U.S. Court of International Trade

Slip Op. 17–61

UNITED STATES, Plaintiff, v. GREAT AMERICAN INSURANCE COMPANY OF NEW YORK, Defendant.

Before: Mark A. Barnett, Judge
Court No. 15–00047
PUBLIC VERSION

[The court grants Plaintiff's motion for summary judgment, in part, and denies Defendant's motion for summary judgment.]

Dated: May 18, 2017

Monica P. Triana, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for plaintiff. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, and *Amy M. Rubin*, Assistant Director, International Trade Field Office.

Barry M. Boren, Law Offices of Barry Boren, of Miami, FL, and *Gerson M. Joseph*, Gerson M. Joseph, P.A., of Weston, FL, for defendant.

OPINION

Barnett, Judge:

The United States of America ("United States" or "Plaintiff") sued Great American Insurance Company of New York ("GAIC" or "Defendant") to recover $50,000 in unpaid antidumping duties and interest, the limit on a continuous entry bond that GAIC issued, plus pre- and post-judgment interest, including statutory interest pursuant to 19 U.S.C. § 580 (2006)[1] and equitable interest. *See generally* Compl., ECF No. 2. Plaintiff and Defendant both filed motions for summary judgment; those motions are fully briefed. *See* Confidential Pl.'s Mot. for Summ. J. and Pl.'s Mem. of Law in Supp. of its Mot. for Summ. J. ("PMSJ"), ECF No. 55; Great Am. Ins. Co. of New York's Mot. for Summ. J. and Supporting Mem. of Law, ECF No. 47; Mem. of Law in Supp. of the Def.'s, Great Am. Ins. Co. of New York, Mot. for Summ. J. ("DMSJ"), ECF No. 48. The court has subject matter jurisdiction pursuant to 28 U.S.C. § 1582. For the reasons discussed below, the

[1] All references to the United States Code are to the 2006 edition, as determined by the date of importation of the subject merchandise, unless otherwise stated.

court grants Plaintiff's motion for summary judgment, in part, and denies Defendant's motion for summary judgment.

STANDARD OF REVIEW

The court may grant summary judgment when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law" based on the materials in the record. U.S. Court of International Trade ("USCIT") Rule 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). When both parties move for summary judgment, the court generally must evaluate each party's motion on its own merits and draw all reasonable inferences against the party whose motion is under consideration. *JVC Co. of Am., Div. of US JVC Corp. v. United States*, 234 F.3d 1348, 1351 (Fed. Cir. 2000). Ultimately, the court's function is "not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. A dispute about a material fact is genuine when it "may reasonably be resolved in favor of either party." *Id.* at 249–50 (to defeat summary judgment, the opponent must do more than present evidence that is "merely colorable" or "not significantly probative," rather, the opponent must present sufficient evidence on a disputed factual issue tending to show that "a jury [could] return a verdict for that party").

USCIT Rule 54(b) governs the entry of partial summary judgment. Rule 54(b) provides that "[w]hen an action presents more than one claim for relief, . . . the court may direct entry of a final judgment as to one or more but fewer than all claims . . . only if the court expressly determines that there is no just reason for delay." USCIT Rule 54(b).

BACKGROUND

I. Material Facts Not Genuinely in Dispute

Pursuant to USCIT Rule 56(c)(1)(A), movants are to present material facts as short and concise statements, in numbered paragraphs, with citations to "particular parts of materials in the record" as support. *See* USCIT Rule 56.3(a)("factual positions described in Rule 56(c)(1)(A) must be annexed to the motion in a separate, short and concise statement, in numbered paragraphs"). In responsive papers, the opponent "must include correspondingly numbered paragraphs responding to the numbered paragraphs in the statement of the movant." USCIT Rule 56.3(b). "If a party fails to properly . . . address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion." USCIT Rule 56(e)(2).

Parties submitted separate statements of undisputed material facts with their respective motions and responses to the opposing party's statements. *See* Confidential Pl.'s Statement of Undisputed Facts ("PSOF"), ECF No. 55;[2] Def., GAIC's, Objs. to the Pl.'s Statement of Undisputed Facts ("Def.'s Resp. to PSOF"), ECF No. 52–2; Uncontested Material Facts ("DSOF"), ECF No. 48 (pp. 11–12); Pl.'s Resp. to Def.'s Statement of Undisputed Facts ("Pl.'s Resp. to DSOF"), ECF No. 61. Upon review of Parties' facts (and supporting documents), the court finds the following material facts not genuinely disputed.[3]

A. Overview of the Bond and Entry at Issue

On July 29, 2003, GAIC issued a $50,000 continuous bond to secure the payment of duties, taxes, and charges on merchandise imported by Orleans Furniture Inc. ("Orleans Furniture"). PSOF ¶ 1; Def.'s Resp. to PSOF.[4] The bond had an effective date of August 22, 2003, and a termination date of August 31, 2007. PSOF ¶ 2; Def.'s Resp. to PSOF.

On June 1, 2006, Orleans Furniture made one entry (Entry Number 3225581818–2) of parts of wooden bedroom furniture from the People's Republic of China.[5] PSOF ¶ 2; Def.'s Resp. to PSOF; DSOF ¶

[2] Plaintiff submitted its statement of facts in a single electronic filing (ECF No. 55) along with its motion, memorandum of law, and confidential exhibits. The statement of facts is located at pp. 52–59 of ECF No. 55.

[3] Citations are provided to the relevant paragraph number of the undisputed facts and response; internal citations generally have been omitted. Citations to the record are provided when a fact, though not admitted by both Parties, is uncontroverted by record evidence.

[4] Defendant's response to Plaintiff's statement of facts only included paragraphs addressing its objections to Plaintiff's assertions; it did not include paragraphs admitting any of Plaintiff's assertions. *See* Def.'s Resp. to PSOF. Accordingly, the court cites to Defendant's response generally when recounting facts that Defendant did not dispute.

[5] Plaintiff asserts an entry date of June 5, 2006, and contends the entry consisted of "wooden bedroom furniture." PSOF ¶ 2 (citing Compl., Confidential Ex. B ("Entry Summary"), ECF No. 4–1). Defendant asserts an entry date of June 1, 2006. DSOF ¶ 1 (citing Def. Ex. 1, ECF No. 48–1 (copy of the Entry Summary)). Defendant does not object to Plaintiff's description of the subject merchandise in its response to Plaintiff's statement of facts, but elsewhere contends the subject merchandise consisted of parts, not finished bedroom furniture. *See* DMSJ at 31–32. Because Defendant's date corresponds to the date on the Entry Summary, *see* Entry Summary, the court relies on that date. The court further notes that the Entry Summary describes the subject merchandise as "wooden parts of furniture." *Id*. The differences in dates and description of the merchandise, however, are not material to the court's resolution of the summary judgment motions. Moreover, the court's description of the subject merchandise is not an indication of the court's position on whether the subject merchandise was within the scope of the relevant antidumping duty order. *See infra* Background Sect. E (discussing Orleans Furniture's protest of the reliquidation on the basis that the subject merchandise was not covered by the relevant antidumping duty order and Customs' deemed denial thereof). The time for seeking judicial review of the denied protest has long passed. *See* 28 U.S.C. § 2636(a) (a civil action challenging the deemed denial of a protest must be filed within 180 days of the denial).

1; PL.'S RESP. TO DSOF ¶ 1.[6] On the Entry Summary, Orleans Furniture identified the relevant antidumping duty ("AD") order and exporter using Commerce case number "A-570–890–101." PSOF ¶ 4; Def.'s Resp. to PSOF.[7] Commerce case number A-570–890–101 is associated with exporter Gaomi Yatai Wooden Ware Co., Ltd. ("Gaomi Yatai"). PSOF ¶ 10.[8] Commerce later determined that the exporter was Company X.[9] PSOF ¶12; Def.'s Resp. to PSOF. Exports from Company X are subject to the China-wide rate. PSOF ¶ 12; Def.'s Resp. to PSOF.

B. Antidumping Duty Order and Administrative Review

On November 17, 2004, Commerce issued its final determination of sales at less than fair value in the antidumping duty investigation of wooden bedroom furniture from the People's Republic of China ("PRC" or "China"). DSOF ¶ 2; Pl.'s Resp. to DSOF ¶ 2; *see also Wooden Bedroom Furniture From the People's Republic of China*, 69 Fed. Reg. 67,313 (Dep't of Commerce Nov. 17, 2004) (final determination of sales at less than fair value); *Wooden Bedroom Furniture From the People's Republic of China*, 70 Fed. Reg. 329 (Dep't of Commerce Jan. 4, 2005) (notice of am. final determination of sales at less than fair value and antidumping duty order).[10]

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[6] The total entered value for the merchandise was [[ ]]. PSOF ¶ 3; Def.'s Resp. to PSOF.

[7] The first six digits (A-570–890) are specific to the AD order; the last three digits (101) are specific to a particular manufacturer/exporter. PSOF ¶¶ 4, 9; Def.'s Resp. to PSOF. Use of "000" as the last three digits of the case number indicates that the China-wide rate applies to the merchandise. PSOF ¶ 8; Def.'s Resp. to PSOF.

[8] Defendant objects to this statement on the basis that "[n]owhere in any of the liquidation directives issued by Commerce does the case [number] A-570–890–101 appear[,] nor is it associated with [Gaomi Yatai] in the directives." Def.'s Resp. to PSOF ¶ 10. In fact, suspension of liquidation instructions issued by Commerce on February 24, 2009 (Message 9055211) specifically identify Gaomi Yatai with Commerce case number A-570–890–101. PMSJ, Ex. 4 ("Feb. 24, 2009 Suspension Instructions") at CBP000014. Because there is uncontroverted record evidence demonstrating that Commerce case number A-570–890–101 appears in Commerce's instruction to Customs and is associated with Gaomi Yatai, there is no genuine dispute as to that fact. *See Anderson*, 477 U.S. at 249.

[9] Company X is identified as [[ ]]. PSOF ¶ 12; Def.'s Resp. to PSOF.

[10] The scope of the order included "wooden bedroom furniture" that "is generally, but not exclusively, designed, manufactured, and offered for sale in coordinated groups." *Wooden Bedroom Furniture From the People's Republic of China*, 69 Fed. Reg. at 67,314. Excluded from the scope are:

> unfinished furniture parts made of wood products . . . that are not otherwise specifically named in this scope (i.e., wooden headboards for beds, wooden footboards for beds, wooden side rails for beds, and wooden canopies for beds) and that do not possess the essential character of wooden bedroom furniture in an unassembled, incomplete, or unfinished form. Such parts are usually classified in subheading 9403.90.7000, HTSUS.

69 Fed. Reg. at 67,314 n.13.

On March 7, 2007, Commerce initiated an administrative review of wooden bedroom furniture imported from China for the period of review ("POR") from January 1, 2006 to December 31, 2006 (the "2006 POR"). PSOF ¶ 13; Def.'s Resp. to PSOF; *see also Wooden Bedroom Furniture From the People's Republic of China*, 72 Fed. Reg. 10,159 (Dep't of Commerce March 7, 2007) (notice of initiation of admin. review of the antidumping duty order). The liquidation of entries subject to the review was suspended pending completion of the review. PSOF ¶ 13; Def.'s Resp. to PSOF; DSOF ¶ 3; Pl.'s Resp. to DSOF ¶ 3.

On August 20, 2008, Commerce published the final results of its review. PSOF ¶ 14; Def.'s Resp. to PSOF; *see also Wooden Bedroom Furniture From the People's Republic of China*, 73 Fed. Reg. 49,162 (Dep't of Commerce Aug. 20, 2008) (final results of antidumping duty admin. review and new shipper review; 2006); *Wooden Bedroom Furniture From the People's Republic of China*, 74 Fed. Reg. 4,916 (Dep't of Commerce Jan. 28, 2009) (am. final results of antidumping duty admin. review; 2006). Publication of the final results lifted the suspension of liquidation for entries subject to the review. PSOF ¶ 15; Def.'s Resp. to PSOF.

On January 27, 2009, Commerce issued Message 9027213 instructing Customs to assess antidumping duties at a rate of 216.01% to entries subject to the China-wide rate and identified by Commerce case number A-570–890–000. PSOF ¶ 16; Def.'s Resp. to PSOF; *see also* PMSJ, Confidential Ex. 3 ("Jan. 27, 2009 Liquidation Instructions"). For all other entries, Commerce ordered Customs to "continue to collect cash deposits of estimated [AD] duties [for the merchandise] at the current cash deposit rates." PSOF ¶ 17; Def.'s Resp. to PSOF.

C. Court Proceedings Enjoining Liquidation

On February 13, 2009, the court issued a temporary restraining order ("TRO") enjoining the liquidation of 2006 POR entries from several exporters, including Gaomi Yatai. PSOF ¶ 18 (citing *Am. Signature, Inc. v. United States,* Consol. Court No. 08 00316, Order (Feb. 13, 2009) ("Am. Signature TRO"), ECF No. 64). The court subsequently issued a preliminary injunction in that case. PSOF ¶ 18 (citing *Am. Signature,* Consol. Court No. 08–00316, Order (Feb. 24, 2009) ("Am. Signature Prelim. Inj."), ECF No. 70). Pursuant to the TRO, Commerce issued Message 9055211 instructing Customs to suspend the liquidation of entries exported by Gaomi Yatai for the 2006 POR and identified by Commerce case number A-570–890–101, and which remained unliquidated as of February 19, 2009. PSOF ¶ 19

(citing Feb. 24, 2009 Suspension Instructions).[11] A Customs official subsequently entered a notation in CBP's Automated Commercial Systems ("ACS") database stating that Entry Number 322–5518182 was "subject to [the] TRO dated 2/13/09 per CBP message 9055211," and that, therefore, the entry should not be liquidated "absent further instructions." PSOF ¶ 20; Def.'s Resp. to PSOF; PMSJ, Ex. 5, ECF No. 60 (ACS entry notation). Customs treated the entry as if it had been suspended. PSOF ¶ 21; Def.'s Resp. to PSOF.

When the court dismissed *American Signature* on May 18, 2009, the injunction dissolved and the suspension of liquidation of entries of merchandise exported by Gaomi Yatai associated with Commerce case number A-570–890–101 was lifted. PSOF ¶ 22 (citing *Am. Signature*, Consol. Court No. 08–00316, Order (May 18, 2009), ECF No. 91); Def.'s Resp. to PSOF.

D. Liquidation of the Subject Entry

On June 23, 2009, Commerce issued Message 9174201 instructing Customs to liquidate entries exported by Gaomi Yatai for the 2006 POR and assess an AD duty rate of 32.23 percent. PSOF ¶ 23 (citing PMSJ, Ex. 6 ("June 23, 2009 Liquidation Instructions")); Def.'s Resp. to PSOF. On September 30, 2009, John Gerace, a Customs Supervisory Import Specialist, attempted to apply the June 23, 2009 Liquidation Instructions to the subject entry. PSOF ¶ 24. In so doing, he learned that Orleans Furniture had used the wrong Commerce case number on the entry documents. PSOF ¶ 24.[12] Instead of Gaomi

[11] Defendant objects to the facts asserted in paragraphs 18 and 19 of Plaintiff's statement of facts on the basis that Commerce's liquidation instructions directed Customs to suspend liquidation of entries exported by Gaomi Yatai *and* imported by [[ ]]. Def.'s Resp. to PSOF ¶¶18–19. Citing Commerce's *January 27, 2009* Liquidation Instructions, Defendant contends the injunction at issue "only applied to {[[ ]]} entries," and "[n]owhere does it say to suspend or liquidate entries with the number A570–890–101." Def.'s Resp. to PSOF ¶¶ 18–19.

Plaintiff, in fact, pointed to the TRO and preliminary injunction issued in *American Signature* and to the customs message issued pursuant thereto. PSOF ¶¶ 18–19. Both the TRO and the preliminary injunction refer to exports by Gaomi Yatai without any limitation as to the importer. *See* Am. Signature TRO; Am. Signature Prelim. Inj.; Message 9055211 (issued pursuant to the TRO) is consistent with that. Defendant's response refers to Message 9027213 issued pursuant to the *Klaussner* case. *See* Def.'s Resp. to PSOF ¶¶ 18–19; *Klaussner Furniture Industries, Inc., et al. v. United States, et al.,*Consol. Court No. 08–00323. While Defendant correctly notes that the injunction in that case is limited, in relevant part, to exports by Gaomi Yatai imported by [[ ]], it does not detract from the breadth of the injunction in *American Signature*, nor does it create a genuine factual dispute. *See Klaussner,* Consol. Court No. 0800323, Order (Dec. 8, 2008), ECF No. 40.

[12] Defendant objects, asserting that "CBP learned of the error on June 23, 2009, not September 30, 2009." Def.'s Resp. to PSOF ¶ 24. Defendant does not object to Plaintiff's assertion that Mr. Gerace attempted to apply the June 23, 2009 Liquidation Instructions to the subject entry, or that Mr. Gerace himself learned of the error on September 30, 2009. *See* Def.'s Resp. to PSOF ¶ 24.

Yatai, the actual exporter was Company X. PSOF ¶ 12; Def.'s Resp. to PSOF. "[Company X] was not entitled to a separate rate, and the correct associated case number was A-570–890–000, to which a corresponding duty rate of 216.01 [percent] applied." PSOF ¶ 26; Def.'s Resp. to PSOF. Accordingly, the suspension of liquidation of entries exported by Gaomi Yatai identified in Commerce's February 24, 2009 Suspension Instructions did not apply to the subject entry; instead, publication of the August 20, 2008 Final Results lifted the suspension of liquidation of entries subject to the review, including the subject entry, and the January 27, 2009 Liquidation Instructions directing Customs to apply a 216.01 percent AD duty rate to entries subject to the China-wide rate and identified by Commerce case number A-570–890–000 applied. PSOF ¶¶ 27–28.[13]

Contrary to USCIT Rule 56.3(c), which requires "each statement controverting any statement of material fact" to be "followed by citation to [admissible] evidence," Defendant does not offer evidentiary support for his assertion that someone at CBP (other than Mr. Gerace) learned of the error on June 23, 2009. *See* Def.'s Resp. to PSOF ¶ 24. However, in its statement of undisputed facts, Defendant similarly asserts that "[a]t least as early as June 23, 2009, CBP had already decided to rate advance this entry." DSOF ¶ 7 (citing DMSJ, Ex. 7 ("Sept. 30, 2009 ACS Entry Note")); *see also* Pl.'s Resp. to DSOF ¶ 7 (objecting to the assertion). That entry note states:

> AD CASE A570890101 WAS USED ERRONEOUSLY AT TIME OF ENTRY, *INCORRECT AD CASE NO. WAS DETECTED AT TIME OF LIQ. INSTRUCTIONS (MSG. 9174201, DATED 6/23/09*) CORRECT CASE FOUND TO BE A570890000, LIQ INSTRUCTIONS PER MSG 9027213, DATED 1/27/09. DEEM LIQ BY OP LAW.

Sept. 30, 2009 ACS Entry Note (underline added); *see also* PSOF ¶ 31 (reproducing the entry note); Def.'s Resp. to PSOF. Thus, the basis for Defendant's objection is language stating that the incorrect case number had been detected "at time of [liquidation] instructions," and its interpretation of that language to mean that the error had been detected when the June 23, 2009 Liquidation Instructions issued, not when the instructions were applied. *See* DSOF ¶ 7.

It is undisputed that Mr. Gerace created the entry note on September 30, 2009 when he learned of the error. *See* PSOF ¶ 30 (averring that "[c]ontemporaneous with Mr. Gerace's finding [of the error, he] entered a note into ACS explaining what had taken place"); Def.'s Resp. to PSOF ¶ 30 (averring that "*CBP* discovered the error on June 23, 2009 and not contemporaneously with *Mr. Gerace's findings*") (emphasis added); *see also* Sept. 30, 2009 Entry Note (identifying "JGERACE" as the user generating the entry); PMSJ, Confidential Ex. 1 (Declaration of John Gerace) ("Gerace Decl.") ¶¶ 11, 15 (averring that on September 30, 2009, Mr. Gerace learned that Orleans Furniture had used the wrong case number and subsequently created the entry note). Defendant's interpretation of the entry note language necessarily implies that Mr. Gerace knew about an unidentified CBP official's prior knowledge and included it in the entry note. But Defendant offers no evidence supporting this interpretation, nor does it offer evidence contradicting Mr. Gerace's sworn declaration. Conjecture and speculation about when a Customs official learned of the importer's error are insufficient to raise a genuine issue of material fact. *See Applikon Biotechnology, Inc. v. United States*., 35 CIT ___, ___. 807 F. Supp. 2d 1323, 1325 n.2 (2011) (citing *Kulak v. City of New York*, 88 F.3d 63, 71 (2d Cir.1996)). Instead, the opponent "must point to an evidentiary conflict created on the record at least by a counter statement of a fact or facts set forth in detail *in an affidavit by a knowledgeable affiant." Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.,* 731 F.2d 831, 836 (Fed. Cir. 1984), *quoted in Processed Plastics Co. v. United States*, 473 F.3d 1164, 1170 (Fed. Cir. 2006) (emphasis added). This, Defendant has not done. Accordingly, there is no genuine dispute as to when Orleans Furniture's error was discovered. *See Anderson*, 477 U.S. at 249; USCIT Rule 56(e)(2).

[13] Defendant objects that the "[i]nstructions in [M]essage 9055211 [i.e., the February 24, 2009 Suspension Instructions] did apply because the importer was Orleans and not {[[ ]]}."

By operation of law, on February 20, 2009, six months after suspension was lifted, the subject entry liquidated (hereinafter referred to as the "deemed liquidation"). PSOF ¶ 29; Def.'s Resp. to PSOF; DSOF ¶ 5; Pl.'s Resp. to DSOF ¶ 5. On December 18, 2009, "the 'no-change' liquidation became effective in ACS, and Customs posted a bulletin notice of the deemed liquidation for the [subject entry] on the same date." PSOF ¶ 33; Def.'s Resp. to PSOF; DSOF ¶ 8; Pl.'s Resp. to DSOF ¶ 8.[14]

On January 8, 2010, Customs reliquidated the entry at the correct AD rate of 216.01 percent. PSOF ¶ 35; Def.'s Resp. to PSOF ¶ 35; PSOF ¶ 36.[15]

Def.'s Resp. to PSOF ¶¶ 27–28. The point of Defendant's statement is unclear. The February 24, 2009 Suspension Instructions suspended entries exported by Gaomi Yatai regardless of the identity of the importer. *See* Feb. 24, 2009 Suspension Instructions at CBP000014. However, Parties agree that [[ ]] was the exporter, not Gaomi Yatai, [[ ]] was subject to the China-wide rate, the correct Commerce case number was A-570–890–000, suspension of liquidation for the subject entry lifted on August 20, 2008, upon publication of the Final Results, and, pursuant to the January 27, 2009 Liquidation Instructions, Commerce ordered Customs to apply a 216.01 percent AD duty rate to entries subject to the China-wide rate and identified by Commerce case number A-570–890–000. PSOF ¶¶ 12, 16, 26; Def.'s Resp. to PSOF; DSOF ¶ 4; Pl.'s Resp. to DSOF ¶ 4. Defendant's objection fails to raise a genuine issue of material fact.

[14] Plaintiff asserts as an undisputed fact that, after Mr. Gerace's discovery of the incorrect case number, but before Customs posted the bulletin notice, "time was needed to process the Entry, verify the case and rate information, generate a Notice of Action (CF 29), forward the Notice of Action to the entry unit at Customs and allow time for processing." PSOF ¶ 32 (citing Gerace Decl. ¶ 17). Defendant objects that "CBP needed no time to verify any information . . . ." Def.'s Resp. to PSOF ¶ 32. Defendant, again, does not cite to admissible evidence supporting its assertion or countering Mr. Gerace's sworn declaration. *See* Def.'s Resp. to PSOF ¶ 32; USCIT Rule 56.3(c). Instead, Defendant points to its "answer brief," i.e., its opposition to Plaintiff's summary judgment motion. Def.'s Resp. to PSOF ¶ 32. Therein, Defendant characterizes Plaintiff's assertion as "curious" and "stunningly unconvincing." *See* Def. Resp. at 9. Defendant offers its "serious[] doubt" that the time taken by CBP to process the entry "is even close to the time it takes a customhouse broker to actually prepare the entry," which must be done within 15 days of arrival, Def. Resp. at 9, and asserts that the math required to calculate the correct AD duty "takes about two minutes" to complete, Def. Resp. at 10 (citing Def.'s Resp., Ex. 3 (Customs' Liquidation/Reliquidation Worksheet)). Crucially, however, Defendant offers no evidence contradicting Mr. Gerace's sworn declaration concerning the actions CBP performed before posting the bulleting notice, nor does it offer evidence supporting its objection that "no time" was needed by the agency to complete those actions before posting the Bulletin Notice. *See* Def's Resp. to PSOF ¶ 32. Defendant's speculative objection is insufficient to raise a genuine dispute. *See Applikon Biotechnology, Inc*., 807 F. Supp. 2d at 1325; *Processed Plastics Co*., 473 F.3d at 1170.

[15] Defendant objects to Plaintiff's assertion that the unpaid principal amounts to $60,336.14, and asserts that the unpaid principal is $[[ ]], but does not object to the fact of reliquidation or correctness of the AD rate. Def.'s Resp. to PSOF ¶ 35. However, Defendant does not dispute that "CBP re-liquidated the entry with an ADD rate advance of $60,336.14." DSOF ¶ 9; Pl.'s Resp. to DSOF ¶ 9.

E. Protest and Demand for Payment from Surety

On February 4, 2010, Orleans Furniture protested the reliquidation on the basis that AD duties should not have been assessed because the subject merchandise was only "posts" and not finished bedroom furniture. PSOF ¶ 37; Def.'s Resp. to PSOF; *see also* PMSJ, Ex. 10 (Protest Number 200610100128). Orleans Furniture requested "accelerated disposition" of the protest pursuant to 19 C.F.R. § 174.22, which was subsequently deemed denied. PSOF ¶ 38.[16] GAIC did not protest the reliquidation, and neither Orleans Furniture nor GAIC challenged the deemed denial. PSOF ¶ 41; Def.'s Resp. to PSOF.

On April 27, 2010, Customs sent GAIC a "Formal Demand on Surety for Payment of Delinquent Amounts Due."[17] PSOF ¶ 42 (citing Compl., Confidential Ex. C ("612 Report")).[18] GAIC did not protest Customs "charge[s] or exaction[s]." PSOF ¶ 44; Def.'s Resp. to PSOF. On December 15, 2014, Customs sent GAIC a letter demanding payment of $50,000 (the face value of the issued bond). PSOF ¶ 45; Def.'s Resp. to PSOF. **F. Procedural History**

On February 19, 2015, the United States initiated this collection action against GAIC for unpaid antidumping duties and interest. *See generally* Compl. Earlier in these proceedings, GAIC moved to dismiss the complaint for failure to state a claim on the grounds that Customs lacked authority to reliquidate an entry that had been deemed liquidated and, alternatively, failed to timely reliquidate the entry. *See generally* Great American Ins. Co. of New York's Mot. to Dismiss and Supp. Mem. of Law ("Def.'s MTD"), ECF No. 12. The court denied the motion to dismiss, finding that Customs has statu-

[16] Defendant does not object to the assertion that Orleans Furniture requested accelerated disposition, rather, that "[f]or the reasons stated in [its] Motion for Summary Judgment, . . . the protest was not deemed denied." Def.'s Resp. to PSOF ¶ 38. It is well settled that arguments by counsel cannot constitute facts for the purpose of summary judgment. *See, e.g., Gaub v. Professional Hosp. Supply, Inc*., 845 F. Supp. 2d 1118, 1128 (D. Idaho 2012); *Trinsey v. Pagliaro*, 229 F. Supp. 647, 649 (D.C. Pa. 1964) ("Statements of counsel in their briefs . . . are not sufficient for purposes of . . . summary judgment"). Further, as discussed herein, the legal basis for Defendant's assertion (which concerns whether Customs' deemed denial amounted to an *ultra vires* ruling on the scope of the AD order) lacks merit. *See infra* Discussion Sect. III (Status of Administrative Proceedings).

