in determining whether to extend the 90-day deadline.

Remand Redetermination 8.

Glycine & More did not hold that Commerce lacked any discretion under § 351.213(d)(1) to deny a request when the results of the immediately prior review are not yet known. Commerce, therefore, interprets the holding of *Glycine & More* too broadly. The court's holding does not "nullify" the Department's discretion. For example, a situation could exist in which a respondent requests an extension of the 90-day period after Commerce has expended considerable time and resources in the current review and the respondent seeks to withdraw its review request after concluding that the results are not likely to be in its favor. In the preamble to its 1997 amendments to its regulations, a portion of which the court quoted in *Glycine & More*, 39 CIT at __, 107 F. Supp. 3d at 1366, Commerce recognized this situation as an example of abuse of the procedures for requesting and withdrawing a review. *See id.* (quoting *Antidumping Duties; Countervailing Duties* (Final rule), 62 Fed. Reg. 27,296, 27,393 (Int'l Trade Admin. May 19, 1997)). In that preamble, Commerce stated that to prevent such abuse, "the Department must have the final say concerning rescissions of reviews requested after 90 days . . . ." *Id.*

The situation Commerce identified in the preamble to the 1997 amendments as an abuse of the procedures for requesting and withdrawing reviews could occur even though the final results of the immediately prior review are not yet known to the respondent. Such a respondent, having participated in both reviews, could have reason to conclude that the results of the current review are likely to be less favorable to it than the pending final results of the preceding one. Such a scenario differs from situation presented in this case, in which there is no indication, and no finding by Commerce, that Baoding abused the procedures for requesting and withdrawing a review. In *Glycine & More*, the court analyzed the regulatory history of the second sentence of 19 U.S.C. § 351.213(d)(1) to observe, in *dicta*, that "it is difficult to *see* why granting at least a brief extension due to the second sentence would *not* presumptively be reasonable where the preceding review is still ongoing at the close of that period." *Id.* As shown by the court's use of the word "presumptively," the court did not foreclose the possibility that abuse of the procedures in some cases could render an extension unwarranted even if the final results of the preceding review were still pending. Rather than view the pending status of the immediately prior review as a single fact that controlled the outcome of this case, the court remanded the Final Results for reconsideration based on all of the relevant circumstances.

E. The Court Does Not Find Merit in GEO's Objections to the Remand Redetermination

GEO challenges the Department's determination on remand. Specifically, GEO argues that the Remand Redetermination is contrary to this court's opinion and order in *Glycine & More*, in which the court stated that:

> "it could sustain a decision reinstating the previous, negative decision only if the record were to support a finding of a new and compelling circumstance, not previously identified by Commerce in the Issues & Decision Memorandum or otherwise during the review that, despite the circumstances the court has identified, could justify disallowing Baoding's withdrawal."

GEO's Comments 1–2 (quoting *Glycine & More*, 39 CIT at __, 107 F. Supp. 3d at 1370). GEO identifies what it believes are two such "new and compelling" circumstances on the record thathad not been previously addressed by Commerce. *See* GEO's Comments 2. GEO submits that each of the circumstances it identifies requires the court to remand the matter to Commerce a second time. *Id.* at 2–3. The court disagrees.

First, GEO argues that "[t]he Court omitted in its opinion a critical portion of the 1997 preamble of the revised regulation that, if included, would significantly undermine the Court's position that the 1989 preamble still provides the regulation's stated purpose . . . ." *Id.* at 3. GEO cites the language from the 1997 preamble quoted by the court and identifies one sentence omitted from the court's quotation as an alleged "new and compelling" circumstance meriting reconsideration by Commerce. The portion of the 1997 preamble quoted by the court in its opinion and order in *Glycine and More*, with highlighting showing the sentence the court omitted from its quotation, is as follows:

> We agree that the 90-day limitation may be too rigid. However, we believe that the Department must have the final say concerning rescissions of reviews requested after 90 days in order to prevent abuse of the procedures for requesting and withdrawing a review. For example, we are concerned with the situation in which a party requests a review, the Department devotes considerable time and resources to the review, and then the party withdraws its requests once it ascertains that the results of the review are not likely to be in its favor. *To discourage this behavior, the Department must have the ability to deny withdrawals of requests for review, even in situations where no party objects*.

> Therefore, in § 351.213(d)(1), we have retained the 90-day requirement. In addition, we have added a new sentence, taken from 19 CFR §§ 353.22(a)(5) and 355.22(a)(3), that essentially provides that if a request for rescission is made after the expiration of the 90-day deadline, the decision to rescind a review will be at the Secretary's discretion.

Antidumping Duties; Countervailing Duties (Final rule), 62 Fed. Reg. 27,296, 27,317 (Int'l Trade Admin. May 19, 1997).

The court does not find merit in GEO's first argument. GEO is not correct in arguing that the sentence the court omitted from the quotation in the *Glycine & More* opinion "would significantly undermine the Court's position that the 1989 preamble still provides the regulation's stated purpose . . . ," GEO's Comments 3. The purpose of allowing extensions, as first enunciated by the Department in 1989, was to address "the problem in which a party is faced with the need to decide whether it wants a review before knowing the final results of the immediately preceding review." *Glycine & More*, 39 CIT at __, 107 F. Supp. 3d at 1366. As the court discussed previously in this Opinion, the purpose Commerce originally identified for the second sentence in the regulation, i.e., to allow a party to know the results of the immediately preceding review before making its decision as to withdrawal, is not inconsistent with the Department's stated objective of discouraging abuse of its procedures for requesting and withdrawing reviews. The omitted sentence, whether read alone or in context, does not state or imply to the contrary. Nor does the 1997 preamble indicate that Commerce was changing its intended purpose in continuing to allow a party to obtain an extension of the 90-day period.

GEO grounds its second argument for a "new and compelling circumstance" in the court's discussion in *Glycine & More* of the two choices facing a party seeking to withdraw a review request: "[i]t either must withdraw its request for a review outright within the 90-day period, regardless of whether the results are known, or it must forego any realistic opportunity to do so." GEO's Comments 4 (citing *Glycine & More*, 39 CIT at __, 107 F. Supp. 3d at 1367). According to GEO, there is a third option "whereby a party could request in a timely manner an extension of the withdrawal deadline *before* the 90-day withdrawal deadline and that request could be for an extension of that deadline until the final results of the prior review are ascertained." *Id.* GEO argues that the availability of this "third option" is a "new and compelling" circumstance that Commerce failed to address and now should be required to address. *Id.* at 5–6.

The "third option" GEO describes is not available to a party in Baoding's position. Under the interpretation of § 351.213(d)(1) that Commerce adopted in 2011, and expressly applied in the review at

issue, Commerce as a general matter accepts withdrawal requests only if filed within the 90-day period, regardless of whether the results of the immediately preceding review have been issued. The only exception Commerce will allow is where a requestor demonstrates that an extraordinary circumstance *prevented* it from filing its withdrawal request within the 90-day period. *See id.*, 39 CIT at __, 107 F. Supp. 3d at 1363. Lack of knowledge of the final results of the immediately preceding review could not reasonably be described as a "circumstance," let alone an "extraordinary" one, that could *prevent* a withdrawal request from being filed within the 90-day period. Therefore, the 2011 policy announcement, which Commerce referenced when announcing the opportunity to request the subject review and reiterated upon initiating this review, precludes the third option upon which GEO relies for its position.

III. CONCLUSION

For the reasons discussed above, the court concludes that substantial evidence on the record supports the Department's intention to extend the 90-day period set forth in 19 C.F.R. § 351.213(d)(1), to thereby accept Baoding's withdrawal request, and to rescind the review with respect to Baoding. Judgment will enter accordingly.

Dated: October 11, 2016
New York, New York

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