[17] Defendant objects that the 612 Report "noted that there was an outstanding protest" and "[was] not a demand on Surety." Def.'s Resp. to PSOF ¶¶ 42–43. Although Defendant is correct the 612 Report listed Orleans Furniture's protest as "open," the 612 Report is plainly titled "Formal Demand on Surety for Payment of Delinquent Amounts Due," and it cites the "APPROVAL/DENIAL DATE: 02/09/10" for the protest in question, indicating that the deadline for ruling on the protest had passed. *See* 612 Report. Defendant offers no evidence supporting its assertion that the 612 Report, so titled, is not a demand for payment from surety. Accordingly, there is no genuine dispute as to that fact. *See Anderson*, 477 U.S. at 249–50; USCIT Rule 56(e)(2).

[18] According to the 612 Report, Customs sought payment of $60,336.14 in principal and $398.02 in interest. 612 Report (line item for bill number 45462263).

tory authority to reliquidate deemed liquidations within 90 days of transmitting notice of the deemed liquidation to importers pursuant to 19 U.S.C. § 1501,[19] and the complaint adequately alleged facts showing that Customs had timely reliquidated the subject entry within the 90 day period. *See generally United States v. Great American Ins. Co. of New York*, 39 CIT ___, 121 F. Supp. 3d 1288 (2015). The court further found that the ten month delay from the date of the deemed liquidation to the date on which Customs posted notice was not, "as a matter of law," unreasonable. *Id.* at 1295.

Pending are the Parties' motions for summary judgment. Plaintiff moves for summary judgment on the basis that the undisputed material facts establish that the time between the deemed liquidation and the posting of the bulletin notice of the deemed liquidation was reasonable. *See generally* PMSJ. Defendant raises several grounds for summary judgment; central to its motion, however, is Defendant's construction of the relevant statutory scheme as affording Customs 90 days (or alternatively, 180 days) from the date on which entries are deemed liquidated to voluntarily reliquidate those entries. *See generally* DMSJ. For the reasons discussed below, the court grants Plaintiff's motion, in part, and denies Defendant's motion.

DISCUSSION

I. Defendant's Ability to Challenge the Reliquidation

Plaintiff asserts two bases for precluding Defendant from challenging the reliquidation: failure to exhaust administrative remedies and the doctrine of law of the case. The court will address each, in turn.

A. Administrative Exhaustion

Plaintiff argues that, pursuant to 19 U.S.C. § 1514, Defendant is barred from challenging the reliquidation because it failed to protest CBP's demand for payment (the 612 Report) or challenge the denial of Orleans Furniture's protest of the reliquidation. PMSJ at 12–13; *see also* Confidential Pl.'s Reply Mem. of Law in Further Supp. of its Mot.

[19] In full, § 1501 provides:

> A liquidation made in accordance with section 1500 or 1504 of this title or any reliquidation thereof made in accordance with this section may be reliquidated in any respect by the Customs Service, notwithstanding the filing of a protest, within ninety days from the date on which notice of the original liquidation is given or transmitted to the importer, his consignee or agent. Notice of such reliquidation shall be given or transmitted in the manner prescribed with respect to original liquidations under section 1500(e) of this title.

19 U.S.C. § 1501 (2006). As discussed herein, in 2016 Congress amended § 1501 to provide for reliquidation within 90 days from the date of the deemed liquidation only and not from the date on which notice of the deemed liquidation is given or transmitted to the importer. However, that amendment does not apply here. *See infra* Discussion Sect. I.B.b.ii.

for Summ. J. ("Pl.'s Reply") at 14–18, ECF No. 57. Defendant responds that the finality provisions stated in § 1514 do not apply to reliquidations pursuant to 19 U.S.C. § 1501. GAIC Mem. of Law in Resp. to Pl.'s Mot. for Summ. J. ("Def.'s Resp.") at 13, ECF No. 52. Defendant broadly contends that it may raise any defense to the government's enforcement action without having filed a protest, and, more specifically, that CBP's reliquidation of an entry deemed liquidated did not have to be protested. *Id.* at 13–16.[20]

a. Legal Framework

Section 1514 governs the finality of CBP's decisions. In relevant part, it provides that:

> (a) [e]xcept as provided in . . . section 1501 of this title (relating to voluntary reliquidations), . . . any clerical error, mistake of fact, or other inadvertence, . . . adverse to the importer, in any entry, liquidation, or reliquidation, and, *decisions of the Customs Service*. . . as to—
>
> . . .
>
> **(3)** *all charges* or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
>
> . . .
>
> **(5)** the liquidation *or reliquidation* of an entry, or reconciliation as to the issues contained therein, or any modification thereof, including the liquidation of an entry, pursuant to either section 1500 of this title or section 1504 of this title;
>
> . . .
>
> shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade
>
> . . . .

19 U.S.C. § 1514(a) (emphasis added). Either an importer or a surety

[20] Defendant also asserts that "[a]ny CBP decision on a protest would have been *ultra vires*," and the deemed liquidation was final and conclusive. Def.'s Resp. at 14–15. Defendant does not explain why CBP's decision would have been *ultra vires*; presumably, however, the assertion relates to Defendant's separate argument that, in the event the court finds the reliquidation to be valid, it is entitled to summary judgment on the basis that Orleans Furniture's protest could not have been deemed denied because "any action (or non-action) by CBP on [Orleans Furniture's] protest was an *ultra vires* determination [by CBP on the scope of the AD order] and the issue is still pending." DMSJ at 33. As discussed herein, Defendant's argument lacks merit. *See infra* Discussion Sect. III.

may protest a decision specified in § 1514(a). *See id.* § 1514(c)(2) (providing for protests by importers or their sureties); *id.* § 1514 (c)(1) (noting that "[o]nly one protest may be filed for each entry of merchandise," but that "separate protests filed by different authorized persons with respect to any one category of merchandise . . . are deemed to be part of a single protest"). Additionally, a surety has "180 days from the date of mailing of notice of demand for payment against its bond" to protest a claim against its bond. *Id.* § 1514(c)(3).

It is well settled that Customs' findings related to a particular liquidation "merge with the liquidation" and are final and conclusive unless challenged in accordance with § 1514. *Volkswagen of Am., Inc. v. United States*, 532 F.3d 1365, 1370 (Fed. Cir. 2008); *see United States. v. Am. Home Assur. Co. ("AHAC (09–403)"),* 39 CIT ___, ___, 100 F. Supp. 3d 1364, 1369 (2015).[21] Unprotested issues related to the liquidation of the subject entries may not be "raised in any context," *United States v. Cherry Hill Textiles, Inc*., 112 F.3d 1550, 1557 (Fed. Cir.1997); that is, the rule of finality "applies to both importer duty recovery suits and to [g]overnment enforcement actions," *AHAC (09–403)*, 100 F.Supp.3d at 1369.

b. Analysis

i. Section 1514 Applies to Reliquidations

Defendant contends that § 1514 does not apply to reliquidations pursuant to 19 U.S.C. § 1501. Def.'s Resp. at 13.[22] In support, Defendant points to the first sentence of 19 U.S.C. § 1514, which governs the finality of Customs' decisions as to liquidations and reliquidations "[e]xcept as provided in . . . section 1501 . . . ." *See id.* at 13.

Defendant misreads the significance of the cited sentence. "Absent clear legislative intent to the contrary, the plain meaning of [a] statute will prevail." *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir.1992) (citation omitted). Pursuant to § 1514, "absent timely reliquidation or protest," a liquidation is final and conclusive. *Volkswagen*, 532 F.3d at 1370 (citation omitted); 19 U.S.C. § 1514. Section 1501 provides for voluntary reliquidation by CBP of entries affirmatively liquidated pursuant to § 1500 or deemed liquidated

[21] Because there are several cases involving American Home Assurance Company, for ease of identification subsequent case citations include the USCIT Court No.

[22] Defendant also contends that § 1514(a) only applies to "'any clerical error, mistake of fact, or other inadvertence,'" but does not apply to mistakes of law." Def.'s Resp. at 13. Defendants confuses the operative language. The "final and conclusive" language stated in § 1514(a) applies to both "any clerical error, mistake of fact, or other inadvertence . . . adverse to the importer, in any entry, liquidation, or reliquidation," *and* to "decisions of the Customs Service, . . . as to . . . the liquidation or reliquidation of an entry." § 1514(a); *see also* Pl.'s Reply at 13.

pursuant to § 1504. *See* 19 U.S.C. § 1501. Thus, in the event CBP reliquidates an entry pursuant to § 1501, the reliquidation—not the original liquidation—becomes "final and conclusive." *See id.* § 1514(a)(5)(governing the finality of reliquidations). Thus, Defendant's argument, which essentially precludes reliquidations pursuant to § 1501 from ever becoming "final and conclusive," lacks merit.

ii. Defendant is Foreclosed From Challenging Matters Subsumed by the Reliquidation

Defendant also contends that it may raise any defenses to liability in this enforcement action notwithstanding its failure to protest the reliquidation that formed the basis for the charge. Def.'s Resp. at 13–17. Defendant is incorrect.

As an initial matter, the 612 Report that Customs sent to GAIC on April 27, 2010 detailing the importer's delinquent amounts due constitutes a protestable "decision[]" as to a "charge[]" for purposes of § 1514(a)(3).[23] The basis for Customs' issuance of the 612 Report involved its substantive determinations regarding the subject entry's eligibility for reliquidation and the "applicable rate of duty." *See U.S. Shoe Corp.*, 114 F.3d at 1569. Customs then had to identify the relevant bonds, determine whether the duties owed exceeded the face value of the bonds, determine any applicable rate of interest,[24] and issue the demand for payment from the surety. *Cf. AHAC (09–403)*, 100 F. Supp. 3d at 1370–71 (Customs decision to seek post-liquidation § 1505(d) interest from the surety constituted a protestable charge; surety's failure to seek judicial review of denied protests barred it from asserting defenses to § 1505(d) liability). That demand for payment "identif[ied] the name and address of the delinquent importer, the bill number, billing date, port of entry, document date, entry number, the amount due, and the importer number." *Peerless Ins. Co. v. United States*, 12 CIT 1231, 1232–33, 703 F. Supp. 104, 105 (1988) (noting that, "since 1977, Customs has issued its payment demand to

[23] A "decision" is a "substantive determination[] involving the application of pertinent law and precedent to a set of facts, such as tariff classification and applicable rate of duty." *U.S. Shoe Corp. v. United States*, 114 F.3d 1564, 1569 (Fed. Cir. 1997) (passive receipt of a harbor maintenance tax by Customs constitutes a "charge or exaction," but not a "decision" pursuant to § 1514(a)). A "charge" is "an obligation or duty; a claim or encumbrance; a liability, an expense or the price of an object; an entry in an account of what's due from one party to another." *St. Paul Fire and Marine Ins. Co. v. United States*, 14 CIT 43, 46, 729 F. Supp. 1371, 1374 (1990) (citations omitted), *rev'd on other grounds*, 959 F.2d 960 (Fed. Cir. 1992).

[24] Pursuant to 19 U.S.C. § 1677g, the government is entitled to collect interest on underpayment of amounts deposited on merchandise entered on or after the date on which an antidumping order issues. The government is also entitled to so-called "delinquency interest" pursuant to 19 U.S.C. § 1505(d). *See AHAC (09–403)*, 100 F. Supp. 3d at 1368–71.

sureties containing such information); 612 Report. The court has found that a 612 Report constitutes a protestable "charge" pursuant to § 1514(a)(3). *See Hartford Fire Ins. Co. v. United States*, 31 CIT 1281, 1286, 507 F. Supp. 2d 1331, 1335–36 (2007), *aff'd*, 544 F.3d 1289 (Fed. Cir. 2008); *Hartford Fire Ins. Co. v. United States*, Court No. 07–00101, Def.'s Mot. to Dismiss, Ex. A, ECF No. 13 (appending a "Formal Demand on Surety for Payment of Delinquent Amounts Due," i.e., a 612 Report, as evidence of the charge at issue). Accordingly, Customs' issuance of the 612 Report triggered a 180 day period during which GAIC could have protested the underlying reliquidation giving rise to the charge. *See* 19 U.S.C. §§ 1514(a)(3), (c)(3)(B); *see also Pope Prods., Div. of Purex v. United States*, 15 CIT 279, 283 (1991) (demand for payment begins the timeframe during which a surety may protest a liquidation).

To support the proposition that it "did not have to file a protest in order to raise *any and all* defenses available to it in this collection action," Defendant first relies on *United States v. Am. Home Assurance Co*. ("*AHAC (09–401)*"), 39 CIT ___, ___,151 F. Supp. 3d 1328, 1347–48 (2015). Def.'s Resp. at 14 (emphasis added). However, Defendant misreads *AHAC (09–401)*. There, the court distinguished "protestable matters" related to the entries from "defenses related to [a surety's] contractual obligations," for the purpose of determining whether the surety's defenses were preserved. *AHAC (09–401)*, 151 F. Supp. 3d at 1347. To be sure, a surety is not barred from raising contractual defenses in an enforcement action. *St. Paul Fire & Marine Ins. Co. v. United States*, 959 F.2d 960, 963–64 (Fed. Cir.1992); *AHAC (09–401)*, 151 F. Supp. 3d at 1347. Here, however, Defendant's arguments are not "personal" to the surety's obligations pursuant to the bond; rather, they concern Customs' authority to reliquidate the subject entry beyond a specified timeframe. *See* DMSJ*; cf. AHAC 09–401*, 151 F. Supp. 3d at 1346–48 (surety was not barred from arguing that it was prejudiced by its failure to receive notice of the lifting of suspension); *St. Paul Fire*, 959 F.2d at 963–64 (surety's claim that the government knew, but failed to timely disclose, its awareness that the importer was evading customs laws, was "personal" to the surety and "separate and distinct" from the importer's protest). Defendant's arguments against liability constitute the type of "collateral[] challenge" to the validity of the reliquidation the Federal Circuit has cautioned the exhaustion requirement of § 1514 was designed to prevent. *See Cherry Hill*, 112 F.3d at 1557 (permitting sureties to "collaterally challenge the liquidation" in a subsequent enforcement action "would create a gaping hole in the administrative exhaustion requirement of section 1514 and would be inconsistent

with the underlying policy of section 1514, which is to channel challenges to liquidations through the protest mechanism in the first instance"); *cf. United States v. Utex Int'l Inc*., 857 F.2d 1408, 1414 (Fed. Cir. 1988) (permitting surety to defend against the government's demand for liquidated damages, occurring four years after final liquidation, because the issue did not involve administrative review of the liquidation); *Cherry Hill*, 112 F.3d at 1555 (construing *Utex Int'l* to be consistent with barring challenges to the accuracy or validity of a liquidation when those challenges were not protested administratively).

Defendant relies on *Cherry Hill* to support its alternative argument that it did not have to file a protest raising a "deemed liquidation defense" to raise that same defense in a subsequent enforcement action. Def.'s Resp. at 15–16 (citing *Cherry Hill*, 112 F.3d at 1550); *see also Cherry Hill*, 112 F.3d at 1558 (referring to the "deemed liquidation" defense as a "narrower ground for reversal" than the argument that § 1514 exhaustion was only required in the case of importer recovery suits and not government enforcement actions). *Cherry Hill* held that because the subject "entry was liquidated by operation of law *prior* to the October 28, 1988, liquidation, [the surety] was not required to protest the October 28 liquidation in order to be entitled to defend against liability on the ground of the deemed liquidation." 112 F.3d at 1560. The Federal Circuit created this exception to the protest requirement to prevent CBP from "purport[ing] to liquidate an entry anew, years after the first liquidation had become final, and thereby impos[ing] liability on the importer or surety if the importer or surety were not vigilant in watching for notice of such untimely liquidations or if it were no longer able to undertake the burden of filing and pursuing a protest." *Id.; see also United States v. Am. Home Assur. Co. ("AHAC (Fed. Cir.)"*), 789 F.3d 1313, 1321–22 (Fed. Cir. 2015) (discussing *Cherry Hill*). Defendant's reliance on *Cherry Hill* is misplaced.

First, *Cherry Hill* interpreted an older version of § 1501, which did not provide for reliquidation of entries deemed liquidated pursuant to § 1504(d).[25] *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d

[25] 19 U.S.C. § 1501 was amended in 2004 to allow for reliquidation of entries initially liquidated pursuant to § 1504, *i.e.* deemed liquidations. *See* Miscellaneous Trade and Technical Corrections Act of 2004, Pub. L. No. 108–429, §§ 2107, 2108, 118 Stat. 2434, 2598 (2004). Prior to 2004, only entries liquidated pursuant to §1500 could be reliquidated by Customs.

1347, 1362 n.26 (Fed. Cir. 2006). Accordingly, the Federal Circuit reasoned that the deemed liquidation, and not the subsequent liquidation, "must [] be regarded as final" because the government had failed to demonstrate grounds for treating the subsequent liquidation as a reliquidation and could not simply liquidate the entry anew. *See Cherry Hill*, 112 F.3d at 1560 (noting, *inter alia*, that "reliquidation under 19 U.S.C. § 1501 would not be permitted because that provision applies only to liquidations made in accordance with 19 U.S.C. § 1500, and not to 'deemed liquidations' under 19 U.S.C. § 1504"). That reasoning, and, thus, Defendant's reliance on *Cherry Hill* is inapposite in light of the changes to § 1501 affording Customs the authority to reliquidate deemed liquidations made pursuant to § 1504. *See Norsk Hydro*, 472 F.3d at 1362 n.26 (recognizing that "deemed liquidations are subject to reliquidation").

Defendant argues, however, that post-2004 cases "continue to recognize the validity of *Cherry Hills'* [sic] holding on [this] point." Def.'s Resp. at 15 (citing *Int'l Custom Prod., Inc. v. United States*, 791 F.3d 1329, 1339–40 (Fed. Cir. 2015), *AHAC (Fed. Cir.)*, 789 F.3d at 1322, and *Ford Motor Co. v. United States*, 35 CIT ___, ___, 806 F. Supp. 2d 1328, 1335 (2011)). The dates of the opinions are irrelevant; each case involves pre-December 3, 2004 entries of merchandise, did not address the relevant statutory scheme, or is otherwise inapposite.[26] Accordingly, Defendant's reliance on these cases is misplaced.

[26] *Int'l Custom Products* addressed the applicability of the deemed liquidation defense to Customs' purported liquidation in 2007 of 13 entries that had entered between October 2003 and October 2004. *Int'l Custom Prod.*, 791 F.3d at 1333–34. The Federal Circuit relied on *Cherry Hill* to find that the importer could defend against a purported untimely liquidation in an enforcement action without first having to file a protest. *Id.* at 1340–41 (citing *Cherry Hill*, 112 F.3d at 1561). In *AHAC (Fed. Cir.)*, the court rejected the surety's attempt to assert a deemed liquidated defense pursuant to *Cherry Hill* to several 2001 entries that Customs timely liquidated in 2004 and subsequently reliquidated in 2005, because the entries had not been deemed liquidated. 789 F.3d at 1315–33. *Ford Motor Co.* addressed pre-December 3, 2004 drawback entries that "Customs had not affirmatively liquidated when the action commenced on September 2, 2009." *Ford Motor Co.*, 806 F. Supp. 2d at 1331. In determining whether the court had jurisdiction to hear the case, the court relied on *Cherry Hill* for the proposition, made in passing, that "the importer [could] wait for Customs to affirmatively liquidate, decline to pay whatever amount it is billed, and then assert an affirmative defense of deemed liquidation if the United States brings an enforcement action under 28 U.S.C. § 1582." *Id.* at 1335 (citing, *inter alia*, *Cherry Hill*, 112 F.3d at 1560). Additionally, when, as in that case, Customs had not affirmatively liquidated the entries, "the importer [could] bring an action under 28 U.S.C. § 1581(i) to obtain a declaratory judgment from the CIT confirming that there was a deemed liquidation." *Id.* at 1335 (internal quotation marks and citations omitted); *id.* at 1337 (noting that "Plaintiff's allegations also suggest [the same] 'potential for abuse' [that concerned the *Cherry Hill* court] that only a declaratory judgment could prevent"). Neither *Int'l Custom Products*, *AHAC (Fed. Cir.)*, nor *Ford Motor Co.* relied on *Cherry Hill* to permit the assertion of a deemed liquidation defense to challenge a statutorily authorized reliquidation of post-December 3, 2004 entries.

Second, Defendant has not actually raised the "deemed liquidation defense" to liability contemplated in *Cherry Hill*. Defendant interprets the "deemed liquidation defense" to mean that a surety does not have to file a protest whenever the original liquidation was by operation of law, but that stretches the defense too far. *See* Def.'s Resp. at 15–17. As discussed above, *Cherry Hill* permitted a surety to raise the defense that the subject entry had already deemed liquidated, without first filing a protest, when Customs purported to liquidate (*as opposed to reliquidate*) the entry anew, and treat that liquidation as the operative liquidation. *See Cherry* Hill, 112 F.3d at 1560. But that is not what happened here, nor is the mere fact that the entries had deemed liquidated prior to the reliquidation the basis of Defendant's defense to liability. *See* DMSJ (generally contending that Customs *waited too long* before conducting its statutorily authorized reliquidation of the subject entry that were previously deemed liquidated). Thus, *Cherry Hill* does not resolve Defendant's arguments. In sum, Defendant's challenges to liability involve matters that are subsumed by the reliquidation and, thus, could and should have been raised administratively. Because they were not, Defendant is foreclosed from raising those arguments in this action.

B. Law of the Case

Plaintiff argues that the court's prior interpretation of the relevant statutory scheme constitutes the law of the case and, thus, Defendant's contrary arguments should not be revisited. Pl.'s Mem. in Opp'n to Def.'s Mot. for Summ. J. ("Pl.'s Resp.") at 4–6, ECF No. 61; Pl.'s Reply at 2.[27] Defendant contends that a 2016 amendment to 19 U.S.C. § 1501 merits the court's reconsideration of its arguments. GAIC Reply in Supp. of Def.'s, GAIC, Mot. for Summ. J. ("Def.'s Reply") at 1–2, ECF No. 58.

a. Legal Framework

The law of the case doctrine "generally bars retrial of issues that were previously resolved." *Intergraph Corp. v. Intel Corp.,* 253 F.3d 695, 697 (Fed. Cir. 2001) (citing *Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (law of the case "expresses the practice of courts generally to refuse to reopen what has been decided")). The doctrine's purpose is to "promote[ ] the finality and efficiency of the judicial process by protecting against the agitation of settled issues." *Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800, 816 (1988) (citation and internal quotation marks omitted). However, it is well settled that the

[27] The electronic docket numbers for Plaintiff's response and reply are not sequential due to Plaintiff's refiling of its response as a public document. *See* Order (Feb. 21, 2017), ECF No. 59 (granting Plaintiff's motion for errata to replace certain docket entries).

application of the doctrine is within a court's discretion, and it "should not be applied woodenly in a way inconsistent with substantial justice." *Hudson v. Principi,* 260 F.3d 1357, 1363–64 (Fed. Cir. 2001) (citations omitted). Courts may decline to apply the doctrine upon "the discovery of new and different material evidence that was not presented in the prior action" or "an intervening change of controlling legal authority," or when "the prior decision is clearly incorrect and its preservation would work a manifest injustice." *Intergraph Corp.*, 253 F.3d at 698.

b. Analysis

Defendant contends that an amendment to § 1501 that took effect on February 24, 2016 applies to entries that entered before that date, or, alternatively, that the amendment constitutes a change in the controlling law meriting reconsideration of Defendant's prior argument that Congress intended to limit CBP's ability to reliquidate entries previously deemed liquidated to within 90 days of the date of the deemed liquidation. Def.'s Reply at 2. In other words, Defendant contends that the 2016 amendment supports its interpretation of the 2004 version of § 1501 in effect when the subject entries were made. *See id.* Defendant is wrong on both counts.[28]

i. Overview of the 2016 Amendment

On February 24, 2016, Congress amended § 1501 as follows:

> A liquidation made in accordance with section 1500 or 1504 of this title or any reliquidation thereof made in accordance with this section may be re-liquidated in any respect by *U.S. Customs and Border Protection*, notwithstanding the filing of a protest, within ninety days from the date *of the original liquidation*. Notice of such reliquidation shall be given or transmitted in the manner prescribed with respect to original liquidations under section 1500(e) of this title.

Trade Facilitation and Enforcement Act of 2015, Pub. L. No. 114–125, § 911, 130 Stat. 122, 240 (2016) (deletions in strikethrough; additions underlined). In sum, the statute now requires Customs to voluntarily reliquidate affirmative and deemed liquidations within 90 days from the date of the liquidation, not the date on which notice is provided. *See id.*

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[28] As previously noted, 19 U.S.C. § 1501 was amended in 2004 to allow for reliquidation of deemed liquidations. *See supra* note 25. Because the events of this case all took place after 2004, it is the 2004 version of the statute that governs Customs ability to liquidate and reliquidate the entries in question.

ii. The Amendment is Not Retroactive

The U.S. Supreme Court has recognized that "the presumption against retroactive legislation is deeply rooted in our jurisprudence," because "individuals should have an opportunity to know what the law is and to conform their conduct accordingly . . . ." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). However, this presumption is not absolute: "[r]etroactivity provisions often serve entirely benign and legitimate purposes," including correcting mistakes. *Id.* at 267–68. Accordingly, the Court has established a framework to determine whether a statute applies retroactively. *See Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006) ("This Court has worked out a sequence of analysis when an objection is made to applying a particular statute said to affect a vested right or to impose some burden on the basis of an act or event preceding the statute's enactment.").

First, a court must look to "whether Congress has expressly prescribed the statute's proper reach." *Id.* at 37 (citing *Landgraf*, 511 U.S. at 280). Absent such language, a court should "try to draw a comparably firm conclusion about the temporal reach specifically intended by applying '[the court's] normal rules of construction.'" *Id.* (citing *Lindh v. Murphy*, 521 U.S. 320, 326 (1997)). If both efforts fail, a court asks whether the statute has impermissible "retroactive consequence," defined as an application of the statute that "'affect[s] substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment.'" *Id.* (citing *Landgraf*, 511 U.S. at 278).[29] To determine whether a statute has retroactive consequence, the court must consider three *Landgraf* factors: "the 'nature and extent of the change of the law,' 'the degree of connection between the operation of the new rule and a relevant past event,' and 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1364 (Fed. Cir. 2005) (quoting *Landgraf*, 511 U.S. at 270).[30]

In this case, § 1501 (as amended in 2016) does not expressly state the statute's temporal applicability. *See* 19 U.S.C. § 1501 (2016). Nor do the "normal rules of [statutory] construction" suggest a "compara-

[29] There is a distinction between "retroactive consequence," which is impermissible, and applying a statute "retroactively," which may be permissible. *See Landgraf*, 511 U.S. at 269–70 ("The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.").

[30] Neither party has addressed the *Landgraf* factors the court is required to consider pursuant to *Princess Cruises*; instead, Parties dispute the proper application of *Landgraf* as construed by the Court of Appeals for the Ninth Circuit in *Chenault v. U.S. Postal Service*, 37 F. 3d 535, 538 (9th Cir. 1994). *See* DMSJ at 19; Pl.'s Resp. at 21–22; Def.'s Reply at 5. However, the Federal Circuit, not the Ninth Circuit, is binding on the court and the court applies the legal framework as stated in *Princess Cruises*.

bly firm" determination "about the [statute's] temporal reach." *Fernandez-Vargas*, 548 U.S at 37 (citing *Lindh*, 521 U.S. at 326). Defendant relies on legislative history associated with the 2016 amendment to support retroactivity. Def.'s Reply at 5 (quoting 162 Cong. Rec. S836–02 (daily ed. Feb. 11, 2016) (statements of Senators Hatch and Wyden)); *see also* DMSJ at 17 n.5. In the floor debate relied on by Defendant, Senators Hatch and Wyden had the following exchange:

> Mr. HATCH:
> Madam President, the bill we will be voting on shortly contains a provision amending 19 U.S.C. § 1501, which relates to the liquidation of entries into the U.S. The provision in the conference report amending section 1501 is *intended to ensure* in cases where liquidation occurs by operation of law, the 90-day timeframe for the voluntary reliquidation of an entry by Customs and Border Protection begins on the date of the original liquidation. I would ask my colleague, Senator Wyden, the ranking member of the Finance Committee, if that is his understanding of this provision as well.
>
> Mr. WYDEN:
> Madam President, I agree with Senator Hatch that is the intent of the provision amending 19 U.S.C. § 1501.

162 Cong. Rec. S836–02 (daily ed. Feb. 11, 2016) (statements of Senators Hatch and Wyden) (emphasis added). According to Defendant, Senator Hatch's use of the phrasing "intended to ensure" was "obviously meant to clarify that Congress intended the 90-day timeframe in the 2004 amendment to also begin on the date of the original liquidation." Def.'s Reply at 5 (underline omitted). To the contrary, Senator Hatch's statement simply discusses the effect of the 2016 amendment; it falls far short of a "comparably firm" statement of the amended statute's temporal reach. *See Fernandez-Vargas*, 538 U.S. at 37; Pl.'s Resp. at 20 ("Plainly, the Congressmen were discussing the intent of the amendment that result[ed] in the current statute, not the intent of the prior version."). Accordingly, the court must proceed to the third step of the analysis—consideration of the *Landgraf* factors.

First, the "nature and extent of the change of the law" is significant because the amendment changes the starting point for computing the time that CBP has to voluntarily reliquidate an entry from the date of notice to the date of the liquidation. *See Princess Cruises*, 397 F.3d at 1364. Particularly in the context of deemed liquidations, this is significant because those two dates do not necessarily (or even likely)

coincide. *See* 19 C.F.R. § 159.9(c)(ii) (affording Customs "a reasonable period after each liquidation by operation of law" to provide notice); *cf. Koyo Corp. of U.S.A. v. United States*, 497 F.3d 1231, 1240 (Fed. Cir. 2007) (recounting Customs' posting of bulletin notices more than 12 months after the subject entries had been deemed liquidated).

Second, there is a strong "degree of connection between operation of the new rule and a relevant past event." *See Princess Cruises*, 397 F.3d at 1364. Applying the 2016 amendment to the reliquidation at issue here, which occurred within 90 days of notice but not within 90 days of the deemed liquidation, would void the reliquidation and result in the under-collection of antidumping duties. *See supra* Background Sect. I.D; cf. Princess Cruises, 397 F.3d at 1366 (noting that retroactive application of the rule in question would result in plaintiff being overcharged).

Finally, "familiar considerations of fair notice, reasonable reliance, and settled expectations" also disfavor retroactive application. *See Princess Cruises*, 397 F.3d at 1366–67.[31] As the Federal Circuit recognized more than a decade ago, § 1501 plainly afforded Customs 90 days from the date on which it posted the bulletin notice to reliquidate the subject entry. *See Norsk Hydro*, 472 F.3d at 1352. To now hold otherwise implicates fairness and reliance considerations. *Cf. Princess Cruises*, 397 F.3d at 1364, 1366 (receipt of a letter from a Customs official indicating that Plaintiff would not be subject to harbor maintenance tax for layover-only passengers disfavored retroactive application of a contrary Customs ruling). In sum, because all three *Landgraf* factors points to an impermissible retroactive effect, CBP's "substantive rights, liabilities, or duties" would be negatively affected by applying the 2016 amendments to the facts of this case. *See Fernandez-Vargas*, 548 U.S at 37; *Princess Cruises*, 397 F.3d at 1367. Thus, the court must "apply the presumption against retroactivity . . . owing to the absen[ce of] a clear indication from Congress that it intended such a result." *Fernandez-Vargas*, 548 U.S. at 37–38 (internal quotation marks and citation omitted).

As to Defendant's alternative argument—that the amendment supports its interpretation of § 1501 circa 2004—in fact, the opposite is true. *See* Def.'s Reply at 2. Congress' amendment to the statute demonstrates that starting the period for reliquidation at the notice of the deemed liquidation is substantively different from starting it at the date on which the entry liquidated by operation of law, otherwise there would be no reason to amend the statute. Absent evidence that

[31] The Federal Circuit declined to resolve the issue of the relative weight to be given to this factor because all three *Landgraf* factors pointed to the same conclusion. *Princess Cruises*, 397 F.3d at 1366. The court also need not resolve the issue of weight because the factors also point to the same conclusion.

Congress intended the 2016 amendment to § 1501 to apply retroactively, the court is guided by the plain language of the statute in effect when the subject entries were made. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.") (citations omitted). Defendant already has raised, and the court has rejected, the argument that the timeframe for voluntary reliquidation begins on the date of the deemed liquidation. *See* Def.'s MTD; *Great American Ins. Co. of New York*, 121 F. Supp. 3d at 1295 ("[T]he statute is clear that it is the date the notice was transmitted that starts the clock on reliquidation and Customs has 90 days from the date the notice of deemed liquidation is transmitted to reliquidate the entry.") (citing *Norsk Hydro*, 472 F.3d at 1352 ("Customs may *sua sponte* reliquidate an entry, including an entry 'deemed liquidated,' within 90 days of its giving notice of the original liquidation to the importer.")). For that reason, the court declines to reconsider Defendant's arguments regarding statutory interpretation. The issue that remained unresolved at the motion to dismiss stage, and to which the court now turns, is whether Customs posted the bulletin notice "within a reasonable period." *See*19 C.F.R. § 159.9(c)(ii).

II. Whether Customs Posted the Bulletin Notice Within a Reasonable Time

Plaintiff moves for summary judgment on the grounds that the ten month period between the date of the deemed liquidation and the date on which it posted the bulletin notice is reasonable, particularly in light of Orleans Furniture's misidentification of the applicable Commerce case number on the Entry Summary. *See* PMSJ at 9–12. Defendant responds that 90 days from the date of the deemed liquidation constitutes "[a] reasonable time" within which CBP must post a bulletin notice, Def.'s Resp. at 10, and, further, that the ten month delay at issue in this case is unreasonable, *see id.* at 7–10.[32]

[32] Defendant also argues that the reasonableness of the time period must be measured from June 23, 2009, when it contends Customs learned of the importer's error. Def.'s Resp. at 8. As discussed *supra* note 12, Defendant's contention is speculative. Defendant appears to confuse the issue left open after the court denied its motion to dismiss as whether "Customs reliquidate[d] within a reasonable period," which is distinct from whether Customs posted the bulletin notice within a reasonable period. *See* DMSJ at 26–28. Defendant contends that if the court does not find 90 days to constitute a reasonable period, it should find that a reasonable period cannot, as a matter of law, exceed six months from the date of the deemed liquidation. *See id.* at 26–28. Reasonableness, however, is fact specific; thus, it would be improper for the court to read into the governing regulation an arbitrary bright-line temporal rule. Moreover, Defendant's argument is simply another variation of its core argument that the date of the deemed liquidation triggers the time in which CBP may reliquidate the subject entry, which the court has rejected.

A. Legal Framework

As noted above, § 1501 provides that Customs may reliquidate a deemed liquidation "within ninety days from the date on which notice of the original liquidation is given or transmitted to the importer." 19 U.S.C. § 1501. Although Congress predicated reliquidation on Customs' provision of notice of the deemed liquidation, Congress has not, however, mandated that Customs must, in all cases, provide notice of the deemed liquidation. *See id.* § 1504(a)(1) ("Notwithstanding section 1500(e) of this title, notice of liquidation need not be given of an entry deemed liquidated."); *see also id.* § 1500(e) (instructing Customs "to give or transmit" notice of liquidation "in such form and manner as the Secretary shall by regulation prescribe"). Consequently, there is a gap in the statutory scheme because it provides for reliquidation within 90 days of notice that may, or may not, be given. Customs' regulations fill that gap by requiring the posting of a bulletin notice to provide notice of entries liquidated by operation of law. *See* 19 C.F.R. § 159.11 ("Notice of liquidation *will be given* on a bulletin notice of liquidation . . . as provided in §§ 159.9 and 159.10(c)(3)."") (emphasis added);[33] *see also Contreras v. United States*, 215 F.3d 1267, 1274 (Fed. Cir. 2000) ("An agency that has been granted authority to promulgate regulations necessary to the administration of a program it oversees may fill gaps in the statutory scheme left by Congress if it does so in a manner that is consistent with the policies reflected in the statutory program."); *New England Tank Industries of New Hampshire, Inc. v. United States*, 861 F.2d 685, 694 (Fed. Cir. 1988) (referring to the term "will" as it appears in an agency regulation as a "mandatory term") (citations omitted). Customs must post the bulletin notice of liquidation in the customhouse "within a reasonable period after each liquidation by operation of law and [it] shall be dated as of the date of expiration of the statutory period." 19 C.F.R. § 159.9(c)(2)(ii).

B. Analysis

Parties agree that Customs reliquidated the entry on January 8, 2010, within 90 days of Customs' December 18, 2009 posting of the

[33] Strictly speaking, the text of 19 C.F.R. § 159.11 applies to entries that are liquidated by operation of law because they are not liquidated within one year from the date of entry; the regulation does not refer to entries that CBP has failed to liquidate within six months of receiving notice that a statutory or court-ordered suspension has been removed. *See* 19 C.F.R § 159.11. However, pursuant to 19 U.S.C. § 1504, entries within that latter category are treated the same as entries within the former category; i.e., they are deemed liquidated. *See* 19 U.S.C. § 1504(a),(d). Accordingly, 19 C.F.R. § 159.11, which governs deemed liquidations, applies.

bulletin notice. *See* PSOF ¶ 33; Def.'s Resp. to PSOF; DSOF ¶¶ 8–9; Pl.'s Resp. to DSOF ¶¶ 8–9. Thus, the remaining issue is whether Customs posted the bulletin notice "within a reasonable period" after the subject entry was deemed liquidated on February 20, 2009.

Here, Customs' delay in posting the bulletin notice is largely attributable to the importer's erroneous identification on the Entry Summary of the Gaomi Yatai-specific Commerce case number, A-570–890–101, which led Customs to treat it as if liquidation had been suspended pursuant to the TRO and preliminary injunction issued in *American Signature. See supra* Background Sect. A-C. It was not until September 30, 2009 that a Customs official, Mr. Gerace, learned that the exporter was Company X, not Gaomi Yatai, that Company X was subject to the China-wide rate, that publication of the August 20, 2008 Final Results had lifted the suspension of liquidation of the subject entry, and that the subject entry had therefore liquidated by operation of law on February 20, 2009. *See supra* Background Sect. D. This September 30 discovery prompted Customs to process the entry and post the bulletin notice two and a half months later, on December 18, 2009. *See id.*[34]

Defendant seeks to apply *Utex Int'l* to support its contention that "it does not matter if a mistake was made or who made the mistake, once an entry is liquidated and not reliquidated within 90 days, it is final and conclusive to everyone[,] including the government." Def.'s Resp. at 7–8 (citing *Utex Int'l*, 857 F.2d at 1408). The Federal Circuit decided *Utex Int'l* before the 2004 amendments to § 1500 providing for voluntary reliquidation of deemed liquidations. *See supra* note 25. Further, as Plaintiff recognizes, *Utex Int'l* "simply identifie[s] the well-established principle that 'the statutory procedures of liquidation, reliquidation, and timely protest control the finality of the importation process,'" and that "'absent timely reliquidation or protest,'" liquidation is final and conclusive. Pl.'s Resp. at 7 (quoting *Utex Int'l*, 857 F.2d at 1411, 1412). *Utex Int'l* does not speak to the reasonableness of the timeframe within which Customs must post a bulletin notice; thus, it does not support Defendant's position.

Defendant also contends that focusing on the importer's error "is nothing more than a *post-hoc* attempt to justify CBP['s] own negligence" because the Entry Summary otherwise identifies Company X by name and manufacturer identification number. Def.'s Resp. at 11. "At best, . . . the documents submitted by the importer . . . were internally inconsistent." Pl.'s Reply at 9. However, Defendant does

[34] Defendant attempts to dispute the reasonableness of the time CBP needed to process the entry by comparing it to the 15 days afforded to a customs broker to prepare entry paperwork. Def.'s Resp. at 9 & n.4 (citing 19 C.F.R. § 141.5). Defendant's attempt to compare apples and oranges fails to persuade.

not dispute the importer's error or otherwise offer evidence demonstrating that CBP knew the identity of the exporter before September 30, 2009. *See supra* note 12. Further, the importer is responsible for using "reasonable care" when "complet[ing] the entry" so that Customs may "properly assess duties," and must certify that the information is "true and correct." 19 U.S.C. § 1484(a)(1)(B), (d)(1). In sum, although case law is scant on what constitutes reasonableness for purposes of 19 C.F.R. § 159.9(c)(2)(ii), reasonableness is an inherently fact-specific inquiry. Based on the foregoing facts, the court finds that Customs posted the bulletin notice "within a reasonable period." *Cf. Koyo Corp.*,497 F.3d at 1238 (quoting 19 C.F.R. § 159.9(c)(2)(i)-(ii)).

III. Status of Administrative Proceedings

Defendant argues that "[i]f, and only if, the [c]ourt finds the CBP reliquidation was valid, then we submit that the case has not been decided administratively." DMSJ at 31. Defendant appears to contend that because Orleans Furniture's protest concerned the scope of the relevant AD order, Customs should have referred the matter to Commerce for a scope determination; because it did not, the issue remains unresolved, "any action (or non-action) by CBP on the protest was an *ultra vires* determination," and the protest could not have been deemed denied. *Id.* at 31–34; *see also id.* at 33 ("There cannot be a deemed denial of an accelerated disposition for an issue CBP had no legal right to determine."). Plaintiff contends the administrative proceedings are complete. Pl.'s Resp. at 15–18.

A. Legal Framework

In antidumping administrative proceedings, scope issues may be resolved in one of two ways. First, an "interested party" may seek a ruling from Commerce clarifying "whether a particular product is within the scope of an [antidumping duty] order." 19 C.F.R. § 351.225(c)(1); *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599–600 (Fed. Cir. 1998) (reviewing Commerce's "detailed scope determination procedures").[35] Such scope rulings are subject to judicial review by this court. *See* 19 U.S.C. § 1516a(a)(2)(B)(vi). Alternatively, when the scope of an order is clear, an importer may protest Customs' determination that a product is within the scope of the order pursuant to 19 U.S.C. § 1514(a)(2), and subsequently challenge any protest denial before this court. *See Xerox Corp. v. United States*, 289 F.3d 792, 794–95 (Fed. Cir. 2002) (holding that an importer need not have sought a scope ruling from Commerce when "the scope of the order

[35] Commerce may also self-initiate an inquiry into whether a product is within the scope of an order. 19 C.F.R. § 351.225(b).

[was] not in question" because the importer had asserted that the subject merchandise was "facially outside the scope of the [order]"; distinguishing *Sandvik Steel* in which "importers should have sought scope rulings from Commerce . . . because . . . it was unclear whether the goods at issue were within the scope of [the] orders"); *cf. Sunpreme Inc. v. United States*, 40 CIT ___, ___,145 F. Supp. 3d 1271, 1285 (2016) (CBP "acts beyond its authority" when it "attempts to determine whether a product falls within the scope based upon factual information that the scope language does not explicitly call on CBP to consider.").

B. Analysis

Defendant contends that Customs should have obtained a scope ruling from Commerce because it was unclear "whether . . . the items were within the scope of the [AD] order." *See* DMSJ at 32. Defendant asserts that, "[i]n the protest, [Orleans Furniture] reminded CBP that the [subject] merchandise . . . [constituted] posts and not finished bedroom furniture." *Id.*; *see also* Def.'s Reply at 9 (the importer's protest "put CBP on notice that [the importer] was contesting the fact that the merchandise . . . was not covered by the [AD order]").[36]

Here, Orleans Furniture timely protested Customs' reliquidation and therein requested accelerated disposition. *See* PSOF ¶ 37; Def.'s Resp. to PSOF. Pursuant to § 1515(b), "a protest which has not been allowed or denied in whole or in part within thirty days following the date of mailing by certified or registered mail of a request for accelerated disposition shall be deemed denied." 19 U.S.C. § 1515(b); *see also* 19 C.F.R. § 174.22(d) (governing deemed denials of protests for which accelerated disposition had been sought). The Parties agree that Orleans Furniture requested accelerated disposition; absent evidence that Customs otherwise "allowed or denied [the protest] in whole or in part," there is no genuine dispute that Orleans Furniture's protest was deemed denied and the administrative proceedings are, thus, complete. *See* PSOF ¶ 38; Def.'s Resp. to PSOF ¶ 38; *Anderson*, 477 U.S. at 249. Whether Customs properly applied the terms of the scope of the AD order to include Orleans Furniture's

[36] Defendant relies on *Sunpreme* to support its argument that Commerce, not CBP, is responsible for making scope determinations. *See* DMSJ at 32–34; Def.'s Reply at 10. Defendant's reliance is misplaced. As noted above, in *Sunpreme*, the court found that CBP "acts beyond its authority" when it "attempts to determine whether a product falls within the scope based upon factual information that the scope language does not explicitly call on CBP to consider." 145 F. Supp. 3d at 1285. That case, however, arose as a result of Customs' affirmative determination that the scope of the relevant order covered the subject merchandise, and the court relied on its residual jurisdiction, pursuant to 28 U.S.C. § 1581(i), to review plaintiff's challenge to CBP's decision that the subject merchandise was within the scope of the relevant order and, consequently, to suspend liquidation and collect cash deposits on the entries. *See id.* at 1280–82, 1283–92.

merchandise is no longer reviewable. That decision was made in the context of the reliquidation. Defendant's time to challenge that decision, through protest and, if necessary, challenge to the denial of the protest, has passed. As discussed above, *supra* Discussion Sect. I.A.b.ii, issues that were subsumed in the liquidation/reliquidation are final and cannot be raised as a defense in this collection action.

Based on the foregoing, the reliquidation and associated charges are "final and conclusive." Therefore, Defendant is liable to the Plaintiff for the $50,000 face value of the bond.

IV. Plaintiff's Entitlement to Interest

Plaintiff seeks statutory interest pursuant to 19 U.S.C. § 580 and equitable interest. *See* PMSJ at 13–14; Compl.¶ 1. According to Plaintiff, statutory and equitable interest should be calculated on the face value of the bond because the total amount of antidumping duties, pre-liquidation interest, and delinquency interest due exceeds the bond's value. *See* Pl.'s Reply at 21. Plaintiff asserts, however, that the issue of equitable interest should be held in abeyance pending the Federal Circuit's determination whether the government is entitled to equitable and statutory interest. *See* PMSJ at 13–14 (citing *AHAC (09–403)*, 100 F. Supp. 3d at 1373 (declining to award equitable interest in light of the government's entitlement to § 580 interest), *appeal docketed*, Nos. 16–1088, 16–1090 (Fed. Cir. Oct. 20, 2015);[37] *United States v. Am. Home Assur. Co.* ("*AHAC (10–185)*"), 39 CIT ___, ___, 102 F. Supp. 3d 1376, 1380 (2015) (same), *appeal docketed*, No. 16–1258 (Fed. Cir. Nov. 30, 2015));[38] Pl.'s Reply at 20. Defendant does not dispute Plaintiff's entitlement to statutory interest. *See* Def.'s Resp. at 17–20. Defendant contends that Plaintiff is not entitled to equitable interest, and the court should adjust any award of statutory interest by a "negative 'equitable prejudgment interest'" amount. *Id.* at 19. Defendant further contends that interest should be calculated on the amount of antidumping duties due,[39] not the $50,000 face value of the bond, and that interest began to accrue on December 15, 2014. *Id.* at 18, 20.[40]

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[37] The Federal Circuit heard oral argument on this appeal on February 9, 2017. *See AHAC (09–403)*, No. 16–1088, Docket Entries 63, 66.

[38] The Federal Circuit heard oral argument on this appeal on April 7, 2017. *See AHAC (10–185)*, No. 16–1258, Docket Entries 60, 63.

[39] This amount is [[ ]]. Def.'s Resp. at 20; Pl.'s Reply at 21.

[40] Defendant also contends that "interest starts to run from the time Commerce issues its scope determination" regarding whether the subject entries are covered by the relevant AD order. Def.'s Resp. at 18. As discussed *supra* Discussion Sect. III, Defendant's scope-related arguments lack merit.

A. Statutory Interest

The government is entitled to collect statutory interest "at the rate of [six] per centum a year," 19 U.S.C. § 580, on all "bonds securing the payment of antidumping duties when the government sues for payment under those bonds," *AHAC (Fed. Cir.)*, 789 F.3d at 1325. Interest is calculated "from the time when said bonds became due." 19 U.S.C. § 580.

Here, the "bonds became due" on April 27, 2010, the date Customs issued to Defendant the 612 Report. *See* 612 Report (titled "Formal Demand on Surety for Payment of Delinquent Amounts Due"); 19 U.S.C. § 580. Thus, interest began to accrue on that date, and runs until the court issues judgment on liability. *See AHAC (10–185)*, 102 F. Supp. 3d at 1379 (§ 580 interest accrues from the date Customs first demanded payment until the date of the court's judgment on liability).

Defendant's contention that interest should instead accrue from December 15, 2014, the date on which Customs sent it a demand letter, and not the earlier date on which Customs issued the 612 Report because the 612 Report noted there was an open protest, is unavailing. A surety's "payment obligation runs independently of the protest proceedings." *United States v. Ataka America, Inc.*, 17 CIT 598, 607, 826 F. Supp. 495, 503 (1993) (regardless of whether "protest proceedings are pending," a surety "owes the duties and in the absence of other defenses, breaches its bond if it does not pay in accordance with its obligation"). Moreover, as noted above, *supra* note 17, the 612 Report recognized that the deadline for ruling on the protest had passed. *See* 612 Report.

Defendant's contention that interest accrues on the amount of antidumping duties owed, and not the face value of the bond, also lacks merit. Pursuant to 19 U.S.C. § 1677g,[41] the government is entitled to collect interest on underpayment of amounts deposited on merchandise entered on or after the date on which an antidumping order issues. Thus, § 1677g interest accrues on the difference between the cash deposit paid by Orleans Furniture[42] and the liquidated amount.[43] The government is also entitled to delinquency interest

[41] Section 1677g provides, *inter alia*, that "[i]nterest shall be payable on overpayments and underpayments of amounts deposited on merchandise entered, or withdrawn from warehouse, for consumption on and after . . . the date of publication of a countervailing or antidumping duty order." 19 U.S.C. § 1677g(a). The rate of interest is calculated pursuant to 26 U.S.C. § 6621. 19 U.S.C. § 1677g(b). Pursuant to § 6621, the "underpayment rate" is "the sum of . . . the Federal short-term rate determined under subsection (b) [of § 6621], plus . . . 3 percentage points." 26 U.S.C. § 6621(a)(2).

[42] This amount is $[[ ]]. PMSJ, Ex. 9.

[43] This amount is $[[ ]]. PMSJ, Ex. 9.

pursuant to 19 U.S.C. § 1505(d).[44] Because the sum total of the principal, § 1677g interest, and § 1505(d) interest exceeds the face value of the bond, *see* PSOF ¶ 43; Def.'s Resp. to PSOF; 612 Report, § 580 interest is calculated on the face value of the bond. Interest therefore ran on a liability amount of $50,000 from April 27, 2010 to the judgment date at a rate of six percent per annum.

B. Equitable Interest

Having found that the government is entitled to § 580 interest, as Plaintiff has proposed, the court will defer its consideration of the appropriateness of an award of equitable prejudgment interest, pending the Federal Circuit's determination whether the government is entitled to both. *See supra* Discussion Sect. IV. Deferring consideration of this issue will not expose Defendant to additional interest because interest stops accruing on the date the court enters judgment on liability. *Cf. AHAC (10–185)*, 102 F. Supp. 3d at 1379 n.2 (rejecting the government's argument that interest accrues until the court enters judgment following remand from the Federal Circuit).[45] And, as discussed below, the court finds it appropriate to enter partial summary judgment pursuant to USCIT Rule 54(b).

C. Partial Summary Judgment

The court has determined that Plaintiff is entitled to recover $50,000 in unpaid antidumping duties and interest, which is the face value of the bond that GAIC issued, plus statutory prejudgment interest. Nevertheless, Plaintiff proposes that the court defers reaching the issue of its entitlement to equitable prejudgment interest. *See* PMSJ at 13–14. Deferring the equitable interest issue without entering judgment as to liability, however, could prejudice the Defendant by permitting additional interest to accrue while the Federal Circuit resolves the issue in the two cases pending before it. Accordingly, the court will treat Plaintiff's request for equitable prejudgment interest as a claim for relief that is separate from its claim for the value of the bond and statutory interest, thereby enabling the court to enter partial summary judgment pursuant to USCIT Rule 54(b).

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[44] Pursuant to § 1505(d), delinquent "duties, fees, and interest . . . bear interest by 30-day periods, at a rate determined by the Secretary, from the date of liquidation or reliquidation until the full balance is paid." 19 U.S.C. § 1505(d). When the 612 Report issued, delinquency interest in the amount of $398.02 had accrued. *See* 612 Report; Pl.'s Reply at 21.

[45] The court need not reach Defendant's argument that the court should adjust any award of statutory interest by a "negative 'equitable pre-judgment interest'" amount. Def.'s Resp. at 19. In the event the Federal Circuit permits the award of equitable interest in addition to the statutory interest awarded herein, Defendant is free to raise any arguments it wishes regarding the possibility of overcompensation.

As previously stated, Rule 54(b) provides that "[w]hen an action presents more than one claim for relief . . ., the court may direct entry of a final judgment as to one or more but fewer than all claims . . . only if the court expressly determines that there is no just reason for delay." USCIT Rule 54(b). "Rule 54(b) requires finality—'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'" *United States v. Horizon Prods. Int'l, Inc.*, 39 CIT ___, ___, 91 F. Supp. 3d 1339, 1340 (2015) (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956)). To determine whether there is no just reason for delay, the court examines whether the concern for avoiding piecemeal litigation is outweighed by considerations favoring immediate entry of judgment. *See id.* (citing *Timken v. Regan*, 5 CIT 4, 6 (1983)).

Here, the United States seeks to recover the face value of the bond, statutory prejudgment interest pursuant to 19 U.S.C. § 580, and equitable prejudgment interest. The court has determined that Plaintiff is entitled to the face value of the bond and statutory interest. There is nothing more for the court to decide in connection with those claims; thus, the court has reached an "ultimate disposition" as to those claims. Moreover, resolution of those claims do not bear on the court's resolution of Plaintiff's claim to equitable prejudgment interest.

The entry of a Rule 54(b) judgment on Defendant's liability and an award of statutory interest while deferring the issue of equitable interest serves the interests of both parties and the administration of justice because it tolls the accrual of prejudgment interest and prevents an extraneous appeal of an issue the Federal Circuit is already deciding. To the extent partial summary judgment gives rise to piecemeal litigation, i.e., an appeal of these decided issues while the issue of equitable interest remains unresolved, that concern is outweighed by the interest in tolling the accrual of prejudgment interest, which favors the immediate entry of judgment. *See Horizon Prods. Int'l*, 91 F. Supp. 3d at 1340–41 (fixing the amount of prejudgment interest favors the entry of final judgment). Accordingly, the court finds that there is no just reason for delay and will enter partial summary judgment pursuant to USCIT Rule 54(b).[46]

[46] Entering judgment will, however, permit the accrual of statutory post-judgment interest. *See* 28 U.S.C. § 1961(a) ("Interest shall be allowed on any money judgment in a civil case recovered in a district court."); Compl. ¶ 1 (seeking post-judgment interest).

CONCLUSION

For the reasons discussed above, the court will grant Plaintiff's motion for summary judgment, in part, and deny Defendant's motion for summary judgment. Judgment will be entered accordingly.

Dated: May 18, 2017
New York, New York

/*s*/ *Mark A. Barnett*
MARK A. BARNETT, JUDGE

Slip Op. 17–62

JINKO SOLAR CO., LTD. et al, Plaintiffs and Consolidated Plaintiff, and YINGLI GREEN ENERGY AMERICAS, INC. et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and SOLARWORLD AMERICAS, INC. et al., Defendant-Intervenors and Consolidated Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Consol. Court No. 15–00080
PUBLIC VERSION

[Sustaining in part and remanding in part the Department of Commerce's final determination in its antidumping investigation of certain solar panels from the People's Republic of China.]

Dated: May 18, 2017

Alexander Hume Schaefer and *Hea Jin Koh*, Crowell & Moring, LLP, of Washington, DC, for Plaintiffs Jinko Solar Co., Ltd., Jinko Solar Import and Export Co., Ltd., and JinkoSolar (U.S.) Inc.

Timothy C. Brightbill and *Laura El-Sabaawi*, Wiley Rein, LLP, of Washington, DC, for Consolidated Plaintiff and Defendant-Intervenor SolarWorld Americas, Inc.

Neil R. Ellis, Richard L.A. Weiner, Brenda Ann Jacobs, and *Rajib Pal*, Sidley Austin, LLP, of Washington, DC, for Plaintiff-Intervenors Yingli Green Energy Americas, Inc., Yingli Green Energy Holding Co., Ltd., and Canadian Solar Inc.

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

Francis J. Sailer, Andrew Thomas Schutz, Brandon Michael Petelin, and *Mark E. Pardo*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, DC, for Defendant-Intervenors Hanwha Solarone (Qidong) Co., Ltd. and Hanwha Solarone Hong Kong Limited.

OPINION AND ORDER

Kelly, Judge:

Before the court in this consolidated action are motions for judgment on the agency record arising from the final affirmative determination of the U.S. Department of Commerce ("Commerce") in its antidumping investigation of certain solar panels from the People's Republic of China ("PRC" or "China"). *See Certain Crystalline Silicon Photovoltaic Products from the [PRC]*, 79 Fed. Reg. 76,970 (Dep't Commerce Dec. 23, 2014) (final determination of sales at less than fair value) ("*Final Results*") and accompanying Issues and Decision Memorandum for the Final Determination of Sales at Less Than Fair Value, Dec. 15, 2014, ECF No. 34–5 ("Final Decision Memo").

Plaintiffs Jinko Solar Co., Ltd., Jinko Solar Import and Export Co., Ltd., and JinkoSolar (U.S.) Inc. (collectively "Jinko Solar"), mandatory respondents in this investigation, challenge Commerce's determination to treat Jinko Solar and certain additional companies as a single entity. *See* Mem. of Points & Auths. in Supp. of Jinko's Mot. for J. on the Agency R., Mar. 18, 2016, ECF No. 39 ("Jinko Br."); *see also* Mot. of Consol. Pl.-Intervenor Canadian Solar Inc. for J. on the Agency R. 2, Mar. 18, 2016, ECF No. 37 (adopting the arguments presented by Jinko Solar); Mot. of Pl.-Intervenors Yingli Green Energy Holding Co., Ltd. and Yingli Green Energy Americas, Inc. for J. on the Agency R. 2, ECF No. 38 (adopting the arguments presented by Jinko Solar).[1] In addition, Consolidated Plaintiff SolarWorld Americas, Inc. ("SolarWorld"), the domestic industry petitioner, challenges Commerce's choices of certain surrogate input and offset values, the agency's determination to accept a respondent's evidence of quality insurance expenses, and the agency's decision to offset the respondents' antidumping (or "AD") cash deposit rate by the amount of estimated countervailing duties assessed for the subject merchandise in the parallel countervailing duty ("CVD") investigation. SolarWorld Br. in Supp. of its Rule 56.2 Mot. for J. on the Agency R., Mar. 21, 2016, ECF No. 41 ("SolarWorld Br.").

For the reasons that follow, the court sustains: 1) Commerce's decision to value respondents' general expenses and profit using Mustek's financial statements; 2) Commerce's determination that import

[1] Jinko Solar was an individually-investigated ("mandatory") respondent, while the other respondent Plaintiffs received the "all others" rate. *See Final Results*, 79 Fed. Reg. at 76,974. Because the "all others" rate was calculated by averaging the dumping margins of the two mandatory respondents, *id.*, a change to Jinko Solar's rate would result in a correlative change to the "all others" rate for the other respondent Plaintiffs, who have adopted Jinko Solar's arguments in this action and present no separate arguments of their own.

data for articles covered under subheading 7604, Harmonized Tariff Schedule ("HTS"), constitutes the best available information for valuing respondents' aluminum frames; 3) Commerce's determination to accept, for purposes of adjusting Trina Solar's U.S. prices, the information provided by Trina Solar during verification related to quality insurance expenses covering the entire period of investigation ("POI"); and 4) Commerce's determination to offset respondents' antidumping duty cash deposit rate by the full amount of an export subsidy calculated based on adverse facts available ("AFA") in the companion countervailing duty investigation. The court remands to Commerce for reconsideration or further explanation of: 1) the decision to collapse the ReneSola entities with the Jinko entities and treat these companies as a single entity, and 2) the decision to value respondent Changzhou Trina Solar Energy Co., Ltd.'s solar modules by-products using South African import data within subheading 8548.10, HTS.

BACKGROUND

On January 22, 2014, in response to a petition filed by domestic producer SolarWorld, Commerce initiated an antidumping duty investigation on imports of crystalline silicon photovoltaic cells, whether or not assembled into modules, from China for the period of April 1, 2013 through September 30, 2013. *See Certain Crystalline Silicon Photovoltaic Products From China and Taiwan*, 79 Fed. Reg. 4,661 (Jan. 29, 2014) (notice of initiation of AD duty investigation); *see* Petition for the Imposition of Antidumping and Countervailing Duties Pursuant to Sections 701 and 731 of the Tariff Act of 1930, As Amended, PD 1–10, bar codes 3171232–01–10 (Dec. 31, 2013).

Commerce published the preliminary affirmative determination on July 24, 2014, finding that subject imports were, or were likely to be, sold in the United States at less than fair value. *See Certain Crystalline Silicon Photovoltaic Products From the [PRC]: Affirmative Preliminary Determination of Sales at Less Than Fair Value*, 79 Fed. Reg. 44,399 (July 31, 2014) ("*Prelim. Results*"), and corresponding Decision Memorandum for the Preliminary Determination in the Antidumping Duty Investigation of Certain Crystalline Photovoltaic Products from the [PRC] at 1, PD 698, bar code 3217803–01 (July 24, 2014) ("Prelim. Decision Memo"). Commerce selected Changzhou Trina Solar Energy Co., Ltd. ("Trina Solar") and Renesola Jiangsu Ltd. as mandatory respondents for individual examination in this investigation. *Prelim. Results*; *see* Section 777A of the Tariff Act of

1930, as amended, 19 U.S.C. § 1677f-1(c)(2)(B) (2012).[2] Commerce preliminarily selected South Africa as the primary surrogate country, and calculated mandatory respondents' dumping margins using South African data to value factors of production and offsets for calculating respondents' normal value. Prelim. Decision Memo at 22; [AD] Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the [PRC]: Factor Valuation Memorandum, PD 704, bar code 3218533–01 (Jul. 24, 2014) ("Prelim. Surrogate Value Memo"). Commerce used financial statements of South African computer assembly company Mustek for valuing respondents' financial ratios, Prelim. Surrogate Value Memo at 8–9; import data corresponding to South African subheading 7604.29.65, HTS, to value respondents' aluminum frames input, *id.* at 3–4; and import data corresponding to South African subheading 8548.10, HTS, to value respondent Trina Solar's by-product offset for scrap solar modules. *See* [AD] Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the [PRC]: Preliminary Analysis Memorandum for Changzhou Trina Solar Energy Co., Ltd., Attach. II, All Input Prices, July 24, 2014, ECF No. 97–14. Commerce also preliminarily determined that mandatory respondent Renesola Jiangsu Ltd. is affiliated with Renesola Zhejiang, Jinko Solar, and Jinko Solar I&E pursuant to 19 U.S.C. § 1677(33)(F), and that these entities should be treated as a single entity for the AD investigation, pursuant to 19 C.F.R. § 351.401(f). Memorandum Pertaining to ReneSola and Jinko Solar Affiliation and Single Entity Status at 7, PD 542, bar code 3207993–01 (June 6, 2014) ("Affiliation and Collapsing Memo"); *see* 19 C.F.R. § 351.401(f) (2014).[3]

On December 15, 2014, Commerce published the final affirmative determination. *Final Results*, 79 Fed. Reg. at 76,970. Commerce continued to use the same data sources to calculate surrogate values for respondents' general expenses and profit, *see* Certain Crystalline Silicon Photovoltaic Products from the [PRC]: Factor Valuation Memorandum at 1, PD 827, bar code 3249189–01 (Dec. 15, 2014) ("Final Surrogate Value Memo"), aluminum frames, *Final Decision Memo* at 48–50, and the by-product value of Trina Solar's scrap solar modules. *Id.* at 50–51. Commerce also continued to find the Renesola entities to be affiliated with the Jinko Solar entities, and continued to treat these companies as a single entity. *Id.* at 62–67. In the final determination, based on findings at verification related to Trina Solar U.S.'s quality insurance expenses covering the POI, Commerce made

[2] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

[3] Further citations to the Code of Federal Regulations are to the 2014 edition.

adjustments to the U.S. export price for indirect selling expenses. *Id.* at 52–54. Commerce also offset the antidumping cash deposit rate by the export subsidy rate calculated in the concurrent countervailing duty investigation, as is the agency's general practice. *Id.* at 38–39.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i) (2012), and 28 U.S.C. § 1581(c) (2012). Commerce's antidumping determinations must be in accordance with law and supported by substantial evidence. 19 U.S.C. § 1516a(b)(1)(B)(i) (2012).

DISCUSSION

I. Affiliation & Collapsing

A. Commerce's Affiliation Determination

Jinko Solar challenges Commerce's threshold determination that Renesola Jiangsu Ltd. and Renesola Zhejiang Ltd. (collectively "ReneSola") are affiliated with Jinko Solar Co., Ltd., and Jinko Solar Import and Export Co., Ltd. through common control by the Li family grouping.[4] Jinko Br. 8–10. Jinko claims no record evidence reflects any potential for Li family members to act in concert. *See id.* Defendant responds that Commerce's determination is supported by substantial evidence because record evidence established that the Li family owns the largest ownership interest in both sets of entities and that Li family members served, directly or indirectly, as managers or board members of all four companies. Def.'s Mem. Opp. Pls.', Pls.-Intervenors', and Def. Intervenors' Rule 56.2 Mots. J. Upon Agency R. Confidential Version 10–13, Sept. 23, 2016, ECF No. 58 ("Def.'s Resp. Br."). Commerce's determination that the Jinko entities are affiliated with the ReneSola entities through common control by the Li family grouping is supported by substantial evidence.

The statute defines affiliated persons through the following categories:

> (A) Members of a family, including brothers and sisters (whether by whole or half blood), spouse ancestors, and lineal descendants.
> (B) Any officer or director of an organization and such organization.

[4] After determining that the Jinko entities and the ReneSola entities are affiliated under the common control of the Li family, Commerce collapsed these entities, which has the effect of treating the sales of all entities as sales of the same entity for purposes of Commerce's dumping margin calculation. *See* Final Decision Memo at 62; *see also* 19 C.F.R. § 351.401(f)(1) (2014); 19 U.S.C. §§ 1675(a)(2)(A)(ii), 1677b(a).

(C) Partners.
(D) Employer and Employee.
(E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.
(F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.
(G) Any person who controls any other person and such other person.

19 U.S.C. §§ 1677(33)(A)–(G). A person is considered to control another person "if the person is legally or operationally in a position to exercise restraint or direction over the other person."[5] *Id.* Commerce's regulations incorporate the statutory definition of "affiliated persons" and further clarify the non-exhaustive list of considerations Commerce shall take into account in assessing whether control over another person exists as an element of affiliation. 19 C.F.R. § 351.102(b)(3). In evaluating whether control exists under the statute, Commerce will consider, among other factors, "[c]orporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships." *Id.* However, Commerce "will not find that control exists on the basis of these factors unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of subject merchandise." *Id.*

Here, Commerce adequately supports its determination that the role of members of the Li family grouping in both the Jinko entities and the ReneSola entities creates a potential for the family to act in concert with respect to manipulating pricing, production, and cost of subject merchandise. *See* Final Decision Memo at 63. Initially, Commerce supports its determination by finding that Mr. Li Xianshou, Mr. Li Xiande (a brother of Mr. Li Xianshou), Mr. Li Xianhua (another brother of both Mr. Li Xianshou and Mr. Li Xiande), and Mr. Chen Kangping (a brother-in-law of Mr. Li Xianshou) are members of the Li family grouping. Affiliation and Collapsing Memo at 7. Commerce concluded that the Jinko entities and the ReneSola entities are under the common control of the Li family grouping by reviewing the control exercised by various members of the Li family. Final Decision Memo at 63. Specifically, Commerce found that the Li family grouping "indirectly control[s] these companies through their ownership of the largest interests in the parent companies, Renesola Ltd. and Jinko-

[5] A "person" is defined in Commerce's regulations as including "any interested party as well as any other individual, enterprise, or entity, as appropriate." 19 C.F.R. § 351.102(b)(37).

Solar Holding Co. Ltd ("Jinko Holding"),"[6] and through the management and board memberships held in all four companies by members of the Li family, which create the potential to impact decisions concerning production, pricing, or cost of subject merchandise within the companies.[7] Affiliation and Collapsing Memo at 7–8. Commerce reasonably concluded based on the Li family grouping's large shareholdings and numerous senior management positions in the ReneSola and Jinko entities during the POI that the ReneSola and Jinko entities are under common control. *See* Final Decision Memo at 63. Commerce likewise reasonably concluded that those shareholdings and management positions create the potential to impact decisions concerning the production, pricing, or cost of subject merchandise. *See id.* at 64.

Jinko Solar contends Commerce improperly concluded that the Li familial relationships alone create a potential to impact decisions concerning production, pricing or, the cost of subject merchandise. Jinko Br. 8. Commerce's affiliation determination does not rely exclusively on the relationship between Li family members. Commerce highlighted that the Li family members hold ownership shares in the Jinko and ReneSola parent companies and also held senior manage-

[6] Commerce found that "Mr. Li Xianshou owned 30.75 percent of Renesola Ltd. during the period of investigation ("POI"), the largest percentage of shares held by any investor. Affiliation and Collapsing Memo at 6 (citing Jinko Solar Section A Questionnaire Response at Ex. A.13, PD 527– 531, bar codes 3207683–01–05 (June 6, 2014) ("Jinko Solar Sec. A Resp.")). Commerce further found that Renesola Ltd. wholly owned Renesola Zhejiang Ltd., which wholly owned Renesola Jiangsu Ltd. *Id.* (citing Jinko Solar Sec. A. Resp. at 7).

Commerce found that "Mr. Li Xiande, Mr. Li Xianhua, and Mr. Chen Kangping collectively owned 36 percent of Jinko Holding during the POI," representing the largest ownership interests in that entity. *Id.* (citing Jinko Solar Separate Rate Application at Ex. 6, PD 239–243, bar codes 3191404–01–03 (Mar. 28, 2014) ("Jinko Solar SRA")). Commerce further found that JinkoSolar Holding Co., Ltd. wholly owned Jinko Solar Technology Limited. *Id.*(citing Jinko Solar SRA at 10). Jinko Solar Technology Solar Technology Limited wholly owned Jinko Solar Co., Ltd., which wholly owned Jinko Solar Import and Export Co., Ltd. *Id.* (citing Jinko Solar SRA at 10).

[7] Commerce reviewed the management positions held by Li family members in the Renesola entities and the Jinko entities. *See* Affiliation and Collapsing Memo at 7–8, 10. Reviewing the Renesola entities, Commerce noted that Mr. Li Xianshou is the Chief Executive Officer ("CEO") and a board member of both Renesola Ltd. and Renesola Zhejiang Ltd. with the ability to hire management such as the general manager that is the top manager of Renesola Jiangsu Ltd. *Id.* at 7, 10. According to Commerce, the same individual has "substantial influence over major corporate decisions regarding mergers, consolidation, the sale of all company assets, and the election of directors" at the ReneSola entities. *Id.* at 7–8. Commerce found that Renesola Jiangsu Ltd. does not have its own directors, but rather is managed directly by the leadership of Renesola Ltd., of which Mr. Li Xianshou is the founder, CEO, and a board member. *See id.* at 10.

Commerce also reviewed the management positions held by Li family members in the Jinko entities. *See id.* at 8. Commerce noted that Mr. Li Xiande, Mr. Li Xianhua, and Mr. Chen Kangping are Chairman, Vice General Manager, and CEO, respectively, of both Jinko Solar Co., Ltd. and Jinko Solar Import and Export Co., Ltd. *Id.* Commerce further found that these individuals collectively act as a management team in charge of production and marketing of solar cells and modules, and make decisions regarding mergers, consolidations, the sale of all company assets, the election of directors, and dividend policy in both entities.

ment and board position roles within the companies, including CEO of Renesola Zhejiang, Ltd. and Chairman, Vice General Manager, and CEO of Jinko Solar Co., Ltd. and Jinko Solar Import and Export Co., Ltd., which had influence and decision making responsibilities within those companies. *See* Affiliation and Collapsing Memo at 7–8.

Jinko highlights the absence of corporate entity overlap, franchise or joint venture agreements between the companies, or shared debt financing. *See* Jinko Br. 10. Although Commerce's regulation provides that it will consider all these factors, the regulation does not require an affirmative finding on all of these factors to support affiliation. *See* 19 C.F.R. § 351.102(b)(3). It is reasonably discernible that Commerce concluded that the Li family members' roles in senior management and board positions together with their shareholdings are sufficient to create a potential to impact the companies' pricing, cost, and production decisions without looking at joint venture agreements and debt financing.[8] *See* Final Decision Memo at 63. By pointing to the shareholdings, board memberships, and significant managerial roles played by members of the Li family grouping in both the Jinko entities and the ReneSola entities Commerce's has supported it affiliation determination with substantial evidence.

Jinko also argues that the record does not support the notion that the Li family grouping acts in concert. Jinko Br. 8–10. Specifically, Jinko claims that the absence of managerial overlap between the ReneSola entities and the Jinko entities renders Commerce's determination that the shareholdings, board memberships, and management positions held by Li family members creates the potential for manipulation of pricing, production, or cost of subject merchandise unreasonable.[9] *See id.* at 9–10. Jinko cites no authority requiring

[8] Jinko's contention that Commerce's practice of using aggregated indicia of control to find that a family grouping's relationships with either company has the potential to impact pricing, production, and cost of subject merchandise without finding that the companies also had franchise and joint venture agreements, and debt financing amounts to an "irrebuttable presumption" is similarly unfounded. *See* Jinko Solar Co. Ltd's Reply Mem. Further Supp. Mot. Summ. J. Agency R. 3, Oct. 26, 2016, ECF No. 66. Here, there is unrefuted evidence of significant shareholdings, board memberships, and management positions held by Li family members. *See* Affiliation and Collapsing Memo at 7–8, 10. Moreover, Jinko does not argue that it is unreasonable to determine that a family grouping creates the potential to impact pricing, production or costs, but only that it is unreasonable to find that the family grouping is sufficient to find the family actually controls the entities. *See* Jinko Solar Co. Ltd's Reply Mem. Further Supp. Mot. Summ. J. Agency R. 2–3, Oct. 26, 2016, ECF No. 66.

[9] Jinko contends that the corporate and family groupings are insufficient to reasonably conclude that the Jinko and ReneSola entities are under common control of the Li family grouping because Jinko and ReneSola entities compete against each other in the marketplace. *See* Jinko Br. 10. It is reasonably discernible that Commerce concludes that the notion that the companies may compete does not detract from the potential for the Li family grouping to impact decisions concerning pricing, production, and cost of subject merchandise. *See* Final Decision Memo at 63. Commerce's conclusion is reasonable.

Commerce to identify overlap of individual managers to find that a family grouping that holds important management positions and significant shareholdings creates the potential to impact decisions. Where there is a family grouping at issue, Commerce's practice is to "consider[ ] the control factors of individual members of the group (*e.g.*, stock ownership, management positions, board membership) in the aggregate." *See* Affiliation and Collapsing Memo at 7 (citing *Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea*, 69 Fed. Reg. 26,361 (Dep't Commerce May 12, 2004) (final results and rescission in part of antidumping duty administrative review and accompanying Issues and Decision Memorandum for the 2002-2003 Administrative Review of the Antidumping Duty Order on Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea: Final Results at 3, A580–836, (May 12, 2004), *available at* http://ia.ita.doc.gov/frn/summary/korea-south/0410773–1.pdf (last visited May 15, 2017); *Chlorinated Isocyanurates From the People's Republic of China*, 74 Fed. Reg. 68,575 (Dep't Commerce Dec. 28, 2009) (final results of June 2008 through November 2008 semi-annual new shipper review) and accompanying Issues and Decision Memorandum for June 2008 through November 2008 Semi-Annual New Shipper Review of Chlorinated Isocyanurates from the People's Republic of China at 10, A-570–898, (Dec. 17, 2009), *available at* http://ia.ita.doc.gov/frn/summary/prc/E930687–1.pdf (lasted visited May 15, 2017)). Commerce found that the Li family grouping is in a position to impact decisions of both the Jinko and ReneSola companies through the ownership stakes and key management positions held by the Li family grouping. *See* Affiliation and Collapsing Memo at 7–8. Even if no individual member of the Li family controls both the ReneSola entities and the Jinko entities, the aggregated shareholdings, management positions, and board memberships are sufficient to support a reasonable inference that these relationships allow the Li family grouping to potentially exercise restraint or direction over both sets of entities.

B. Commerce's Determination to Collapse the Affiliated Entities

Jinko challenges Commerce's decision to collapse ReneSola with Jinko Solar Co., Ltd., and Jinko Solar Import and Export Co., Ltd. and treat them as a single entity for purposes of this investigation.[10] Jinko Br. 8–13. Jinko argues that there is no overlap in ownership by

[10] If affiliated producers and exporters are collapsed, those companies may be considered a single entity. Collapsing entities allows sales of one collapsed entity to be considered sales of the other for purposes of Commerce's dumping margin calculation. *See* 19 C.F.R. § 351.401(f)(1) (2014); 19 U.S.C. §§ 1675(a)(2)(A)(ii), 1677b(a).

any individual member or company, no overlap of individuals in management or corporate governance roles, and that the transactions between the companies are not significant enough to create a significant potential for manipulation.[11] *See id.* at 11–13. Defendant responds citing Commerce's findings on the significant ownership of the Li family grouping, the significant management positions held by members of the Li family in each of the ReneSola and Jinko entities, and the significant transactions between the two sets of companies. Def.'s Resp. Br. 15–18. The court remands Commerce's determination to collapse the ReneSola companies for further explanation or reconsideration.

The statute does not address the consequences of finding entities affiliated in terms calculating the dumping margin. *See* 19 U.S.C. § 1675(a)(2)(A)(ii); 19 U.S.C. § 1677b)(a). Commerce's regulations permit it to

> treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities . . . and [Commerce] concludes that there is a significant potential for the manipulation of price or production.

19 C.F.R. § 351.401(f)(1). The non-exhaustive list of factors Commerce may consider in assessing whether there is a "significant potential for manipulation of price or production" for collapsing affiliated producers include:

(i) The level of common ownership;
(ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and
(iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

[11] Commerce found that "[t]he Renesola and Jinko groups of companies . . . each include producers of similar and identical merchandise." Memorandum re: Affiliation and Single Entity Status at 8, PD 542, bar code 3207993–01 (June 6, 2014). Commerce found that Renesola Zhejiang Ltd. produces and sells wafers and solar cells, which are necessary components in the manufacture of certain solar products and similar products. *Id.* Commerce also found that Jinko Solar Co., Ltd. produces and sells wafers, solar cells and modules, among other intermediary products used in the production of solar cells and modules. *Id.* Finally, Commerce found that Jinko Solar Co., Ltd. produces the merchandise sold by Jinko Solar Import and Export Co., Ltd. during the period of investigation. *Id.* Jinko does not challenge Commerce's determination that the Jinko entities and the ReneSola entities have production facilities for similar or identical products under 19 C.F.R. § 351.401(f)(1).

19 C.F.R. § 351.401(f)(2).

Commerce's decision to collapse the ReneSola entities with the Jinko entities is not supported by substantial evidence because the common ownership, the shared management of these companies, and intertwined operations is insufficient to reasonably support Commerce's conclusion. As already discussed, Commerce found significant common ownership by the Li family grouping of both the Jinko and ReneSola entities. *See* Affiliation and Collapsing Memo at 6. Although Commerce purports to conclude that managerial employees or board members of the ReneSola entities sit on the board of directors of the Jinko entities, or vice versa, the evidence relied upon by Commerce only demonstrates that members of the Li family grouping sat on the boards of both entities. *See* Affiliation and Collapsing Memo at 10. The affiliation statute is sufficiently broad that Commerce can consider a family grouping's collective indicia of control, including the collective board memberships and managerial positions held by a family grouping, *see* 19 U.S.C. §§ 1677(33)(A), (F), but Commerce's collapsing regulation calls upon it to consider overlap of individual board member between collapsed entities.[12] *See* 19 C.F.R. §

[12] Commerce found that there is overlap in the directors and management of the ReneSola entities and the Jinko entities when the Li family is viewed as a single person. *See* Affiliation and Collapsing Memo at 10. However, the language of 19 C.F.R. § 351.401(f)(2)(ii) is specific, and the regulation explicitly calls upon the agency to assess the extent to which individual managerial employees or board members of one firm sit on the board of directors of an affiliated firm. *See* 19 C.F.R. § 351.401(f)(2)(ii). Commerce's regulation has defined the inquiry under 19 C.F.R. § 351.401(f)(2)(ii) much more narrowly than the statute does to require Commerce to compile a list of managers or board members on one firm and compare them to the board of directors of an affiliated firm. *See* 19 C.F.R. § 351.401(f)(2)(ii). In contrast, the affiliation statute, which considers family members to be affiliated persons and allows persons to be affiliated through common control by the same person, *see* 19 U.S.C. §§ 1677(33)(A), (F). This statutory language leaves Commerce discretion to define "persons" broadly to include "any interested party as well as any other individual, enterprise, or entity, as appropriate." 19 C.F.R. § 351.102(b)(37).

Defendant argues that Commerce may treat a family as a single unit for purposes of evaluating 19 C.F.R. § 351.401(f)(2)(ii). *See* Def.'s Resp. Br. 16–17 (citing *Zhaoqing New Zhongya Aluminum Co., Ltd. v. United States*, 39 CIT __, __, 70 F. Supp. 3d 1298, 1309 (2015)). However, in *Zhaoqing*, the court held that overlapping boards of directors are not required to support a collapsing determination because the list of factors in 19 C.F.R. § 351.401(f)(2) is non-exhaustive. *See id.* SolarWorld cites *Catfish Farmers of America v. United States*, 33 CIT 1258, 1266, 641 F. Supp. 2d 1362, 1372 (2009) and *Zhaoqing*, arguing that the Court has found that managerial overlap among a family grouping can support a finding that there is significant potential for manipulation. SolarWorld Americas, Inc. Br. Resp. Mem. Supp. Rule 56.2 Mots. Pls. and Pl.-Intervenors 16, Sept. 23, 2016, ECF No. 58. In neither *Catfish Farmers* nor in *Zhaoqing* does the holding sustaining Commerce's determination rest entirely upon a family grouping holding managerial positions in both entities. *See Zhaoqing*, 39 CIT at __, 70. F. Supp. 3d at 1305–6 (where Commerce also found common ownership among the family grouping and significant transactions because of evidence of some transactions between a sibling and a spouse of a sibling combined with an adverse inference based on the company's failure to cooperate); *Catfish Farmers*, 33 CIT at 1265–66, 641 F. Supp. 2d at 1362–72 (where Commerce also found large family shareholdings and that the companies had a past arrangement whereby one affiliate processed

351.401(f)(2)(ii). The factors enumerated in 19 C.F.R. § 351.401(f)(2) are non-exhaustive, and nothing precludes Commerce from considering that members of a family unit sit on the boards of two sets of entities as reflecting a potential for manipulation. 19 C.F.R. § 351.401(f)(2)(i)–(iii). On remand, if Commerce wishes to rely upon board memberships and management positions held by a family grouping, it must so state and explain how this factor creates a significant potential for the manipulation of price or production or reconsider its determination.

Further, Commerce has not sufficiently explained how the raw material purchases, accounts receivable, and other transactions between the ReneSola entities and the Jinko entities support Commerce's conclusion that the companies had intertwined operations during the POI. Commerce found that Renesola Ltd.'s 2012 and 2013 consolidated financial statements report "significant raw material purchases and accounts receivable from [Jinko Solar Co., Ltd.] and its affiliates." Final Decision Memo at 66 (citing Renesola Ltd. Sec. A. Resp. Part 6 at Ex. A.11 at F-34, CD 357, bar code 3197707–06 (Apr. 24, 2014) ("ReneSola 2012 Consol. Fin. Sts."); Renesola Verification Exhibits Part 95 at Ex. II-2 at F-36, CD 928, bar code 3222969–95 (Aug. 21, 2014) ("Renesola 2013 Form 20F"); Jinko Solar Co., Ltd.'s Separate Rate Application at Ex. 5 at F-33–34, CD 123–131, bar codes 3191372–01–05, 3191379–01–03 (Mar. 28, 2014) ("Jinko Holding Consol. Fin. Sts."). However, the value of the sales, purchases of raw materials, and accounts receivable between the Renesola entities and the Jinko entities [[ ]] from 2012, prior to the POI, to 2013.[13]

subject merchandise of the other for export to the United States, which Commerce found evidenced future potential for manipulation).

[13] Specifically, Commerce relies upon the fact that Renesola Ltd.'s 2012 and 2013 financial statements report significant raw material purchases and accounts receivable from Jinko Solar and its affiliates. *See* Final Decision Memo at 66. Commerce references these transactions in more detail in its Affiliation and Collapsing Memo. *See* Affiliation and Collapsing Memo at 11. Commerce reviews that

> Renesola Ltd. reported that in 2012 (the fiscal year closest to the POI for which there is information on the record) it and its affiliated sold $59.5 million worth of goods to Jinko Solar and its affiliates, purchased $85.1 million of raw materials from [Jinko Solar Co., Ltd.] and its affiliates, had accounts receivable from [Jinko Solar Co., Ltd.] and its affiliates of $5,479 588, and accounts payable to Jinko Solar and its affiliates of $16,277,011.

Id. However, in 2013 Renesola Ltd. reported [[ ]] of raw material purchases from Jinko Solar Co., Ltd. and its affiliates, [[ ]] of accounts receivable to Jinko Solar Co., Ltd. and its affiliates, and accounts payable to Jinko Solar Co., Ltd. and its subsidiaries of [[ ]]. *See* Renesola 2013 Form 20-F at F-36. Commerce does not recognize or attach any significance to the [[ ]] in these amounts. *See* Final Decision Memo at 66; Affiliation and Collapsing Memo at 11.

Commerce also references the fact that the fiscal year 2012 Jinko Holding financial statements "reported significant raw material purchases and accounts receivable from[ ] Renesola Ltd. and its affiliates." Final Decision Memo at 66. Commerce likewise reviews these transactions in more detail in its Affiliation and Collapsing Memo, stating that

Compare Renesola 2012 Consol. Fin. Sts. at F-34 with Renesola 2013 Form 20-F at F-36. Commerce does not explain why the change in level of transactions between the two entities does not affect its determination that the two entities' operations were intertwined. *See* Affiliation and Collapsing Memo at 10 (citing and reviewing only the extent of 2012 sales between Renesola and its affiliates and Jinko and affiliates, purchases of raw materials between Renesola and its affiliates and Jinko and its affiliates, and accounts receivable between Renesola and its affiliates and Jinko and its affiliates); Final Decision Memo at 66 (citing ReneSola 2013 Consol. Fin. Sts. At F-34, Renesola 2013 Form-20-F at F-35, Jinko Holding 2012 Consol. Fin. Sts. at F-33–34). Moreover, Jinko highlights that Renesola Ltd.'s 2013 consolidated financial statements, which show that the company reported raw material purchases and accounts receivable with Jinko entities that only account for a de minimis level of activity relative to the companies' overall operations.[14] *See* Jinko Solar Co. Ltd.'s Reply Mem. Further Supp. Mot. Summ. J. Agency R. 4–5, Oct. 26, 2016, ECF No. 66 ("Jinko Reply Br."). This evidence undermines the reasonableness of Commerce's determination that the transactions between the Renesola entities and the Jinko entities during the POI are significant, but Commerce offers no explanation or acknowledgment of a disparity between the extent of transactions during the POI and transactions outside the POI. *See* Final Decision Memo at 66. On remand, Commerce must explain why it is reasonable to conclude that the totality of the circumstances creates a significant potential for manipulation in light of the concerns highlighted here.

Defendant implies that significant transactions between Renesola Ltd and Jinko entities from outside the POI lend further support to Commerce's determination because Commerce may consider "both

> Jinko Holding reported that in 2012, it and its affiliates sold [Renminbi ("RMB")] 150,705,597 worth of goods and services to Renesola Ltd. and its affiliates, purchased RMB 266,714,991 of raw materials from Renesola Ltd. and its affiliates, had accounts receivable from Renesola Ltd. and its affiliates of RMB 105,531,368, and accounts payable to Renesola Ltd., and its affiliates of RMB 30,045,245.

Affiliation and Collapsing Memo at 11. In 2013, Jinko Holding reported that it and its affiliates sold RMB 29,021,348 worth of goods and services to Renesola Ltd. and its affiliates, purchased RMB 20,854,435 of raw materials from Renesola Ltd. and its affiliates, had accounts receivable from Renesola Ltd. and its affiliates of RMB 56,990,772, and accounts payable to Renesola Ltd. and its affiliates of RMB 28,611,284. *See* Jinko Holding Consol. Fin. Sts. at F-33–34. Commerce does not recognize or make note of the fact that, for the nine months ended September 30, 2013, most of the numbers cited also [[ ]]. *See* Final Decision Memo at 66; Affiliation and Collapsing Memo at 11.

[14] Specifically, Jinko notes that Renesola Ltd.'s consolidated financial statements "reported raw material purchases of $2,302,375 from Jinko which only accounts for 0.16% of the $1,416,371,905 total cost of revenue reported. [Renesola Ltd.] also reported accounts receivable, or revenue, in the amount of $180,102 from Jinko which accounts for 0.01% of its total revenue reported." Jinko Solar Co. Ltd.'s Reply Mem. Further Supp. Mot. Summ. J. Agency R. 4–5, Oct. 26, 2016, ECF No. 66 (citing Renesola 2013 20-F at F-6, F-36).

actual manipulation in the past and the possibility of future manipulation, which does not require evidence of actual manipulation during the [POI]." Def.'s Resp. Br. 18 (citing *Dongkuk Steel Mill Co. v. United States*, 29 CIT 724, 733 (2005)). However, the record before the *Dongkuk* court demonstrated substantial evidence of actual manipulation before the period under consideration, including sharing a number of common directors and officers and transfer of senior managers between the two companies, sale of raw material to each other and sharing of customer information in connection with those sales, the companies' shared interest in a freight provider servicing both, and the value of services received during the period of review. *See Dongkuk*, 29 CIT at 728. The court, in *Dongkuk*, does not suggest that, absent evidence of actual manipulation, Commerce can infer future potential for manipulation. *See id.* at 733. The court cannot say that past significant transactions could not demonstrate a future significant potential for manipulation. However, the intent to rely upon past transactions to show future manipulation is not reasonably discernible from Commerce's determination because Commerce does not acknowledge that the information from outside the POI is relied upon to support an inference of future potential for manipulation. *See* Final Decision Memo at 66 (reviewing the extent of transactions between the companies for fiscal years 2012 and 2013); Affiliation and Collapsing Memo at 11 (reviewing the extent of transactions between the companies for fiscal year 2012). Moreover, Commerce does not rely on past transactions to infer future potential manipulation or explain why such a practice is reasonable based on the record before it. *See* Final Decision Memo at 66. On remand, if Commerce relied upon such an inference, Commerce must say so and explain why such an inference is reasonable based on the record before it.

II. Surrogate Financial Statements

SolarWorld challenges as unreasonable Commerce's choice to use surrogate financial statements from South African computer assembly company Mustek to calculate respondents' general expenses and profit as part of its normal value calculation. SolarWorld Br. 8–18. Specifically, SolarWorld contends that Mustek's financial statements did not constitute the best available information because Mustek is not a producer of sufficiently comparable merchandise,[15] the statements were not sufficiently contemporaneous with the POI, and the

[15] In arguing that Mustek is not a producer of comparable merchandise, SolarWorld contends both that computers are not comparable to crystalline silicon photovoltaic cells because they have dissimilar production processes, end uses, and physical characteristics, and that Mustek is not a "producer" of computers, but rather is an "assembler" of computers. SolarWorld Br. 10–11.

statements lacked necessary specificity. *Id.* at 10–17. Defendant responds that substantial evidence supports Commerce's decision that Mustek's financial statements constituted the best available information as each of the Thai companies with statements on the record received countervailable subsidies, Mustek is a producer of comparable merchandise, and the statements are sufficiently specific and contemporaneous.[16] Def.'s Resp. 20–27. For the reasons that follow, Commerce's decision to value respondents' general expenses and profit using Mustek's financial statements is reasonable.

Commerce determines whether a company is engaged in dumping by comparing the normal value of the subject merchandise with the actual or constructed export price of the merchandise. 19 U.S.C. § 1677b(a). The normal value of the merchandise is the price of the merchandise when sold for consumption in the exporting country. 19 U.S.C. § 1677b(a)(1)(B). However, when the exporting country is, like China, an NME country, Commerce calculates the normal value for subject merchandise from an NME country by valuing inputs including the factors of production ("FOPs") utilized in producing the merchandise and "an amount for general expenses and profit." 19 U.S.C. § 1677b(c)(1). Commerce selects a surrogate value for each of these inputs from a source in a market economy country that is economically comparable to the NME country and a significant producer of the merchandise in question. 19

[16] Defendant also references the fact that the Mustek financial statements were the only financial statements on the record from the primary surrogate country, emphasizing that Commerce has a preference for using surrogate values from the primary surrogate country where possible. Def.'s Resp. 20–21. Commerce stated in the Preliminary Surrogate Value Memo, the findings of which were adopted in the Final Surrogate Value Memo, that "Mustek's financial statements are the only financial statements on the record of this investigation from the chosen surrogate country, South Africa." Prelim. Surrogate Value Memo at 8–9; Final Surrogate Value Memo at 1. These statements imply that the Mustek data was selected as financial surrogate values in part because the data was from the primary surrogate country, which raises concerns about circular reasoning because South Africa was selected as the primary surrogate country in part because reliable financial statements existed on the record from South Africa. *See* Final Decision Memo at 35–37. However, in the Prelim. Surrogate Value Analysis Memo, Commerce also emphasized other reasons why the Mustek data was selected, including that the Mustek "statements are complete, cover a period contemporaneous with the POI, are from a South African assembler of comparable merchandise (computers), and are from a company that earned a before-tax profit in 2013," and emphasizing that there was no evidence of countervailable subsidies in Mustek's financial statements. Prelim. Surrogate Value Analysis Memo at 8–9. The Final Decision Memo does not indicate that the Mustek statements were used in part because South Africa was the primary surrogate country, emphasizing that the statements were superior to the Thai statements on the record which contained evidence of subsidies. Final Decision Memo at 35–36. Further, Defendant clarified at oral argument that the decisions to select South Africa as primary surrogate country and to use the Mustek financial statements as financial surrogate values were made simultaneously, based on the same consideration of data availability and reliability: lacking usable Thai financial data and possessing usable South African financial data, Commerce determined South Africa was a better primary surrogate country; the statements from South Africa were used because they were superior to the Thai statements on the record. Oral Arg. 00:33:30–00:34:13, Feb. 28, 2017, ECF No. 89.

U.S.C. §§ 1677b(c)(4)(A)–(B); 19 C.F.R. § 351.408(b). Commerce calculates the amount for general expenses and profit using publicly available financial data from a producer of identical or comparable merchandise. 19 C.F.R. § 351.408(c)(4).

Commerce values each of these inputs using "the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate."[17] 19 U.S.C. § 1677b(c)(1); *see* 19 C.F.R. §§ 351.408(a)–(c). With "best available information" not defined in the statute, Commerce has discretion to determine what data constitutes the best available information for valuing the inputs. *QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011); *Nation Ford Chemical Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999). The agency makes this determination by considering the data's "quality, specificity, and contemporaneity."[18] Final Decision Memo at 34.

Here, Commerce evaluated Mustek's financial statements as part of its selection of South Africa as the primary surrogate country,[19] Final Decision Memo 33–37, and used Mustek's financial statements for the fiscal year ending December 31, 2013 to value factory overhead, selling, general and administrative expenses, and profit. Prelim. Decision Memo at 25; Prelim. Surrogate Value Memo at 8–9. Commerce determined that Mustek was a producer of comparable merchandise, Prelim. Surrogate

[17] Commerce has a regulatory preference to value all inputs using data from a single surrogate country. *See* 19 C.F.R. § 351.408(c)(2) ("[Commerce] normally will value all factors in a single surrogate country"). Defendant notes that this practice is followed "unless the specific data for an input is not available or unreliable in that surrogate country." Def.'s Resp. 21 (quoting Dept. of Commerce, Final Results of Redetermination Pursuant to Court Remand, *Elkay Mfg. Co. v United States*, A-570–983, at 19; citing *Clearon Corp. v. United States*, 35 CIT 1013 (2013) (sustaining Commerce's preference for valuing surrogate values from a single surrogate country).

[18] Commerce's practice in determining the "best available information" is to "use investigation or review period-wide price averages, prices specific to the input in question, prices that are net of taxes and import duties, prices that are contemporaneous with the period of investigation or review, and publicly available data." *See* U.S. Dep't Commerce, *Non–Market Economy Surrogate Country Selection Process* (2004) at 2, *available at* http://enforcement.trade.gov/policy/bull041.html (last visited May 15, 2017).

[19] Although adequate surrogate value data existed on the record for most key inputs from both Thailand and South Africa, Commerce found that the record lacked reliable financial data from Thailand for valuing surrogate financial ratios because each of the Thai companies with financial statements on the record had received countervailable subsidies which Commerce found may be distortive. Final Decision Memo at 35. Commerce noted the financial statements on record from Mustek, the South African computer assembly company, did not contain evidence of countervailable subsidies, and determined that the available South African financial data was superior to the financial data from Thailand. *Id.* at 36. Finding that neither country's data was otherwise superior on the basis of specificity or contemporaneity, Commerce concluded that South Africa was the appropriate primary surrogate country. *Id.* at 37. In the Prelim. Decision Memo, Commerce found that any "individual specificity issues in this case are outweighed by the lack of usable Thai financial statements, *i.e.*, financial statements that do not contain evidence of receipt of countervailable subsidies." Prelim. Decision Memo at 10.

Value Memo at 8–9; *see* Final Decision Memo at 33, and that respondents' solar module and panel assembly processes are "more comparable" to Mustek's computer assembly operations than to the Thai companies' circuit board manufacturing processes. Final Decision Memo at 36. Commerce emphasized that Mustek and the Thai circuit board companies each conducted activities that were similar to a single stage of the multistage solar panel production process:

> [S]olar panel manufacturing consists of casting silicon into ingots, slicing ingots into wafers, processing the wafers into cells, and assembling the cells into panels. While circuit board manufacturing may be similar to processing wafers into cells, assembling solar cells into panels is also a significant stage of solar panel manufacturing. We preliminarily find that the panel assembly stage of manufacturing, which involves assembling cells, wires, junction boxes and other parts into panels, is more comparable to the assembly of computers, which involves assembling circuit boards, wires, junction boxes and other parts into a computer, than it is to circuit board manufacturing, which involves attaching and connecting electronic components and etching conductive tracks, pads and other features from copper sheets and laminating them onto a nonconductive substrate.

Prelim. Decision Memo at 9–10. Reasonably discernible from this analysis is an acknowledgment by Commerce that none of the companies with financial data on record—the five Thai circuit board companies and South African computer assembly company Mustek—constituted an ideal surrogate with which to value financial inputs for the solar panel production process, as the companies' operations each aligned with only one stage of the multistage solar panel production process. It is evident that Commerce considered these available options and made a reasoned selection based on its analysis of which stages of solar production are significant and which company's operations align with those stages. *Id.* ("While circuit board manufacturing may be similar to processing wafers into cells, assembling solar cells into panels is also a significant stage of solar panel manufacturing."). Commerce reiterated this evaluation in the Final Determination, noting:

> While solar cell production is similar to printed circuit board production, the merchandise under consideration is manufactured in an assembly operation, using solar cells manufactured elsewhere. . . . The merchandise under investigation consists of certain panels assembled in the subject country, and we do not find that circuit board production is necessarily more similar to panel assembly than is computer assembly.

Final Decision Memo at 36–37. Commerce also determined that Mustek's financial statements were specific and contemporaneous with the period of review. *Id.* at 34–35. Regarding specificity, Commerce stated that it understood "distribution" to refer to a selling expense because the term appeared "elsewhere in the Mustek financial statement in conjunction with customer service and support of resellers,"[20] and that "Operating expenses" indicated "non-manufacturing expenses not directly related to production." Final Decision Memo at 37. Regarding contemporaneity, Commerce noted that the Department considers a statement with any amount of overlap with the POI sufficiently contemporaneous for purposes of serving as surrogate value data; there is no preference for a greater overlap. *See id.* at 35; Def.'s Resp. 25.

It is also discernible that Commerce's decision to use Mustek's data was heavily impacted by the presence of subsidies in the Thai financial statements. *See* Prelim. Surrogate Value Memo at 9. Commerce determined there was no adequate surrogate financial data on the record from Thailand in the context of the primary surrogate country selection, *see* Prelim. Decision Memo at 9; Final Decision Memo at 34, and it is reasonably discernible from this that Commerce selected the Mustek statements to value the general expenses and profits for the same reason. *See* Prelim. Surrogate Value Memo at 9; Final Decision Memo at 34–35. Defendant emphasizes that Commerce's choice to not rely on the Thai statements is "consistent with [agency] practice not to rely on financial statements when evidence of receipt of countervailable subsidies is present and other usable financial statements are available." Def.'s Resp. 21. SolarWorld's arguments that the Thai companies' circuit board assembly processes are more similar to solar cell production than are Mustek's computer assembly processes asks the court to reweigh the evidence. Taking into consideration imperfections in the available evidence, and explaining why it chose the South African data despite those imperfections, Commerce sufficiently explained its reasoning for determining that Mustek's financial statements constituted the best available information. On the record presented, Commerce's choice is not unreasonable. Accordingly, it is sustained.

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[20] SolarWorld argues that Mustek's financial statements lacked specificity because the terms "distribution" and "other operating expenses" were ambiguous, and that there was no evidence that the expenses were equivalent to the selling, general, and administrative expenses that Commerce that generally measures. SolarWorld Br. 15. In arguing that Commerce cited nothing to support its interpretation, SolarWorld does not point to anything that refutes Commerce's interpretation of the terms as used in the financial statements. *See id.*

III. Surrogate Values for Aluminum Frames

SolarWorld also challenges as unsupported by substantial evidence Commerce's decision to value respondents' aluminum frames for solar modules using heading 7604, HTS, rather than heading 7616, HTS.[21] SolarWorld Br. 18–22; Reply Br. of Defendant-Intervenor SolarWorld Americas, Inc. Confidential Version 6–9, Oct. 27, 2016, ECF No. 68 ("SolarWorld Reply"). SolarWorld contends that heading 7604, HTS, is inappropriate because the provision applies only to unfinished articles and frames of uniform cross-section, alleging that respondents' aluminum frames are neither unfinished nor of uniform cross-section. SolarWorld Br. 20–22; SolarWorld Reply 7–9. SolarWorld highlights United States Customs and Border Protection ("CBP") rulings which support its position. SolarWorld Br. 19–21; SolarWorld Reply 7. Defendant responds that Commerce's use of heading 7604, HTS, is reasonable because the subheading constitutes the best available information to value the aluminum frame inputs. Def.'s Resp. 27–30. For the reasons that follow, Commerce's determination is reasonable and is sustained.

As discussed above, Commerce calculates the normal value of subject merchandise from an NME country by valuing factors of production utilized in producing the merchandise. 19 U.S.C. § 1677b(c)(1). Commerce values each factor of production with the "best available information," using available surrogate data from a comparable market economy country that is a significant producer of comparable merchandise. 19 U.S.C. § 1677b(c)(1). Commerce calculates certain of these inputs using "import-based, per-unit surrogate values." *See* Prelim. Decision Memo at 22.

Here, both respondents reported aluminum frames as a production input, so Commerce sought surrogate value data by which to value the cost of the aluminum frames. *See* Final Decision Memo at 48–49; Prelim. Surrogate Value Memo at 3. Commerce found that the best available information by which to value respondents' aluminum frames was the average value of South African imports under subheading 7604.29.65, HTS ("Aluminum alloy bars, rods and profiles, other than hollow profiles of a maximum cross-sectional dimension not exceeding 370 mm"), rather than Thai imports under subheading 7616.99, HTS, ("Articles of aluminum not otherwise specified or indicated: other") covering a more diverse array of aluminum products. Final Decision Memo at 48–50; *see* Prelim. Surrogate Value Memo at 3–4 Commerce determined that "HTS category 7616.99 is a catch-all category that covers many diverse aluminum products–such as reels,

[21] SolarWorld also characterizes Commerce's use of heading 7604, HTS, for valuing respondents' aluminum frames as "unlawful." *See* SolarWorld Br. 18–19, 22.

cups, bag handles, and cigarette cases–whose value is not reasonably comparable [to solar panel aluminum frames]." Final Decision Memo at 49. Because the respondents described their aluminum frames as "an aluminum alloy made frame that is an aluminum profile having a cross section of less than 370mm," *id.* at 48, and Commerce "did not find anything on the record, or during verification, to call into question the accuracy of both respondents' descriptions of their aluminum frames," *id.* at 48–49, Commerce determined that subheading 7604.29.65, HTS, was the best available information regarding the surrogate market value of respondents' aluminum frames. *Id.*

Commerce reasoned that subheading 7604.29.65, HTS, encompasses all aluminum profiles and therefore is the best available information to value this FOP. Final Decision Memo at 48–49. The alternative HTS category is a catch all category which Commerce reasoned is not reasonably comparable. *Id.* Commerce confronted SolarWorld's arguments that various CBP rulings would support using subheading 7616.99, HTS. *Id.* at 48–50. Commerce noted that the agency is not bound by CBP rulings "when selecting import values from surrogate countries," *id.* at 49, and emphasized that Commerce is bound instead by its statutory requirement to value inputs using the best available information. *Id.*; *see* 19 U.S.C. § 1677b(c)(1); 19 C.F.R. §§ 351.408(a)–(c). Thus CBP's decision that solar panel aluminum frames should be classified under the residual catch-all category does not mean that the values of the myriad diverse goods that fall within that category– such as bag handles and cigarette cases– provide the best approximation of the market value of solar panel aluminum frames. *See* Final Decision Memo at 49.

Likewise Commerce responded to SolarWorld's claim that respondents' aluminum frames do not meet the definition for "profiles" under heading 7604, HTS, as the frames are not of uniform cross section along their entire length as required in the Chapter Notes to Chapter 76.[22] SolarWorld Br. 21–22. SolarWorld emphasizes record

[22] SolarWorld also argues that there was evidence before Commerce in this investigation that the respondents' aluminum frames were finished articles, which detracts significantly from Commerce's conclusion that the aluminum frames are more similar to unfinished aluminum articles under heading 7604, HTS. SolarWorld Br. 19–21. SolarWorld argues that heading 7604 is specific to unfinished articles, *id.*, such that an otherwise covered article (*i.e.*, an aluminum bar, rod, or profile) "that has been subsequently worked into a finished, ready-to-use product is no longer described by Heading 7604, but by other headings describing those finished, ready-to-use products – in this case, Heading 7616." SolarWorld Reply 8–9. SolarWorld contends that heading 7604 is limited to unfinished articles due to the absence of record evidence indicating that finished articles fall within the heading. SolarWorld Br. 20–21. Commerce addressed SolarWorld's argument, and determined that the inquiry into finished or unfinished articles was

> not relevant to our decision. While there are CBP rulings on the record which support the use of HTS subheading 7604 and these rulings relate to unfinished aluminum articles, this does not necessarily mean that HTS subheading 7604 would only apply to

evidence demonstrating that respondents' frames possess corners, cut-outs, and holes which, according to SolarWorld, render the frames' cross-section non-uniform and thus detract from finding that the selection of heading 7604, HTS, is supported by substantial evidence.[23] Commerce noted that the frames' corners "are only a small part of the aluminum frames used to build solar modules," Final Decision Memo at 50, from which it is discernible that Commerce considers the corners are not significant to alter the article from those covered by the subheading. Although HTS Chapter Notes have the force of law for classification purposes, the frames are not being classified here; Commerce's inquiry regards finding the value data that is the closest fit for the frames. Although heading 7604, HTS, may be an imperfect selection, Commerce's determination that it is a closer fit to the frames than SolarWorld's suggested category, heading 7616, HTS–a catch-all provision covering articles that are entirely dissimilar to frames–is not unreasonable. Commerce's inquiry is intended to obtain the most accurate, comparable value data for articles that are the most comparable to respondent's frames. Commerce's implicit concern that the less-specific catch-all provision would yield less accurate data, as the data values less comparable articles. *See Universal Camera Corp. v. N.L.R.B.*, 340 U.S. at 488. Therefore, Commerce's use of subheading 7604.29.65, HTS, to value respondents' aluminum frames is supported by substantial evidence.

IV. Surrogate Values for Scrap Solar Cells/Modules[24]

SolarWorld also challenges Commerce's use of South African import data under subheading 8548.10, HTS ("Waste and scrap of primary

> unfinished aluminum profiles. In fact, the ITC definition of aluminum profiles cited by Petitioner indicates that profiles may be worked after production. While other HTS categories identify whether they pertain to finished or unfinished items, HTS subheading 7604 does not specify whether it covers finished or unfinished aluminum profiles.

Final Decision Memo at 49. Defendant emphasizes that the ITC definition indicates that "the aluminum profiles could be finished or unfinished." Def.'s Resp. 30.

[23] SolarWorld emphasizes that Commerce collected at verification photographs of Trina's aluminum frames, which demonstrated that the frames possess "[[ ]]." SolarWorld Reply 7.

[24] Trina Solar reported the by-product offset was related to its "module scrap," comprised of "completely broken modules." *See*, *e.g.*, Trina Solar Questionnaire Section D at D-21, CD 394–411, bar code 3202241–01 (May 15, 2014). Commerce referred to the scrap as "scrap modules" in the preliminary determination, when the agency originally selected South African HTS heading 8548 as the appropriate category of import data for valuing the offset. *See* [AD] Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the [PRC]: Preliminary Analysis Memorandum for Changzhou Trina Solar Energy Co., Ltd., Attach. II, All Input Prices, July 24, 2014, ECF No. 97–14. However, Commerce referred to the by-product as "scrap solar cells" in the final determination, without explanation for the change in term. *See* Final Decision Memo at 50–51. SolarWorld and Defendant likewise each refer to the by-product as "scrap solar cells." *See*, *e.g.*, SolarWorld Br. 22; Def.'s Resp. 30. Upon remand Commerce must explain its selection of an appropriate HTS subheading for "scrap modules," consistent with Trina Solar's reported by-product.

cells, primary batteries and electric storage batteries; spent primary cells, spent primary and electric storage batteries"), to value respondent's offsets for scrapped solar cells when calculating normal value. SolarWorld Br. 22–25; Final Decision Memo at 51; 19 U.S.C. § 1677b(c). SolarWorld argues that Commerce's selection of subheading 8548.10, HTS, is not supported by substantial evidence, contending that Commerce unreasonably valued the by-product using values that were not representative of the scrap solar cells. *See* SolarWorld Br. 22–25. SolarWorld contends that subheading 2804.69, HTS ("Hydrogen, rare gases, and other nonmetals: Silicon: Other"), is the appropriate subheading for scrap polysilicon of less than 99.99 percent purity, and that Commerce should have valued the offsets for respondent's scrapped solar modules using Thai import data under subheading 2804.69, HTS. *Id.* Defendant responds that Commerce's determination that subheading 8548.10, HTS, constitutes the best available information for valuing the by-product offset is supported by substantial evidence. Def.'s Resp. 30–32. For the reasons that follow, this issue is remanded to Commerce to explain or reconsider its selection of subheading 8548.10, HTS, for valuing respondent's scrap solar modules.

As discussed above, Commerce calculates normal value for NME respondents by valuing FOPs based on surrogate values from producers of comparable merchandise in market economy countries of comparable economic development. 19 U.S.C. § 1677b(c)(1). In calculating normal value, Commerce may also allow adjustments for normal value via offsets, including scrap material or by-products. *See* 19 C.F.R. § 351.401; *Am. Tubular Prod., LLC v. United States*, 847 F.3d 1354, 1358 (Fed. Cir. 2017) (explaining that "[t]he production of [subject merchandise] may generate [scrap materials], which may be sold for revenue to offset the raw material cost for producing the [subject merchandise] that generated the scrap," and noting that a respondent bears the burden of establishing its entitlement to a scrap offset.).

Here, Trina Solar reported generating "module scrap" comprised of "completely broken modules" in the production of its subject merchandise. Trina Solar Questionnaire Section D at D-21, CD 394–411, bar codes 3202241–01–18 (May 15, 2014). Trina Solar reported that these broken modules constitute a by-product of the solar module production process, as all of the broken modules are sold, and claimed a by-product offset to normal value for the scrapped modules. *Id.* at D-21; *see* Prelim. Decision Memo at 21. Commerce accordingly sought representative surrogate data by which to value the scrap generated and sold during the POI for offsetting Trina Solar's normal value.

See Final Decision Memo at 50–51. Commerce determined that subheading 8548.10, HTS, is "more similar to solar cells than the HTS category for polysilicon (HTS subheading 2804.69), which is only specific to one raw material contained in the solar cell – polysilicon – and is also not specific to scrap materials." *Id.* at 51.

SolarWorld argues that Commerce did not consider record evidence which detracts from the reasonableness of a determination that subheading 8548.10, HTS, is the appropriate subheading for valuing scrapped solar cells. SolarWorld Br. 22–25. SolarWorld argues that heading 8548, HTS, covering batteries that are produced using different raw materials and a different manufacturing process than solar cells, "has nothing at all to do with photovoltaic products, including scrap solar cells," *id.* at 23, whereas subheading 2804.69, HTS, covers products that are specific to scrap solar cells, because it captures polysilicon of less than 99.99 percent purity, which "accounts for the 'scrap' nature of the scrap solar cells." *Id.* at 25. SolarWorld argues that polysilicon is "by far the predominant raw material in solar cells, and the raw material that is reclaimed when solar cells are scrapped." *Id.* SolarWorld further argues, as it did before Commerce, *see* Case Br. of SolarWorld Americas, Inc. 45, ECF No. 80–5, that heading 8548, HTS, is specific to "*batteries* and *battery* parts," particularly those capable of being recharged, as is clarified by the Chapter 85 Chapter Notes. SolarWorld Br. 23 (emphases in original). Because the value of scrapped solar cells, whose "predominant raw material" is polysilicon of greater than 99.99 percent purity, will differ from the value of scrapped lead-acid or nickel-cadmium batteries, SolarWorld argues that Commerce unreasonably valued scrap solar cells using data for spent batteries, rather than data for scrapped raw polysilicon. *See id.* at 23–25.

Commerce did not sufficiently address this evidence. Commerce concluded that SolarWorld "provided no evidence or basis for finding that imports under HTS subheading 8548.10 would not include scrap solar cells," Final Decision Memo at 51, but the agency did not address SolarWorld's argument that the language of heading 8548, HTS, evidences that the products imported under that heading are specific to electrical batteries and "are produced using a significantly different manufacturing process with completely different raw material inputs than are solar cells." SolarWorld Br. 23; *see also* Final Decision Memo at 50–51. Although Commerce has considerable discretion in selecting the appropriate data to calculate surrogate values, *see Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996) (granting Commerce significant deference in deter-

minations "involv[ing] complex economic and accounting decisions of a technical nature"), Commerce "must cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983). Because Commerce did not address SolarWorld's arguments, the agency has failed to adequately explain how its decision is reasonable in light of the record as a whole, including the evidence that reasonably detracts from its conclusion. *Universal Camera Corp. v. NLRB*, 350 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.").

Defendant makes two post hoc rationalizations not discernible in Commerce's determination. First, Defendant contends that Commerce selected subheading 8548.10, HTS, because Commerce determined that subheading 2804.69, HTS, "was less representative of scrap solar cells because it would undervalue the costs associated with the additional raw material components comprising a cell," as it is a subheading specific to just one material in the solar cells. Def.'s Resp. 32. This reasoning is not discernible from Commerce's analysis. Second, Defendant contends that, "Commerce reasonably determined that solar cells were more similar to the parts of 'electrical machinery' covered by chapter 85 of the HTS than simple polysilicon because they are capable of generating electricity." *Id.* Commerce says nothing regarding the ability of solar cells to conduct electricity, and it is not discernible within Commerce's analysis that the agency considered the solar cells' ability to generate solar power when determining that the products covered by subheading 8548.10, HTS, are most similar to respondents' scrapped solar cells. If either of these rationalizations informed Commerce's selection of subheading 8548.10, HTS, on remand Commerce must make these rationalizations explicit and identify the record evidence that supports them. *See NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009) ("Commerce must explain the basis for its decisions; while its explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court."). Accordingly, remand is necessary so that Commerce may reconsider its determination that subheading 8548.10, HTS, is the appropriate category with which to value respondent's by-product or provide additional explanation explicitly addressing SolarWorld's arguments and evidence to the contrary.

V. Trina Solar's Quality Insurance Indirect Selling Expense

SolarWorld challenges Commerce's determination to accept and use information provided by Trina Solar during verification to adjust

Trina Solar's U.S. prices for quality insurance expenses,[25] rather than using facts otherwise available under 19 U.S.C. § 1677e(a). SolarWorld Br. 26–30; *see* 19 C.F.R. § 351.402(b). SolarWorld argues that Commerce should have applied facts available (*i.e.*, Trina Solar U.S.'s quality expense information for the insurance policy covering the last two months of the POI) to calculate Trina Solar's quality insurance expenses for the first four months of the POI, rather than accepting the information Trina Solar provided for the first four months' expenses. *Id.* at 26. Defendant contends that Commerce properly accepted the quality insurance expense information related to the first two months' policy. Def.'s Resp. 32–37. Commerce's decision to accept and use new information obtained at verification related to Trina Solar's quality insurance expenses is sustained.

Commerce conducts verification of, inter alia, "producers, exporters, or importers" in order "to verify the accuracy and completeness of submitted factual information." 19 C.F.R. § 351.307(d). Consistent with this objective, Commerce accepts new information at verification under limited circumstances: "only when: (1) the need for that information was not evident previously; (2) the information makes minor corrections to information already on the record; or (3) the information corroborates, supports, or clarifies information already on the record." Antidumping Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the [PRC]: U.S. Verification Agenda at 2, PD 726, bar code 3219163–01 (July 31, 2014) ("Commerce Verification Notification"). Commerce is afforded broad discretion to make such determinations which "involve complex economic and accounting decisions of a technical nature." *See Fujitsu Gen. Ltd.*, 88 F.3d at 1039; *Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995); *Smith-Corona Group v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022 (1984). The court addresses whether Commerce's determination is reasonable and within this discretion. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm*, 463 U.S. at 48–49 ("[A]n agency must cogently explain why it has exercised its discretion in a given manner."); *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–405, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137, 1139 (Fed. Cir. 1987).

Here, during verification Commerce accepted as minor corrections Trina Solar's quality insurance expense information covering the POI

[25] The quality insurance expenses relate to the cost of insurance policies purchased by Jinko Solar as a guarantee that the conditions of the company's 25-year warranty would be met. *See* Final Decision Memo at 53; Trina Solar Verification Report at 2, 24. At verification, Trina Solar officials explained that the company [[
]] Trina Solar Verification Report at 24.

for the purposes of adjusting U.S. sales price.[26] Final Decision Memo at 53; Verification of Trina Solar (U.S.) Inc. in the [AD] Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the [PRC] at 2, 24, PD 759, CD 952 (Sept. 26, 2014) ("Trina Solar Verification Report"). Commerce first accepted and verified quality insurance expense information covering the last two months of the POI, reported by Trina Solar U.S. officials during verification as a correction to its indirect selling expense information. *See* Trina Solar Verification Report at 2, 24. Upon receiving this information, Commerce questioned the company's officials as to whether Trina Solar U.S. had similar insurance expenses for the first four months of the POI. *Id.* ; Final Decision Memo at 53. Trina Solar U.S. officials explained that a different Trina Solar entity had paid the quality insurance policy covering the earlier part of the POI, and provided Commerce with information related to that policy coverage.[27] Trina Solar Verification Report at 24; Final Decision Memo at 53. Commerce verified this new information. Trina Solar Verification Report at 24; Final Decision Memo at 53. Commerce ultimately used the information from both policies to value Trina Solar's quality insurance expenses and deducted these expenses from the constructed export price. Final Decision Memo at 54; *see* 19 U.S.C. § 1677a(d)(1).

Commerce's decision to accept the insurance expense information for the first four months of the POI is reasonable as the new information corrected and clarified the quality insurance expense information already on the record for the last two months of the POI. *See* Commerce Verification Notification at 2. At verification Trina Solar presented quality insurance expense information for only the last two months of the six month POI, which Commerce accepted as a minor

[26] When calculating constructed export price, Commerce is directed to "make certain adjustments to the price to the unaffiliated purchaser in the United States." 19 C.F.R. § 351.402(a). Specifically, the Department will adjust the price of U.S. sales by deducting "expenses associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser, no matter where or when paid." 19 C.F.R. § 351.402(a). Commerce noted that it made adjustments for the quality insurance expenses covering the entire POI here, even though the insurance expenses for the first four months of the POI were paid by a Trina Solar entity outside the U.S.:

> While a company or companies outside of the United States may have obtained, and paid for, part of Trina U.S.' quality insurance during the POI, the insurance covered Trina U.S.' sales. Thus, the payment outside of the United States was associated with commercial activities in the United States relating to sales to unaffiliated purchasers. Therefore, the adjustment to U.S. prices for quality insurance expenses should not be limited to only those insurance payments made by Trina U.S.

Final Decision Memo at 53 (internal citations omitted).

[27] The information indicated that Trina Solar U.S. had one quality insurance policy covering the first approximately four months of the POI and a second policy covering the remaining portion of the POI, a period of approximately two months. Final Decision Memo at 53. Trina Solar U.S. originally proffered as a minor correction information related to the policy covering the last two months. Id.

correction to Trina Solar's reported indirect selling expenses; Commerce then asked Trina Solar officials whether similar expenses existed for the first four months of the POI and Trina Solar officials presented documentation of the requested expenses. *See* Trina Solar Verification Report at 24. Commerce's request for, and acceptance of, this additional information was reasonable as it led to more accurate and complete information with which to calculate Trina Solar's indirect selling expenses. Commerce's acceptance of the information was consistent with Commerce's policy to accept new information at verification when that information, inter alia, corrects or clarifies information already on the record. *See* Commerce Verification Notification at 2. This new information served to clarify that the quality insurance expenses for the last two months were not representative of the expenses for the entire POI, and to correct the overall expense data for the POI by including the lower expenses paid during the first four months. Had Commerce not accepted the new information, Commerce would have utilized the higher expenses for the last two months to value the expenses for the entire POI, which would have been inaccurate. The new information thus led to a more complete and accurate picture of the respondent's indirect selling expenses, and Commerce's acceptance of it was therefore reasonable. *See* 19 C.F.R. § 351.307(d).

SolarWorld argues that Commerce was statutorily required to use "facts available" to value the insurance expenses for the first four months of the POI. SolarWorld Br. 26–28; SolarWorld Reply 14–15. SolarWorld alleges that "Trina withheld [information related to the insurance policy], failed to provide [it] by the appropriate deadline, in so doing impeded [the] proceeding and, finally, when specifically asked by Commerce at verification, provide[d] the requested information, but with supporting documentation that was incapable of being verified." SolarWorld Br. 28 (internal citations and quotations to 19 U.S.C. § 1677e(a)(2) omitted). Commerce explained that, because "[t]he actual expenses for quality insurance covering the entire POI are on the record and were verified by the Department," there was "no reason to resort to facts available pursuant to [19 U.S.C. § 1677e(a)]." Final Decision Memo at 53. This statement provides the reasoning underlying Commerce's determination to use the information, *see Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm*, 463 U.S. at 48–49 ("[A]n agency must cogently explain why it has exercised its discretion in a given manner."), and the decision to use the verified information rather than facts available serves Commerce's ultimate objective to achieve an accurate dumping margin. *Yangzhou Bestpak Gifts & Crafts Co., Ltd. v. United States*, 716 F.3d 1370, 1379 (Fed.

Cir. 2013) ("An overriding purpose of Commerce's administration of antidumping laws is to calculate dumping margins as accurately as possible.").

SolarWorld also argues that Commerce's determination to accept and use the information submitted by Trina Solar in relation to the earlier insurance coverage was not supported by substantial evidence because Trina Solar officials "provided [[

]]" as evidence of the coverage. *See* SolarWorld Br. 27–28. However, Commerce emphasized that agency verifiers verified the information presented. Final Decision Memo at 53. Commerce met with Trina Solar officials and made credibility determinations in person during the verification procedure, *see* Trina Solar Verification Report at 1–2, 24–25, and the court will not substitute its judgment for that of Commerce.[28] *See, e.g., De Samo v. Dep't of Commerce* 761 F.2d 657, 661 (Fed. Cir. 1985) ("Where, as here, the presiding official expressly found a witness . . . credible, this court cannot substitute a contrary credibility determination based on a cold paper record."). Commerce's determination to accept the new information provided by Trina Solar with respect to its quality insurance expenses for the entirety of the POI is sustained.

VI. Offset for Export Subsidies

Finally, SolarWorld challenges Commerce's practice of offsetting a respondent's AD duty cash deposit rate in an investigation by the full amount of an export subsidy calculated based on AFA in the companion CVD investigation as unreasonable and contrary to law.[29] *See* SolarWorld Br. 30–33. Specifically, SolarWorld argues that offsetting the full export subsidy, determined through applying an adverse inference, against the AD cash deposit rate neutralizes the adverse effect by lowering the combined AD/CVD cash deposit rate. *See id.* at 32. Defendant responds that Commerce has reasonably determined to offset export subsidies against the AD cash deposit rate in inves-

[28] SolarWorld argues that evidence was fabricated solely for the purpose of Commerce's verification; Commerce concluded otherwise. *See* Trina Solar Verification Report at 24. Commerce verified this evidence as credible, *see* Trina Solar Verification Report at 24, although SolarWorld believes that this was in error. *See* SolarWorld Br. 27.

[29] Although 19 U.S.C. § 1677e(a)–(b) and 19 C.F.R. § 351.308(a)–(c) each separately provide for the use of facts otherwise available and the subsequent application of an adverse inference to those facts, Commerce uses the shorthand term "adverse facts available" or "AFA" to refer to Commerce's use of such facts otherwise available with an adverse inference. *See*, *e.g.*, Final Decision Memo at 6 (discussing the circumstances justifying Commerce's application of AFA to respondents who failed to provide information that was in its possession).

tigations because Commerce concludes that including estimated the AD and CVD rates in the cash deposit rate would result in double-application for the same act. *See* Def.'s Resp. Br. 38–40. Commerce's practice of offsetting the AD cash deposit rate by an export subsidy, even one based on AFA, in the companion CVD investigation is reasonable because Commerce's practice is calculated to ensure that the adverse inference is applied only once.

If Commerce issues a final determination that subject merchandise is being, or is likely to be sold in the United States at less than fair value, Commerce orders the posting of a cash deposit for each entry of the subject merchandise based on an amount based on the estimated weighted average dumping margin. *See* 19 U.S.C. §§ 1673d(a)(1), 1673(c)(1)(B)(i)–(ii). Neither the statute nor Commerce's regulations otherwise define how the cash deposit is to be calculated in an investigation. Commerce has discretion to establish a reasonable practice to calculate a cash deposit rate in investigations where there is no clear statutory directive. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009).[30]

Here, Commerce initially calculated a cash deposit rate and then offset that rate by the amount of the export subsidy calculated in the concurrent CVD investigation. *See* Final Decision Memo at 38. Commerce explains that, although the statute does not direct it to reduce the cash deposit rate as it does direct the export price to be increased in an AD administrative review, offsetting the AD cash deposit rate by the export subsidy in the concurrent CVD investigation seeks to avoid the application of AD duties on reduced export prices that result from the same export subsidy that has been remedied by the CVD rate.[31] *See id.* at 39. Commerce justifies relying on this practice even where the export subsidy rate is based on AFA because the offset ensures that, like the offset of a calculated export subsidy CVD rate, the adverse inference is applied only once in the form of an increased

[30] However, in an AD administrative review, the price used to establish export price and constructed export price must be increased by "the amount of any countervailing duty imposed on the subject merchandise . . . to offset an export subsidy." 19 U.S.C. § 1677a(c)(1)(C).

[31] Commerce interprets 19 U.S.C. § 1677a(c)(1)(C) to require that it offset export price in its AD margin calculation in an administrative review by the amount of the export subsidy actually assessed in the countervailing duty proceeding. *See* Final Decision Memo at 38. Although Commerce recognizes that cash deposit rates in investigations are estimates of AD duties, and consequently serve different purposes than assessment rates in that they are subject to modification and only become final where administrative reviews are not requested, Commerce states that cash deposits are, in most respects, "calculated in the same manner as assessment rates determined in reviews." *Id.* at 38–39. Since Commerce does not assess AD duties on the portion of the AD margin attributed to export subsidies under 19 U.S.C. § 1677a(c)(1)(C), Commerce concludes there is no reason to require a cash deposit to secure the amount attributable to the export subsidy. *See id.* at 39.

CVD rate and also through higher AD duties. *Id.* Commerce's determination that the AFA export subsidy serves as a substitute for a calculated export subsidy is reasonable. Commerce's practice in investigations is also reasonable because fosters consistency in investigations and administrative reviews. *See id.* at 39; *see also*19 U.S.C. § 1677a(c)(1)(C) (providing that the price used to establish export price and constructed export price in calculating a dumping margin in an administrative review shall be increased by the amount of any countervailing duty imposed on the subject merchandise to offset an export subsidy). Commerce reasonably exercised its discretion to offset the AD margin by the AFA CVD rate to avoid estimating duties in the AD cash deposit rate that are reflected in the CVD cash deposit. *See id.*

SolarWorld's claim that Commerce's practice neutralizes the adverse effect of the AFA rate mischaracterizes the nature of the AFA rate.[32] *See* SolarWorld Br. 32. An export subsidy calculated using AFA reflects Commerce's determination of the amount of an export subsidy that actually benefited the subject merchandise. *See* 19 U.S.C. § 1677e(b)(1)(A) (stating that Commerce may use an adverse inference to reach the "applicable determination"). In calculating an AFA rate, Commerce is guided not only by creating a proper deterrent to noncooperation, *see* 19 U.S.C. § 1677e(b), but also by the corroboration requirement in 19 U.S.C. § 1677e(c), which requires that the AFA rate "be a reasonably accurate estimate of the respondent's actual rate." *See F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000). It follows from the requirement that "the AFA rate must be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance," *see Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319, 1323 (Fed. Cir. 2010) (quoting *De Cecco*, 216 F.3d at 1032), that an export subsidy based on AFA serves as a substitute for a calculated rate. SolarWorld emphasizes that "when the export subsidy margin is determined on the basis of an adverse inference, the relationship between the export subsidy margin and the 'actual' benefits received breaks down." SolarWorld Reply Br. 19. However, although the statute emphasizes two considerations that factor in arriving at an AFA rate, the product of the balancing of deterrence and accuracy is only one AFA rate for the export subsidy program in question. Therefore, Commerce cannot avoid double-

[32] Specifically, SolarWorld points out that the practice simultaneously decreases the AD rate by the full AFA rate calculated for the export subsidy, so the deterrent effect of the adverse inference on respondents combined AD and CVD cash deposit rate is neutralized. *See* SolarWorld Br. 32.

counting the export subsidy (*i.e.*, including the export subsidy in the CVD cash deposit rate while also including it in the AD cash deposit rate) without also undermining the deterrent effect of the adverse inference (*i.e.*, reducing the combined cash deposit rate). [33] Commerce is in the best position to balance deterrence with assuring a reasonable margin, *cf. De Cecco*, 216 F.3d at 1032, and the balance favored by Commerce here is reasonable. Therefore, Commerce's practice of offsetting the entire export rate calculated through AFA is reasonable and not contrary to law.

CONCLUSION

For the foregoing reasons, the court sustains Commerce's determinations: 1) that Mustek's financial statements constitute the best available information to value respondents' general expenses and profit; 2) that import data for articles covered under subheading 7604, HTS, constitutes the best available information for valuing respondents' aluminum frames; 3) to accept, for purposes of adjusting Trina Solar's U.S. prices, the information provided by Trina Solar during verification related to quality insurance expenses covering the entire POI; and 4) that respondents' AD cash deposit rate should be offset by the full amount of export subsidy calculated based on AFA in the companion CVD investigation.

This matter is remanded to Commerce for reconsideration or further explanation of the agency's decision to collapse the ReneSola entities with the Jinko entities, treating these companies as a single entity, and of the agency's decision to use South African import data

[33] SolarWorld wrongly describes the basic economic theory underlying Commerce's offset practice as driven by the notion "that the respondent's export prices were lowered in exact correspondence to the export subsidy benefit." SolarWorld Br. at 21. Therefore, SolarWorld posits that the offset is unreasonable where the export subsidy is calculated through AFA because the AFA rate is not an exact approximation of the benefit received by the respondent. *See id.* However, Commerce states only that its offset practice stems from the presumption that "the subsidy contributed to lower-priced sales of subject merchandise in the United States market" and that the subsidy are presumed to be "related." Final Decision Memo at 38. It is reasonably discernible that Commerce did not mean to imply that its offset practice is premised on a reduction in export price that precisely corresponds to the value of the benefit provided to respondents by the export subsidy. Moreover, any such inference is belied by Commerce's reference to its final determination in *Galvanized Steel and Wire From the People's Republic of China*, which describes Commerce's offsetting practice for the AD cash deposit rate as premised only on the concept that domestic subsidies had a symmetrical effect upon export and domestic prices. *See id.* at 39 (citing *Galvanized Steel and Wire From the People's Republic of China*, 77 Fed. Reg. 17,430 (Mar. 26, 2012) and accompanying Antidumping Duty Investigation of Galvanized Steel Wire from the People's Republic of China: Issues and Decision Memorandum for the Final Determination at 18, A-570–975, (Mar. 19, 2012) *available at* http://ia.ita.doc.gov/frn/summary/prc/2012–7212–1.pdf (last visited May 15, 2017) (explaining that there is no basis for concluding that 19 U.S.C. § 1677a(c)(1)(C) was based on an assumption that the effect of subsidies was to cause a pro rata reduction in export prices, only that domestic subsidies had a symmetrical effect upon export and domestic prices)).

under subheading 8548.10, HTS, to value Trina Solar's by-product offset for scrapped solar cells when calculating normal value. In accordance with the foregoing, it is hereby

ORDERED that Commerce's 1) determination to collapse the ReneSola entities with the Jinko entities, thereby treating these companies as a single entity, and 2) determination to use South African import data under subheading 8548.10, HTS, to value respondents' offsets for scrapped solar cells when calculating normal value, are remanded for further consideration consistent with this opinion. Commerce shall file its remand determination with the court within 45 days of this date; and it is further

ORDERED that the parties shall have 30 days thereafter to file comments on the remand determination; and it is further

ORDERED that the parties shall have 15 days thereafter to file a reply to comments on the remand determination.

Dated: May 18, 2017
New York, New York

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

Slip Op. 17–63

SHIJIAZHUANG GOODMAN TRADING CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and FRESH GARLIC PRODUCERS ASSOCIATION, et al., Defendant-Intervenors.

Before: Timothy C. Stanceu, Chief Judge
Court No. 14–00101

[Sustaining a determination issued in response to court order in an antidumping duty new shipper review]

Dated: May 26, 2017

Robert T. Hume, Hume & Associates, LLC, of Taos, NM, for plaintiff Shijiazhuang Goodman Trading Co., Ltd.

Richard P. Schroeder, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant United States. 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 *Khalil N. Gharbieh*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Michael J. Coursey, Kelley Drye & Warren LLP, of Washington D.C., for defendant-intervenors Fresh Garlic Producers Association, Vessey and Company, Inc., The Garlic Company, Christopher Ranch, L.L.C., and Valley Garlic. With him on the brief were *John M. Herrmann II* and *Joshua R. Morey*.

OPINION

Stanceu, Chief Judge:

In this action, plaintiff contested a decision by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"), to rescind an administrative "new shipper" review ("NSR") of an antidumping duty order on fresh garlic from the People's Republic of China ("China" or the "PRC"). *Fresh Garlic from the People's Republic of China: Final Rescission of Antidumping Duty New Shipper Review of Shijiazhuang Goodman Trading Co., Ltd.*, 79 Fed. Reg. 22,098 (Int'l Trade Admin. Apr. 21, 2014) (*"Rescission"*).

Plaintiff, Shijiazhuang Goodman Trading Co., Ltd. ("Goodman"), a Chinese garlic exporter, requested the new shipper review according to section 751(a)(2)(B) of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1675(a)(2)(B), so that it could obtain an individually-determined antidumping duty margin on its garlic exports to the United States.[1] In a previous opinion, *Shijiazhuang Goodman Trading Co. v. United States*, 40 CIT __, 172 F. Supp. 3d 1363 (2016) (*"Goodman I"*), the court ruled on various grounds that the Department's decision to rescind the review was contrary to law.

Before the court is the determination Commerce issued in response to the court's order in *Goodman I* ("Remand Redetermination"). Under protest, Commerce has reversed its decision to rescind the new shipper review. Commerce has completed the review and assigned Goodman a dumping margin of $0.08 per kilogram. The court sustains the Department's new determination.

I. BACKGROUND

Background on this case is presented in *Goodman I*, 40 CIT at __, 172 F. Supp. 3d at 1366–68, and is summarized briefly and supplemented herein.

A. Administrative Proceedings

In early 2013, Commerce initiated the new shipper review at Goodman's request. *Fresh Garlic from the People's Republic of China: Initiation of Antidumping Duty New Shipper Review; 2011–2012*, 78 Fed. Reg. 88 (Int'l Trade Admin. Jan. 2, 2013) ("*Initiation*"). The review covered the period of November 1, 2011 through October 31, 2012. *Id* at 89.

In the preliminary results of the new shipper review ("Preliminary Results"), Commerce concluded that Goodman met the requirements

[1] Statutory citations herein are to the 2012 edition of the United States Code, and citations to regulations are to the 2014 edition of the Code of Federal Regulations.

for a new shipper review and was entitled to an individually-determined antidumping duty margin based on demonstrated independence from the government of the PRC. *Fresh Garlic From the People's Republic of China: Preliminary Results of New Shipper Review of Shijiazhuang Goodman Trading Co., Ltd.*, 78 Fed. Reg. 67,112 (Int'l Trade Admin. Nov. 8, 2013). Departing from its normal practice of expressing weighted-average dumping margins in ad valorem terms, Commerce preliminarily determined a per-unit dumping margin for Goodman, which was $0.44 per kilogram. *Id.* at 67,112. Reversing its position, Commerce issued its rescission of the new shipper review ("Rescission") on April 21, 2014. *Rescission*, 79 Fed. Reg. at 22,098. The result was that Goodman's merchandise was subjected to a cash deposit requirement at the rate Commerce applied to exporters that had not demonstrated independence from the PRC government, which was $4.71 per kilogram. *Id.* at 22,099.

The period of review ("POR") for the requested new shipper review, November 1, 2011 through October 31, 2012, corresponded to the period of review for the eighteenth periodic administrative review of the Order, the final results of which Commerce issued on June 30, 2014, 70 days after the Rescission contested in this case. *Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 18th Antidumping Duty Administrative Review; 2011–2012*, 79 Fed. Reg. 36,721 (Int'l Trade Admin. June 30, 2014) (*"Final Results"*). After stating in the memorandum accompanying the Rescission that "we are considering Goodman's entitlement to a separate rate in that review," Commerce, in the final results of the eighteenth administrative review, rescinded the eighteenth administrative review as to Goodman on the same ground on which it ruled in the Rescission. *Decision Mem. for the Final Results in the Antidumping Duty New Shipper Review of Fresh Garlic from the People's Republic of China: Shijiazhuang Goodman Trading Co., Ltd.*, A-570–831, APR 11–12, at 9 (Int'l Trade Admin. Apr. 3, 2014) (Admin.R.Doc. No. 190), available at http://enforcement.trade.gov/frn/summary/prc/2014–09015–1.pdf (last visited May 22, 2017) (*"Rescission Decision Mem."*); *Final Results*, 79 Fed. Reg. at 36,723.

In the eighteenth review, Commerce retained the PRC-wide rate of $4.71 per kilogram, the rate it continued to apply to Goodman, and determined a rate of $1.82 per kilogram for the respondents in that review that were not individually examined but qualified for a rate separate from the PRC-wide rate. *Final Results*, 79 Fed. Reg. at 36,723. Before this Court, numerous parties, including Goodman, contested the final results of the eighteenth review; that litigation is

ongoing. *See*, *e.g.*, *Fresh Garlic Producers Ass'n v. United States*, 39 CIT __, 121 F. Supp. 3d 1313 (2015).

B. Proceedings before the Court

Goodman brought this action to contest the Rescission on April 21, 2014. Summons, ECF No. 1; Compl., ECF No. 6. The Fresh Garlic Producers Association and its individual members, U.S. garlic producers Christopher Ranch, L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc. (together, the "defendant-intervenors"), intervened on behalf of defendant. Consent Mot. for Leave to Intervene as of Right (May 21, 2014), ECF No. 8 ("Consent Mot. to Intervene"); Order (May 21, 2014), ECF No. 12. Defendant-intervenors are domestic garlic producers that participated in the new shipper review. *See* Consent Mot. to Intervene 2.

On August 22, 2014, Goodman moved for judgment on the agency record. Mot. of Pl. Shijiazhuang Goodman Trading Co., Ltd. for J. on the Agency R. and Mem. in Supp. (Aug. 22, 2014), ECF Nos. 21–22 ("Goodman's Br."). Defendant and defendant-intervenors opposed Goodman's motion. Def.'s Mem. in Opp. to Pl.'s Rule 56.2 Mot. for J. upon the Agency R. (Nov. 6, 2014), ECF Nos. 30–31 ("Def.'s Br."); Def.-Intervenors' Response in Opp. to Pl.'s Mot. for J. on the Agency R. (Nov. 6, 2014), ECF Nos. 32–33 ("Def.-Int.'s Br."). Goodman filed its reply on December 10, 2014. Pl.'s Reply to the Responses of Def. and Def.-Intervenors to Pl.'s Rule 56.2 Mot. for J. upon the Agency R. (Dec. 10, 2014), ECF Nos. 36–37 ("Goodman's Reply Br.").

The court held oral argument on May 21, 2015, ECF No. 43, and issued its previous opinion and order on March 22, 2016. In response, Commerce issued the Remand Redetermination on August 22, 2016. Final Results of Redeterm. Pursuant to Remand (Aug. 22, 2016), ECF Nos. 60–61 ("*Remand Redeterm.*"). Commerce announced, under "respectful protest, that Goodman's sales are *bona fide* and that the company is eligible for a NSR resulting in an individually-determined antidumping duty rate of $0.08/kg, modified and recalculated from the *Preliminary Results*." *Id.* at 1 (footnote omitted).

Goodman submitted comments on the Remand Redetermination on September 19, 2016. Comments on Commerce Dept.'s Final Results of Redeterm. Pursuant to Remand (Sept. 19, 2016), ECF No. 64 ("Goodman's Comments"). On September 21, 2016, defendant-intervenors also submitted comments on the Remand Redetermination. Def.-Intervenors' Comments on Dept.'s Redeterm. Pursuant to Court Order (Sept. 21, 2016), ECF Nos. 65–66 ("Def.-Intervenors' Comments"). Defendant filed a response to the comments on October 21, 2016.

Def.'s Resp. to Comments Regarding Remand Results (Oct. 21, 2016), ECF No. 68 ("Def.'s Resp."). Goodman supports the Remand Redetermination; the defendant-intervenors oppose it. *See* Goodman's Comments 1; Def.-Intervenors' Comments 3.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), under which the court reviews actions contesting the final results of an administrative review of an antidumping duty order brought under section 516A of the Tariff Act of 1930, 19 U.S.C. § 1516a(a)(2)(B)(iii). The court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of New York v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229 (1938).

B. The Department's Rescission of the New Shipper Review

In rescinding the new shipper review, Commerce concluded that the sales upon which Goodman sought an individually determined margin were not *bona fide* sales, finding the average unit values ("AUVs") and quantities in those sales, as determined by Commerce from Customs data on imports of garlic from the PRC during the POR, to be "atypical and, thus, commercially unreasonable." *Goodman I*, 40 CIT at __, 172 F. Supp. 3d at 1371 (quoting *Rescission Decision Mem.* 4). Commerce had stated in the memorandum accompanying the Preliminary Results that in determining whether a sale is *bona fide* it "considers, *inter alia*, such factors as: (1) the timing of the sale; (2) the price and quantity; (3) the expenses arising from the transaction; (4) whether the goods were resold at a profit; and (5) whether the transaction was made on an arm's-length basis." *Decision Mem. for the Preliminary Results of Antidumping Duty New Shipper Review of Fresh Garlic from the People's Republic of China: Shijiazhuang Goodman Trading Co., Ltd.*, A-570–831, ARP 11–12, at 3 (Int'l Trade Admin. Nov. 4, 2013) (Admin.R.Doc. No. 141), available at http://enforcement.trade.gov/frn/summary/prc/2013–26861–1.pdf (last visited May 22, 2017) ("*Prelim. New Shipper Decision Mem.*") (footnote omitted); *see also Bona Fide Nature of the Sales in the Antidumping Duty New Shipper Review of Fresh Garlic from the People's Republic of China (PRC): Shijiazhuang Goodman Trading Co., Ltd.,* A-570–831, ARP 11–12, at 2 (Int'l Trade Admin. Nov. 4, 2013), ECF

No. 24–2 ("*Bona Fide Analysis Mem.*"). For the Preliminary Results, Commerce had concluded that each of its five factors supported a finding that the sales were *bona fide*. *Goodman I*, 40 CIT at __, 172 F. Supp. 3d at 1371. In rescinding Goodman's new shipper review, Commerce adhered to its preliminary results with respect to each of its five factors except the "price and quantity" factor, deciding that the four remaining factors did not indicate that Goodman's sales were not *bona fide*. *New Shipper Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China: Final Analysis of Shijiazhuang Goodman Trading Co., Ltd.*, A-570–831, ARP 11–12, at 9 (Int'l Trade Admin. Apr. 3, 2014), ECF No. 24–8 (*"Final Analysis Mem."*). As to the one factor upon which it made its decision, Commerce found Goodman's entry prices to be "exceptionally high in comparison to other entries of garlic during the POR" and that its entry quantities were lower than those in most other entries during the POR. *Goodman I*, 40 CIT at __, 172 F. Supp. 3d at 1372 (quoting *Rescission Decision Mem.* 4). In support of its decision to rescind the new shipper review, Commerce also inferred that a person employed by Goodman during the POR, identified as "Ms. Gao," who previously was employed by another garlic exporter in the PRC, conducted activities on behalf of Goodman related to those sales that were not solely, if at all, in Goodman's interests. *Id.* at 1372–73 (citing *Final Analysis Mem.)*. Commerce concluded that "[d]ue to the totality of circumstances, including price, quantity, and concerns regarding the relationship with another garlic exporter located in the PRC, as detailed in the Goodman Final Analysis Memorandum, the Department finds that Goodman's sales are not bona fide." *Rescission*, 79 Fed Reg. at 22,098 (footnote omitted).

C. The Court's Opinion and Order in Goodman I

In *Goodman I*, the court held that "Commerce has not based its ultimate decision to rescind the new shipper review on a consideration of the record evidence as a whole." *Goodman I*, 40 CIT at __, 172 F. Supp. 3d at 1379. The court noted that the Department's regulations provide that "'[t]he Secretary may rescind a new shipper review' if Commerce concludes that . . . 'there has not been an entry and sale to an unaffiliated customer in the United States of subject merchandise." *Goodman I*, 40 CIT at __, 172 F. Supp. 3d at 1370 (citing 19 C.F.R. § 351.214(f)(2)(i)). The court noted further that "[i]n applying § 351.214(f)(2)(i) in this and other new shipper review proceedings, Commerce has considered whether a reported sale is 'commercially reasonable, and therefore bona fide.'" *Id*. (citing *Prelim. New Shipper Decision Mem.*).

Goodman I concluded that "the analysis by which Commerce found that Goodman's prices were aberrational and not commercially reasonable failed to consider all relevant and probative record evidence" and that "[s]ubstantial evidence is not available on this record to support a finding that the quantities of Goodman's sales were, in the Department's words, 'aberrational' and not 'commercially reasonable.'" *Goodman I*, 40 CIT at __, 172 F. Supp. 3d at 1377. Additionally, the court decided that the Department's inference that "Ms. Gao's activities on behalf of Goodman in making the relevant shipments to the United States . . . were not conducted solely, if at all, in 'Goodman's interests," an inference upon which Commerce relied "in concluding that Goodman's sales were not 'commercially reasonable,'" was not based upon "record evidence or a finding based on record evidence." *Goodman I*, 40 CIT at __, 172 F. Supp. 3d at 1377–78. The court instructed Commerce to reconsider its rescission of the new shipper review and base its redetermination on the record as a whole. *Goodman I*, 40 CIT at __, 172 F. Supp. 3d at 1379.

D. The Department's Redetermination on Remand

In the Remand Redetermination, "the Department finds that Goodman's sales are *bona fide." Remand Redeterm.* 8. Commerce, "upon re-evaluation of the record evidence," found that "Goodman's prices do not appear to be illegitimate" and agreed with the court "that the low quantities are not in and of themselves 'aberrational.'" *Id.* at 3–6. Additionally, regarding the involvement of Ms. Gao, Commerce found that record evidence was "not adequate to support a non *bona fide* finding in light of the lack of evidence of an aberrational price or quantity." *Id*. at 7. The court concludes that substantial evidence supports the Department's determination that Goodman qualifies for a new shipper review. The Department's specific findings as to price, quantity, and the role of Ms. Gao are discussed below.

1. The Prices in Goodman's Sales

Commerce determined that the AUV on the four entries of Goodman's merchandise that were made during the POR was 1.8 times the AUV for all Chinese whole garlic entries during the POR. *See Remand Redeterm.* 4.[2] Commerce, in rescinding the new shipper review, concluded that the difference between the prices of Goodman's entries

[2] The AUV of Goodman's four entries were $2.67 per kilogram, $2.83 per kilogram, $2.83 per kilogram, and $3.16 per kilogram. *Goodman I*, 40 CIT at __, 172 F. Supp. 3d at 1374 n.8 (citing *New Shipper Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China: Final Analysis of Shijiazhuang Goodman Trading Co., Ltd.,* A-570–831, ARP 11–12, at 7 (Int'l Trade Admin. Apr. 3, 2014)). Further, "[t]he AUV for all whole garlic entries during the POR was $1.58/kg." compared to the weighted AUV of Goodman's four entries during the POR which was $2.85 per kilogram. *Id.*

and the AUV for all whole garlic entries during the POR "indicates that these entries were not typical of the sales Goodman will make in the future" and that the prices of Goodman's entries were "aberrational" and not "commercially reasonable." *Final Analysis Mem.* 7–8.

The court concluded in *Goodman I* that Commerce "failed to analyze certain record data that were relevant to, and indeed probative of, the issue of whether Goodman's prices were aberrational or commercially unreasonable." *Goodman I*, 40 CIT at __, 172 F. Supp. 3d at 1374–75. The court mentioned, for example, that Commerce did not address "the record data showing the prices at which Goodman purchased the subject garlic from the unrelated Chinese producer," which, the court noted, "are not comparable to the general AUV Commerce obtained from the Customs data." *Id.*, 40 CIT at __, 172 F. Supp. 3d at 1375. The record data showed "that the weighted average unit value for Goodman's purchases of the garlic from the unrelated producer was $2.52/kg., or nearly a dollar per kilogram higher than the AUV for all Chinese whole garlic inputs during the POR" and also showed "a weighted-average mark-up of $0.33/kg. ($2.85-$2.52), or 13%." *Id.*, 40 CIT at __, 172 F. Supp. 3d at 1375 n.9, n.10.

The Remand Redetermination states that "[w]ith respect to the purchase prices of garlic in the Chinese market, we continue to find those prices irrelevant for purposes of our antidumping analysis." *Remand Redeterm.* 4. Commerce explained that it does "not rely on prices within a non-market economy, so Goodman's purchase price in China does not provide a useful point for comparison." *Id.* at 5. The court disagrees with this reasoning because a price in a sale of garlic between a Chinese producer and an unrelated Chinese exporter, although the sale was made in China, still would be relevant to the issue of whether the exporter's resale price for that same garlic was aberrational or commercially unreasonable when compared to the prices of other garlic exported from China and imported into the United States. Nevertheless, the issue is moot because Commerce determined that Goodman's sale prices "were not aberrational, regardless of Goodman's purchase prices in the PRC." *Id.* at 11.

The court also concluded that Commerce, when comparing Goodman's prices to a POR-wide AUV for all imports of whole garlic from China, "failed to analyze record data showing that a significant increase in garlic prices occurred during the POR." *Goodman I*, 40 CIT at __, 172 F. Supp. 3d at 1375. The court observed that the Customs import data showed "that the AUV of garlic imports from China was markedly higher during the last eight months of the period of review than it had been during the first four months of that twelve-month period and that the AUV in the last five months, when Goodman's

sales and entries occurred, remained at that higher level." *Id.* (footnote omitted).

In its Remand Redetermination, Commerce stated that "it is not the Department's practice to normally match the entries by month within the POR because we have no information on the corresponding sales dates of the CBP entries, which could vary widely." *Remand Redeterm.* 4. Nevertheless, Commerce "compared Goodman's prices to the AUV of the last eight months of the POR" and found that the average price of Goodman's sales is "1.4 times higher than the AUV of the last eight months in the POR, as opposed to 1.8 times higher than the AUV for the entire POR." *Id.* (footnote omitted). Referring to Goodman's sales prices during July, August, and September 2012, Commerce concluded that "in accordance with the Court's directive, after examining this limited subset of entries, the Department has determined that Goodman's sales were within the range of many other-sales prices, and this supports a finding that the sales are not aberrational." *Id.* (footnote omitted).

Addressing a concern by the court concerning "an apparent anomaly presented by Customs entry data that itself appears to involve aberrational values for garlic," *Goodman I*, 40 CIT at __, 172 F. Supp. 3d at 1376, Commerce found that certain low value sales of a single exporter substantially decreased the AUV in the Customs data. *Remand Redeterm.* 5. In the context of these data, Commerce observed that Goodman's highest-price sale was not substantially higher than its next-highest-price sale and concluded that "when considering Goodman's higher-priced sales along with these lower-priced and otherwise legitimate market transactions, Goodman's prices do not appear to be illegitimate." *Id*. (footnote omitted).

Commerce also addressed the court's observation in *Goodman I*, 40 CIT at __, 172 F. Supp. 3d at 1376, that "Commerce did not address the possibility that its comparison of Goodman's prices with the weighted average unit value from the Customs data could have been affected by price variation due to bulb size." In response, Commerce stated in the Remand Redetermination as follows: "[T]he Department does not have a method of identifying bulb sizes for CBP entries to establish a relationship between size and price, but reason and the evidence available indicate that large bulbs can command higher prices in the market." *Remand Redeterm.* 5. Commerce added that "[s]ome record evidence also suggests that Goodman's garlic bulbs were at the high end of the garlic market, which may account for the higher prices." *Id.* (footnote omitted).

Although the court, as discussed above, does not agree entirely with the Department's analysis, it concludes that substantial record evi-

dence supports the finding Commerce reached as to the entry prices for Goodman's garlic during the POR. That finding, which Commerce reached after considering record evidence it did not address previously, is that those prices "do not appear to be illegitimate." *Remand Redeterm.* 5 (footnote omitted).

2. The Quantities in Goodman's Sales

In deciding to rescind the new shipper review, Commerce relied in part on its finding that the quantities in each of the four entries of Goodman's merchandise were smaller than the average quantity on the entries of garlic from the PRC shown in the Customs import data. As the court stated in *Goodman I*, "Commerce cited the Customs import data on Chinese garlic entries showing that the average quantity on Goodman's entries during the POR was less than half the average quantity for all entries of Chinese garlic during the period of review, which it described as the 'normal entry size.'" *Goodman I*, 40 CIT at __, 172 F. Supp. 3d at 1377. In *Goodman I*, the court held that "[s]ubstantial evidence is not available on this record to support a finding that the quantities of Goodman's sales were, in the Department's words, 'aberrational' and not 'commercially reasonable'" because "[t]he quantities on the four entries, while smaller than the average shown in the Customs import data, cannot be described truthfully as commercially insignificant or exceptional, whether considered individually or collectively." *Id.* (citation omitted). The court stated, further, that "in judging the quantities on the individual entries of Goodman's subject merchandise to be unacceptable because they are less than half of what Commerce considered to be the 'normal entry size,' Commerce unfavorably compared Goodman's quantities with a concept, i.e., 'normal entry size,' that it failed to ground in record evidence." *Id.*

In its Remand Redetermination, Commerce clarified that in using the term "normal entry size," it "was merely commenting on the extent to which Goodman's quantities were below the average entry size of garlic exporters from the PRC." *Remand Redeterm.* 6. Commerce stated that it "agrees that the low quantities are not in and of themselves 'aberrational,'" adding that "if there were other factors suggesting the absence of *bona fide* sales, then the below-average quantities would be more relevant." *Id.*

3. The Involvement of Ms. Gao

Commerce based its finding that Goodman's sales were not *bona fide* partly on an inference it drew regarding activities of Ms. Gao,

who was employed by Goodman during the POR and previously had been employed by another garlic exporter in the PRC, Hebei Golden Bird Trading Co., Ltd. ("Golden Bird"). As described in *Goodman I*, "Commerce stated in the Final Analysis Memorandum that it 'inferred' that a person employed by Goodman during the POR, whom Commerce identified as 'Ms. Gao,' conducted activities on behalf of Goodman 'in making the relevant shipments to the United States . . .' that were not conducted solely, if at all, in 'Goodman's interests.'" *Goodman I*, 40 CIT at __, 172 F. Supp. 3d at 1372 (quoting *Final Analysis Mem.* 8). "Commerce also expressed in the Decision Memorandum that 'the Department has concerns with regards to the reliability of responses provide [*sic*] by Goodman with regards to Ms. Gao's employment at Golden Bird.'" *Id.*, 40 CIT at __, 172 F. Supp. 3d at 1377 (quoting *Rescission Decision Mem* 4).

Regarding the Department's inference, the court opined in *Goodman I* that "an inference is not a finding, and this particular inference is vague and conclusory." *Id.*, 40 CIT at __, 172 F. Supp. 3d at 1378. The court added that "[a]n agency may draw a reasonable inference so long as it is drawn from record evidence or a finding based on record evidence, but this inference is drawn from neither." *Id.* The court also concluded that "[t]he Department's expressed 'concern' about the reliability of Goodman's questionnaire responses is also vague, and Commerce fails to link its concern to specific information Goodman provided during the new shipper review that Commerce deems unreliable or that could be shown to be relevant to the question of whether the prices and quantities in Goodman's sales were aberrational." *Id*.

In its Remand Redetermination, Commerce concluded that "there is no additional evidence on the record that would allow the Department to further develop the inference we stated in the *Final Rescission." Remand Redeterm.* 15. Commerce mentioned "an internal contradiction" in a declaration by Ms. Gao concerning her previous employment but further stated that the "contradiction is all that is certain on this point" and that "[g]iven the Department's revised findings concerning Goodman's sales prices and quantities, we now also revise our inference, finding that the noted discrepancy in Ms. Gao's contradictory declaration is insufficient to support a conclusion that Goodman's sales were not *bona fide." Id.* at 15–16.

E. The Court Does Not Find Merit in Defendant-Intervenors' Objections to the Remand Redetermination

Defendant-intervenors raise two objections to the Remand Redetermination. Maintaining that "the evidence identified by the Court as

detracting from the agency's decision did not require a reversal of the Department's final results," they argue, first, that Commerce again should have found Goodman's sales not to be *bona fide* transactions and, on that basis, again rescinded the new shipper review. Def.-Intervenors' Comments 3. Second, they argue in the alternative that the AUV of the highest priced of the three entries of Goodman's garlic "is aberrational and should have been disregarded by the Department in calculating an individual antidumping rate for Goodman." *Id.*

Defendant-intervenors' first argument is largely an attempt to re-argue issues the court decided in *Goodman I*. Defendant-intervenors raised this argument in their comments on a draft version of the remand redetermination (which comments they incorporate by reference in their comments to the court), but Commerce rejected the argument upon issuing the Remand Redetermination. *Id.* at 2. They point to their having argued in their comments on the draft that they "explained why the evidence identified by the Court as detracting from the agency's decision did not require a reversal of the Department's final results and why additional record evidence supported the Department continuing to find that Goodman's sales are not *bona fide* transactions that can serve as the basis for an individually-determined antidumping margin." *Id.* This argument sidesteps the question now before the court, which is not whether Commerce on this record permissibly could have reached the outcome defendant-intervenors advocate, i.e., rescission of the new shipper review, but whether substantial evidence supports the decision Commerce actually reached in the Remand Redetermination. Defendant-intervenors fail to make the case that Commerce lacked an evidentiary basis to conclude that the Goodman's sales were *bona fide* and, based on that finding, to complete the new shipper review. As the court discussed above, the record contains substantial evidence to support the findings the Remand Redetermination made "upon re-evaluation of the record evidence" that the prices "do not appear to be illegitimate" and that the quantities in the entries are not "aberrational," *Remand Redeterm.* 3–6, and also the finding that the record evidence as to the activities of Ms. Gao is "not adequate to support a non *bona fide* finding in light of the lack of evidence of an aberrational price or quantity," *id.* at 7.

On the issue of prices, which was the principal reason Commerce found Goodman's sales not to be *bona fide* in the Rescission, Commerce concluded that the substantially lower differential of 1.4 between Goodman's prices and the AUV in the Customs data (based on an eight-month base period) when compared to a differential of 1.8 (based on a twelve-month period) "along with the presence of certain

low-value sales that substantially decrease the AUV and the possibility that Goodman's bulb sizes were at the high end of the garlic market, lead us to a different conclusion about the *bona fide* nature of Goodman's sales price." *Id.* at 11. Defendant-intervenors maintain that the differential of 1.4 is evidence that Goodman's prices "are unlikely to be predictive of Goodman's future sales prices," Def.-Intervenors' Comments Attach. 1 at 7, but this argument fails to show that Commerce impermissibly found the sales to be *bona fide* based on the record evidence considered on the whole. They also argue that the record did not contain evidence establishing that Goodman's garlic was resold in the United States at a profit, which lack of evidence they attribute to a failure by Goodman and its U.S. customer to make an adequate record. Def.-Intervenors' Comments Attach. 1 at 10–11. They even go so far as to suggest, without a factual basis, that there was a failure on the part of Goodman to cooperate in the proceeding. *Id.* The lack of evidence of resale at a profit, which Commerce did not attribute to a failure of Goodman to cooperate in responding to the Department's requests for information, does not invalidate the Department's finding, based on the evidence the record did contain, that Goodman's sales were *bona fide*.

In summary, the court must reject defendant-intervenors' first argument because the record considered on the whole, including the evidence Commerce did not address originally, contains substantial evidence to support the Department's determination that Goodman qualifies for a new shipper review based on the sales and entries Commerce analyzed in the Remand Redetermination.

Defendant-intervenors' alternative argument that Commerce should have excluded Goodman's highest-priced entry from the calculated margin also rests on the invalid premise that the record evidence required Commerce to take such a step. Commerce considered this argument in the Remand Redetermination and rejected it, noting that the price in the sale at issue was not significantly higher than the next highest-priced sale and did not deviate from the mean as much as "a substantial number of transactions clustered at the low end of the dataset" deviated from the mean. *Remand Redeterm.* 13. This specific evidence, together with the evidence on the record as a whole, supported the Department's finding that this sale, like the other sales Commerce analyzed, was *bona fide*.

F. The Court Sustains the Department's Individually-Determined Margin of $0.08 per kilogram for Goodman

After determining that Goodman's sales were *bona fide*, Commerce calculated an individually-determined dumping margin for Goodman

of $0.08 per kilogram. *Remand Redeterm.* 1. Commerce addressed comments raised in case briefs and rebuttal briefs during the new shipper review regarding the preliminarily-calculated $0.44-per-kilogram margin and made certain adjustments to the surrogate values, resulting in the $0.08-per-kilogram margin. Goodman supports this determination, and other than their objection that the highest-priced entry should have been excluded, defendant-intervenors raised no objections to the Department's margin calculation, which the court sustains.

III. CONCLUSION

For the reasons discussed above, the court concludes that substantial evidence on the record supports the Department's determination that Goodman's sales were *bona fide* and that Goodman therefore is eligible for a new shipper review and for an individually-determined dumping margin of $0.08 per kilogram. Judgment will enter accordingly.

Dated: May 26, 2017
New York, New York

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

Slip Op. 17–64

INTERNATIONAL FIDELITY INSURANCE CO., Plaintiff, v. UNITED STATES, Defendant.

Before Richard K. Eaton, Judge
Court No. 12–00064

[Plaintiff's motion for summary judgment is denied and defendant's cross-motion for summary judgment is granted.]

Dated: May 30, 2017

Taylor Pillsbury, Meeks, Sheppard, Leo & Pillsbury, of Newport Beach, CA, for the plaintiff. With him on the brief was *Michael B. Jackson, Jr.*

Amy M. Rubin, Assistant Director, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for the defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, and *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC. Of Counsel on the brief was *Chi S. Choy*, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection, of New York, NY.

OPINION

Eaton, Judge

Before the court is plaintiff International Fidelity Insurance Company's ("plaintiff" or "International Fidelity") motion for summary judgment challenging United States Customs and Border Protection's ("Customs") decision to extend the liquidation period for four entries of textiles imported by Family Warehouse, Inc. ("Family Warehouse").[1] *See* Pl.'s Mem. Supp. Mot. Summ. J., ECF No. 24 ("Pl.'s Br."); Pl.'s Mem. Resp. Opp'n Def.'s Cross-Mot. Summ. J. ("Pl.'s Resp. Br."). Specifically, International Fidelity argues that Customs unlawfully extended the liquidation period for the entries by "unreasonably delay[ing] its investigation" by "long periods of inaction . . . before [it] acted or requested further information." *See* Pl.'s Br. 13. Because, plaintiff insists, the extensions were unreasonable, the entries should be found to have been deemed liquidated under 19 U.S.C. § 1504(d) (2006).[2] Pl.'s Br. 1, 9.

The United States ("defendant" or "the Government"), on behalf of Customs, cross-moves for summary judgment, claiming that the entries were not deemed liquidated and asserting that Customs' liquidation extensions did not abuse the agency's discretion, in light of Customs' responsibility to make accurate verifications of North American Free Trade Agreement ("NAFTA") claims. *See* Def.'s Mem. Supp. Cross-Mot. Summ. J., ECF No. 33 ("Def.'s Br.") 8; Def.'s Reply Pl.'s Resp., ECF No. 38 ("Def.'s Reply Br.").

The court has jurisdiction under 28 U.S.C. § 1581(a) (2012), which provides that "[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under [19 U.S.C. § 1515]."

Because plaintiff points to no record evidence demonstrating that Customs abused its discretion by extending any period for liquidation, and Customs has cited to record evidence showing that the extensions were within its discretion, plaintiff's motion for summary judgment is denied, and defendant's cross-motion for summary judgment is granted.

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[1] The entries consisted of two entries of poketin bleached woven fabric (entry numbers 726–1307217–1 and 726–1307218–9) and two entries of poplin unbleached woven fabric (entry numbers 726–1307052–2 and 726–1307053–0).

[2] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition, and any applicable supplements.

BACKGROUND

The facts described below have been taken from the parties' statements of undisputed material facts. *See* Pl.'s Revised USCIT R. 56.3(a) Statement of Undisputed Material Facts Supp. Mot. Summ. J., ECF No. 35–1 ("Pl.'s Statement"); Def.'s USCIT R. 56.3(a) Statement of Undisputed Material Facts Supp. Cross-Mot. Summ. J., ECF No. 33 ("Def.'s Statement"); Def.'s Resp. Pl.'s Statement, ECF No. 38–1 ("Def.'s Resp. Statement").[3] Citation to the record is provided where a fact, although not admitted in the parties' papers, is uncontroverted by record evidence.

Plaintiff served as the surety for the duties owed on entries made by U.S. importer Family Warehouse of poketin bleached woven fabric and poplin unbleached woven fabric.[4] Between July 30, 2007, and January 7, 2008, Family Warehouse imported thirty-three entries of various fabrics through the Port of Laredo, Texas, claiming, on its entry summaries, that the goods qualified for duty-free treatment under NAFTA as "originating goods" from Mexico.[5] Decl. of John L.

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[3] In its papers, defendant claims that plaintiff's initial brief did not comply with USCIT Rule 56.3(a), which now provides

> On any motion for summary judgment filed pursuant to Rule 56, the factual positions described in Rule 56(c)(1)(A) must be annexed to the motion in a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried. Failure to submit this statement may constitute grounds for denial of the motion.

USCIT R. 56.3(a). Defendant argues that plaintiff's motion was not in compliance because it not only included "argument and/or editorial characterizations of asserted facts," but made no attempt to provide evidentiary citations for some of its factual assertions and failed to identify any material facts for which there is no genuine issue to be tried. *See* Def.'s Br. 1–2. Defendant also notes that in plaintiff's reply brief, plaintiff failed to comply with 56.3(b), which requires a party opposing such motion to respond to the moving party's 56.3(a) submission with "correspondingly numbered paragraphs responding to the numbered paragraphs in the statement of the movant . . . ." USCIT R. 56.3(b).

Plaintiff answers by noting that USCIT R. 56.3(a) was not in effect until July 1, 2015, a date after plaintiff's June 15, 2015 motion was filed. Pl.'s Resp. Br. 2. Defendant responds, however, that because of the close proximity to the change in the rule and the court's announcement of the rule, plaintiff was on notice of the need to comply. Def.'s Reply Br. 1. Because plaintiff (1) was in compliance with the rule at the time it submitted its papers; (2) submitted a revised rule 56.3(a) statement of facts compliant with the amendment; and (3) defendant has not demonstrated any prejudice, the court looked to Pl.'s Statement and Def.'s Statement for factual information.

[4] The subject merchandise in dispute is "poketin bleached woven fabric (90 percent polyester/10 percent cotton) imported in Entry Nos. 726–1307217–1 and 726–1307218–9" as well as "unbleached poplin woven fabric (100 percent cotton) imported in Entry Nos. 726–1307052–2 and 726–1307053–0." Decl. of John L. Amaya (Nov. 12, 2015) ¶ 9, ECF No. 33–1.

[5] Provisions of NAFTA were enacted into law on December 8, 1993, through the North American Free Trade Agreement Implementation Act, codified in 19 U.S.C. § 3312, for the purpose of further promoting the free flow of goods between the United States, Canada, and Mexico. *See Corrpro Companies, Inc. v. United States*, 433 F.3d 1360, 1362 (Fed. Cir. 2006). To accomplish this goal, the agreement provides for the elimination of most tariffs collected on goods traded between the three countries. *Id.* Preferential tariff treatment, however, is not automatic, and an importer must make a written declaration that the goods qualify for

Amaya (Nov. 12, 2015) ¶ 6, ECF No. 33–1 ("Amaya Decl."); Def.'s Statement ¶ 5. Of the thirty-three total entries made by Family Warehouse, four are at issue in this action two entries of poketin bleached woven fabric (entry numbers 726–1307217–1 and 726–1307218–9 (together, "the Poketin Entries")), which entered the United States on July 31, 2007, and two entries of poplin unbleached woven fabric (entry numbers 726–1307052–2 and 726–1307053–0 (together, "the Poplin Entries")), which entered the United States on July 30, 2007. Def.'s Statement ¶ 2; Pl.'s Br., Ex. A-D. Plaintiff secured the duties owed on these entries by issuing four single transaction bonds to the importer,[6] as principal, for amounts nearly equal to the value entered for each entry. *See* Compl. ¶¶ 7, 8, 19.

On February 2, 2008, shortly after the importation of the last of Family Warehouse's thirty-three entries of fabric claiming duty-free treatment, Customs issued its first notice of extension, thereby giving it an additional year from the final date of the initial liquidation period to verify the country of origin and ultimately liquidate the subject entries.[7] *See* Def.'s Resp. Pl.'s Req. Admis. No. 9; 19 U.S.C. § 1504(b)(1); 19 C.F.R. § 159.12(a). Thus, the first notice of extension gave Customs until July 31, 2009, to liquidate the Poketin Entries and until July 30, 2009, to liquidate the Poplin Entries.[8] On April 11,

NAFTA treatment based on a "complete and properly executed original Certificate of Origin . . . ." 19 C.F.R. § 181.21(a) (2007). To substantiate the written declaration, Customs may initiate a verification process to determine whether a good is entitled to preferential tariff treatment based on its country of origin. 19 C.F.R. § 181.72. Following completion of the verification process, Customs will issue a written determination to the exporter or producer making the NAFTA claim. 19 C.F.R. § 181.75(a).

Pursuant to 19 C.F.R. § 181.72, Customs may initiate the verification procedure by issuing a questionnaire or verification letter requesting information from the exporter or producer. 19 C.F.R. § 181.72(a)(3). The response—or lack of response—to these verification letters provides Customs with a basis for making a proper determination on whether NAFTA treatment is appropriate.

[6] Customs was the beneficiary of the bonds. *See generally* 19 C.F.R. § 113.62; *see also Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 34 CIT 294, 314, 700 F. Supp. 2d 1330, 1348 (2010), *aff'd in relevant part*, 672 F.3d 1041 (Fed. Cir. 2012) ("The principal and surety are jointly liable to Customs . . . in the event of default of the obligation to deposit estimated duties." (citing 19 C.F.R. § 113.62(*l*)(4) (2009)); *Questions and Answers on CBP Bonds*, U.S. CUSTOMS AND BORDER PROTECTION, https//www.cbp.gov/sites/default/files/documents/q_and_a_bonds_3.doc *available at* https//www.cbp.gov/document/faqs/questions-and-answers-cbp-bonds (last visited this date); Mark K. Neville, Jr., INTERNATIONAL TRADE LAWS OF THE UNITED STATES, ch. 9, ¶ 9.06[3] (2015) ("The principal [under a customs bond] is the party who takes out the bond (e.g., the importer of record). The surety is typically the insurance company that underwrites the debt. Finally, CBP is the third-party beneficiary of the principal/surety contract.").

[7] Under 19 U.S.C. § 1504(a), Customs initially had one year from the date of entry to liquidate the subject merchandise. Thus, without lawful extensions, the last day to liquidate the Poketin Entries would have been July 31, 2008, and the last day to liquidate the Poplin Entries would have been July 30, 2008.

[8] Because 19 C.F.R. § 159.12(a) allows Customs to extend the period by one-year increments, the new liquidation dates fell on the second anniversary of the subject merchandise's entry into the United States.

2009, Customs issued its second notice of extension for the Poketin Entries, giving it until July 31, 2010, to liquidate those entries. On July 25, 2009, Customs issued its second notice of extension for the Poplin Entries, giving it until July 30, 2010, to liquidate those entries.[9] *See* Def.'s Resp. Pl.'s Req. Admis. No. 9. The reason given for making these extensions was that Customs needed more time to both "obtain information" and "await[] delinquent responses to its requests for information."[10] Def.'s Resp. Pl.'s Req. Admis. Nos. 8, 14, 15. The Poplin Entries and one of the Poketin Entries (entry number 726–1307217–1) were liquidated on June 18, 2010. One of the Poketin Entries (entry number 726–1307218–9) was liquidated on July 16, 2010. Thus, all four entries were liquidated prior to the expiration of the second extension period. *See* Def.'s Resp. Pl.'s Req. Admis. No. 9; Compl. ¶ 28. For clarity, the details of the proceedings are discussed separately based on each entry's fabric.

I. THE POKETIN ENTRIES

The Poketin Entries entered the United States on July 31, 2007. As will be discussed hereafter, Customs did not immediately take action on the entries, but waited until all thirty-three Family Warehouse entries were made.[11] Thereafter, Customs sent a verification letter to Textiles Raamsa S.A. de C.V. ("Textiles Raamsa") seeking to confirm the poketin fabric's country of origin. Textiles Raamsa was the company claimed on some of Family Warehouse's entry papers to be the Mexican producer of that fabric. *See* Amaya Decl. ¶¶ 10–12. On February 2, 2008, as Customs' initial investigations were still underway, it extended the liquidation period for the first time. The parties agree that the reason Customs extended the time for liquidation was to "await[] delinquent responses to its requests for information." Pl.'s

[9] These dates represent the third anniversary of the subject merchandise's entry into the United States.

[10] Under 19 C.F.R. § 159.12(a)(i), "[t]he port director may extend the 1–year statutory period for liquidation for an additional period not to exceed 1 year if . . . [i]nformation needed by Customs for the proper appraisement or classification of the merchandise is not available . . . ."

[11] Between January 2008 and September 2008, Customs initiated eight NAFTA verification procedures for the Family Warehouse entries. Amaya Decl. ¶ 10. While the specifics of these initial verification procedures is absent from the record, Senior Import Specialist Amaya's testimony explains that a verification procedure for poketin bleached woven fabric was one of these initial investigations. *See* Amaya Decl. ¶¶ 10–12 ("A majority of the NAFTA claims involved in the 33 Family Warehouse entries were covered by eight NAFTA verifications initiated between January 2008 and September 2008 which covered different fabrics claimed to have been produced by different manufacturers . . . . For example, . . . [a] NAFTA verification was . . . initiated on October 7, 2008 for poketin bleached woven fabric . . . . There was an earlier NAFTA verification covering the same fabric claimed to have been produced by Textiles Raamsa. However, it was discovered that several entries . . . involved a different claimed producer . . . .").

Statement ¶ 11. It was subsequently "discovered," however, "that several entries of poketin bleached woven fabric . . . , including [the entries at issue,] involved a different claimed producer, Textycom S.A. de C.V." ("Textycom"). Amaya Decl. ¶ 12. How the "discovery" was made is unclear. Nonetheless, on October 7, 2008, Customs sent a CBP Form 28 Request for Information ("Request for Information") to Family Warehouse's Mexican exporter Exportadora Deisy, S.A. de C.V. ("Exportadora Deisy") in an effort to determine the origin of the entries and to request further information regarding the entries' producer. Amaya Decl. ¶ 12; Pl.'s Br., Ex. C, CBP Form 28 Request for Information, Oct. 7, 2008, ECF No. 24–1 ("Oct. 7, 2008 Request for Information"). The Request for Information was prompted by the lack of clarity in Family Warehouse and Exportadora Deisy's entry papers concerning the fabric's country of origin

> [I]nvoices [of the Poketin Entries] shows [Textycom], [Exportadora Deisy's] NAFTA Certificate of Origin provided with the entry summary shows [Exportadora Deisy] as exporter but not as producer in block 8. If [Textycom] is not the producer of the fabric of [the Poketin Entries], then notify this office as to which firm is the actual producer of the fabrics. What is the complete name and office title of the individual with [Textycom] or the actual producer of the fabrics who can certify as to the accuracy of the information provided to your firm for your NAFTA Certificate of Origin? What is the complete fax number of [Textycom] or the actual producer of the fabrics?

Oct. 7, 2008 Request for Information. The record contains nothing indicating that the October 7, 2008 Request for Information received a response.

On December 1, 2008, Customs sent a Request for Information to producer Textycom regarding the fabric's origin. Pl.'s Br., Ex. C, CBP Form 28 Request for Information, Dec. 1, 2008, ECF No. 24–1 ("Dec. 1, 2008 Request for Information"). Textycom, however, failed to provide any information. Pl.'s Br., Ex. C, CBP Form 29 Notice of Action, Sept. 23, 2009, ECF 24–1 ("Sept. 23, 2009 Notice of Action").

Having received no response regarding origin information, on December 31, 2008, Customs sent a CBP Form 29 Notice of Action ("Notice of Action") to inform the exporter, Exportadora Deisy, of Customs' intent to deny duty-free treatment. A Notice of Action serves as notice that a negative determination is being proposed, yet provides an additional opportunity for an exporter or producer to submit information before being denied duty-free treatment. Amaya Decl. ¶ 18. Specifically, the Notice of Action informed Exportadora Deisy that

"[i]f the requested [origin] information is not supplied within 30 days . . . preferential tariff treatment will be denied without further notification . . . ." Pl.'s Br., Ex. C, CBP Form 29 Notice of Action, Dec. 31, 2008, ECF No. 24–1 ("Dec. 31, 2008 Notice of Action"). Exportadora Deisy, however, did not respond to the notice. *See* Sept. 23, 2009 Notice of Action. As a result, on February 2, 2009, Customs sent the company a second Notice of Action informing Exportadora Deisy that "verification revealed the good does not qualify for preferential tariff treatment" because "the producer . . . named did not provide [Customs with] the requested corroborating evidence that they manufactured the fabric in Mexico under NAFTA," and the goods were denied duty-free treatment following thirty days with no response from Exportadora Deisy. Pl.'s Br., Ex. C, CBP Form 29 Notice of Action, Feb. 2, 2009, ECF No. 24–1 ("Feb. 2, 2009 Notice of Action"); Def.'s Resp. Pl.'s Req. Admis. No. 12. Shortly thereafter, on April 11, 2009, Customs extended the liquidation period for a second time, pushing the liquidation date back from July 31, 2009, to July 31, 2010. *See* Def.'s Resp. Pl.'s Req. Admis. No. 9; 19 C.F.R. § 159.12(a).

Because duty free treatment had not been shown, Customs, as was its practice, next examined the importer's proposed classification of the fabric under the Harmonized Tariff Schedule of the United States ("HTSUS"). Amaya Decl. ¶¶ 22–23. Customs orders its inquiries in this way since, if duty-free NAFTA treatment is shown, classification normally will not matter. Amaya Decl. ¶ 26. On Family Warehouse's entry summaries, the Poketin Entries were classified under HTSUS subheading 5512.11.0090, which covers "unbleached or bleached woven fabrics of synthetic staple fibers, containing 85 percent or more by weight of polyester staple fibers." Amaya Decl. ¶ 24. Customs' review of the relevant invoice descriptions, however, did not indicate classification under this subheading because "[t]he commercial invoice descriptions for the fabric . . . did not confirm that the fabric was made of staple fibers." Amaya Decl. ¶ 24. To determine the proper classification, Customs sent a Request for Information to importer Family Warehouse on June 17, 2009, asking for additional information regarding the fabric. Amaya Decl. ¶ 25; *see also* Sept. 23, 2009 Notice of Action ("The importer . . . did not respond to this office's Request for Information . . . sent June 17, 2009 for the required additional invoice information for the fabric.").

On September 23, 2009, having received no response to its inquiry seeking information for use in properly classifying the fabric, Customs sent a Notice of Action to Family Warehouse advising it that the entries were being denied duty-free treatment and that the classification would be changed to HTSUS subheading 5407.51.0040, which

covers woven fabrics of synthetic filament yarn, with a duty rate of 14.9 percent. Sept. 23, 2009 Notice of Action. The Poketin Entries were then liquidated on June 18, 2010, and July 16, 2010, and Family Warehouse was billed accordingly. After sixty days without payment from the importer, formal demands were made on International Fidelity as Family Warehouse's surety.

II. THE POPLIN ENTRIES

The Poplin Entries were made on July 30, 2007. Between January 2008 and September 2008, Customs initiated its first eight NAFTA verification procedures for the thirty-three Family Warehouse entries claiming NAFTA treatment. Amaya Decl. ¶ 10. Following the initiation of the original NAFTA verifications, Customs determined that other information was necessary and initiated additional NAFTA verifications regarding the poketin bleached woven fabric produced by Textycom discussed above as well as for the other fabrics found in the thirty-three entries. Amaya Decl. ¶¶ 10–12. That is, because of the number of NAFTA verifications needed for the Family Warehouse entries, Customs determined that "it was more practical to allow for the conclusion of all the NAFTA verifications" before making final determinations for each individual entry. Amaya Decl. ¶ 14. Therefore, because there were multiple entries of the same fabric entered by Family Warehouse with the same claimed manufacturer, Customs decided to seek country of origin information about them at the same time. *See* Amaya Decl. ¶¶ 8–10.

On February 2, 2008, Customs issued its first notice of extension for all four of the entries involved in this action. In June 2009, after a majority of its country of origin investigations closed, Customs conducted a reexamination of the importer's entries. Amaya Decl. ¶ 15. According to Customs, because a final NAFTA determination may affect the tariff treatment of multiple entries involving the same manufacturer, importer, and fabric, at the closing of a NAFTA verification, Customs generally reexamines all relevant entries to make sure each will receive the appropriate treatment under NAFTA. Amaya Decl. ¶ 14 ("[A]t the closing of a NAFTA verification, the relevant entries are examined again to identify all applicable entries."). Thus, once Customs has finished all NAFTA verification proceedings for a particular entry—*i.e.*, a "reporting" entry—it will coordinate its findings with other entries involving the same HTSUS classification that were imported during a "blanket" period (in this

case, between January 1, 2007 and December 31, 2007). *See* Amaya Decl. ¶¶ 8–10; Pl.'s Br., Ex. B, CBP Form 28 Request for Information, June 18, 2009, ECF No. 24–1 ("June 18, 2009 Request for Information").

In June 2009, Customs reexamined the Family Warehouse entries in order to confirm that all similar entries were accorded the same NAFTA treatment. During this reexamination—owing either to an error on the entry papers or to Customs' own clerical error[12]—Customs found that no NAFTA verification had been initiated for the Poplin Entries and two other entries of unbleached poplin woven fabric which the entry papers indicated were produced by Textiles Raamsa. Therefore, on June 18, 2009, Customs sent a Request for Information to Textiles Raamsa. Amaya Decl. ¶ 15; June 18, 2009 Request for Information.

On July 21, 2009, after failing to receive origin information from producer Textiles Raamsa, Customs sent a Notice of Action to Exportadora Deisy advising it that duty-free treatment would be denied if information concerning the origin of the goods was not supplied within thirty days. Pl.'s Br., Ex. B, CBP Form 29 Notice of Action, July 21, 2009, ECF No. 24–1 ("July 21, 2009 Notice of Action"). Shortly thereafter, on July 25, 2009, Customs issued its second notice of extension for the Poplin Entries, making the new liquidation date July 30, 2010. *See* Def.'s Resp. Pl.'s Req. Admis. No. 9; 19 C.F.R. § 159.12(a). On September 21, 2009, Exportadora Deisy provided "additional information by fax to [Customs]," however, Customs replied that the information sent "did not support the producer's claim concerning the origin of the good." Pl.'s Br., Ex. B, CBP Form 28 Notice of Action, Oct. 20, 2009, ECF No. 24–1 ("Oct. 20, 2009 Notice of Action"). Therefore, on October 20, 2009, because neither Textiles Raamsa nor Exportadora Deisy "provide[d] . . . the requested corroborating evidence that [the producer] manufactured the fabric in Mexico under NAFTA," Customs sent a second Notice of Action to Exportadora Deisy informing it that duty-free treatment for the Poplin Entries would be denied without further notice if Exportadora Deisy did not supply the requested information. *See* Oct. 20, 2009 Notice of Action. Exportadora Deisy, however, did not subsequently supply any origin information. *See* Pl.'s Br., Ex. B., CBP Form 29 Notice of Action, May 25, 2010, ECF No. 24–1 ("May 25, 2010 Notice of Action").

[12] Neither International Fidelity nor the Government identifies who was responsible for the clerical error.

Following the denial of duty-free treatment on October 20, 2009, Customs investigated whether the tariff classification, declared on the Poplin Entries' entry summaries, matched the invoice description or the tariff subheading identified on the Certificate of Origin. *See* Amaya Decl. ¶¶ 22–23. On May 25, 2010, after its investigation resulted in no classification change, Customs sent an additional Notice of Action to importer Family Warehouse, informing it again of the denial of duty-free treatment and the resulting 10.5 percent duty rate. *See* May 25, 2010 Notice of Action. In June 2010, Customs liquidated the Poplin Entries and billed Family Warehouse. As with the Poketin Entries, after sixty days without payment from the importer, formal demands were made on International Fidelity as Family Warehouse's surety.

III. THE PROTEST

Pursuant to 19 U.S.C. § 1514, on March 2, 2011, International Fidelity filed a protest[13] covering the four entries at issue. In the protest, International Fidelity argued, among other things, that "the liquidation of the entries occurred by operation of law under 19 U.S.C. § 1504." Compl. ¶ 33. In other words, the surety claimed that the four entries should be liquidated at the rate "asserted by the importer of record" at the time of entry. 19 U.S.C. § 1504(b). In this case, because NAFTA treatment was claimed on the entry documents, that rate would be zero. The protest was denied on September 15, 2011. Compl. ¶ 34. Plaintiff then commenced this action on March 13, 2012. Plaintiff later filed its motion for summary judgment claiming that the entries should be deemed liquidated at the duty-free rate asserted at the time of entry pursuant to 19 U.S.C. § 1504(d).[14] Pl.'s Br. 9. On November 16, 2015, following the close of discovery, defendant cross-moved for summary judgment. Def.'s Br. 1.

STANDARD OF REVIEW

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). "When both

[13] Protest number 2304–11–100023.

[14] The court notes that while plaintiff's brief refers to 19 U.S.C. § 1504(d), the substance of its argument is that the entries should be found to have been deemed liquidated under 19 U.S.C. § 1504(a). Section 1504(d) governs the deemed liquidation of entries whose liquidation was previously suspended. *See* 19 U.S.C. § 1504(d). Section 1504(a), on the other hand, governs the deemed liquidation of entries not liquidated within one year from the date of entry. *See* 19 U.S.C. § 1504(a). As shall be seen, because neither party argues that the liquidation of plaintiff's entries had been suspended, the court views the question of deemed liquidation as falling under 19 U.S.C. § 1504(a).

parties move for summary judgment, the court must evaluate each motion on its own merits, resolving all reasonable inferences against the party whose motion is under consideration." *JVC Co. of Am. v. United States*, 234 F.3d 1348, 1351 (Fed. Cir. 2000). Here, because there are no genuine issues as to any material facts, summary judgment is appropriate.

This Court reviews the validity of Customs' liquidation extensions to determine whether they are "proper under the statute, and [are] not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Int'l Cargo & Sur. Ins. Co. v. United States*, 15 CIT 541, 542, 779 F. Supp. 174, 176 (1991); *see* 5 U.S.C. § 706(2)(A) (2012); *Fabil Mfg. Co. v. United States,* 237 F.3d 1335, 1340 (Fed. Cir. 2001).

DISCUSSION

I. LEGAL CONSIDERATIONS

Liquidation refers to "the final computation or ascertainment of the duties . . . on an entry." 19 C.F.R. § 159.1. If an entry of merchandise is not actually liquidated within one year from its date of entry, however, it is "deemed liquidated" by operation of law at the duty rate asserted by the importer upon entry.[15] 19 U.S.C. § 1504(a)(1); *see Chemsol, LLC v. United States*, 755 F.3d 1345, 1349 (Fed. Cir. 2014). Customs may extend the time in which it must liquidate for an additional one-year period if information is needed for the "proper appraisement or classification" of the merchandise. 19 U.S.C. § 1504(b)(1). For extensions to be lawful, Customs must give appropriate notice to both the importer of record and its surety, as well as articulate a statutory reason for the extension.[16] *See* 19 U.S.C. § 1504(b); *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 767 (Fed. Cir. 1993). Additionally, Customs may not extend the liquidation period more than three times (*i.e.*, three years) per entry. *See*

[15] Title 19 U.S.C § 1504(a)(1) provides

> Unless an entry of merchandise for consumption is extended under subsection (b) of this section or suspended as required by statute or court order, except as provided in section 1675(a)(3) of this title, an entry of merchandise for consumption not liquidated within 1 year from—
>
> (A) the date of entry of such merchandise, . . .
>
> shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted by the importer of record. Notwithstanding section 1500(e) of this title, notice of liquidation need not be given of an entry deemed liquidated.

[16] The court notes that International Fidelity's complaint alleges in Count 2 that "[i]f the liquidation period was extended by Customs for [the four entries], the extension was invalid due to Customs[']s failure to provide written notice of extension to the surety." *See* Compl. ¶ 43. In its papers, however, International Fidelity makes no argument regarding lack of notice. This claim is thus waived. Indeed, the only issue discussed in plaintiff's papers is "[w]hether the entries involved in this case were deemed liquidated by operation of law due to Customs' unreasonable delay in conducting its NAFTA investigation." Pl.'s Br. 1.

19 U.S.C. § 1504(b); 19 C.F.R. § 159.12(e); *Chemsol*, 755 F.3d at 1349.

Thus, at most, Customs has four years to obtain information for appraisement or classification, provided any time extension granted is "for a reasonable period of time relative to the situation." *Detroit Zoological Soc. v. United States*, 10 CIT 133, 138, 630 F. Supp. 1350, 1357 (1986); *see St. Paul*, 6 F.3d at 769–70. Also, Customs may not extend the time for liquidation unless it has reason to believe that information useful to properly appraising or classifying the goods will result. *See* 19 U.S.C. § 1504(b)(1); *see also Detroit Zoological*, 10 CIT at 138, 630 F. Supp. at 1356 ("The term 'information,' as it is used in the statute, 19 U.S.C. § 1504(b)(1) (1982), however, should be construed to include whatever is reasonably necessary for proper appraisement or classification of the merchandise involved.").

While Customs is entitled to deference and a presumption of correctness in the collection of duties and in its official acts, *see* 19 U.S.C. § 3; 28 U.S.C. § 2639(a)(1) (2012), the court is mindful that the deemed liquidation provisions in 19 U.S.C. § 1504(b) serve the important purpose of "'increas[ing] certainty in the customs process for importers, surety companies, and other third parties with a potential liability relating to a customs transaction.'" *St. Paul*, 6 F.3d at 767 (quoting S. Rep. No. 95–778, at 32 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2211, 2243).

The courts have, therefore, provided for a "narrow limitation" on Customs' discretion to extend liquidation

> We thus conclude that Customs may, for statutory purposes and with the requisite notice, employ up to four years to effect liquidation so long as the extensions it grants are not abusive of its discretionary authority. Such an abuse of discretionary authority may arise only when an extension is granted even *following elimination of all possible grounds for such an extension*. There is, in sum, a narrow limitation on Customs' discretion to extend the period of liquidation.

St. Paul, 6 F.3d at 768 (emphasis added); *Ford Motor Co. v. United States*, 286 F.3d 1335, 1344 (Fed. Cir. 2002) ("*Ford IV*"). Thus, the limitation is sufficiently narrow that a court may only find an abuse of discretion when Customs has granted an extension where "all reasonable bases" for making a decision to extend the liquidation period have been eliminated. For example, where Customs has actual knowledge that there is no basis for an extension, then Customs may not grant an extension. *St. Paul*, 6 F.3d at 768 ("Extending a period of liquidation with actual knowledge that no basis exists for so doing would be an abuse of Customs' discretion."); *Intercargo Ins. Co. v.*

United States, 83 F.3d 391, 393 (Fed. Cir. 1996); *Stemcor USA Inc. v. United States*, 26 CIT 1373, 1379, Slip. Op. 02–149 at 6 (Dec. 17, 2002). Based on the case law, however, it is apparent that the limitation on Customs' discretion is very narrow indeed.

The review of this protest, as with all protests, is conducted based on the record developed before this Court. 28 U.S.C. § 2640(a) (2012). In this case, the examination of that record involves looking at the facts with which Customs was presented when it issued each liquidation extension, in order to determine whether these decisions were reasonable at the time they were made. *See Ford Motor Co. v. U.S.*, 157 F.3d 849, 855 (Fed. Cir. 1998) ("*Ford II*"); *Ford IV*, 286 F.3d at 1343. In other words, facts that developed subsequent to each notice of extension cannot be used to judge whether or not each extension was reasonable at the time that the notice of extension was issued.

The burden of demonstrating that Customs acted unlawfully in extending the liquidation period falls on plaintiff, who must satisfy this burden by a preponderance of the evidence. *See St. Paul*, 6 F.3d at 769 ("[W]e conclude . . . that [28 U.S.C. § 2639(a)(1)] requires [plaintiff] to overcome the presumption of correctness accorded to Customs' decisions to extend by a preponderance of the evidence."); *Ford IV*, 286 F.3d at 1340.

II. CUSTOMS DETERMINATIONS TO MAKE LIQUIDATION EXTENSIONS WERE NOT AN ABUSE OF DISCRETION

International Fidelity argues that "long periods of inaction" rendered Customs' liquidation extensions unreasonable. Pl.'s Br. 13; Pl.'s Resp. Br. 11 ("For all four (4) entries, Plaintiff has met or exceeded the burden of proof . . . [by] showing significant time periods in which the agency took *no action* regarding its investigation." (emphasis added)). In particular, plaintiff contends that it has documented a nearly twenty-three month period of claimed inactivity for the Poketin Entries (between their entry on July 31, 2007, the issuance of the first Request for Information on October 7, 2008, the first Request for Information regarding classification on June 17, 2009, and liquidation on June 18 and July 16, 2010) and a thirty-month period of claimed inactivity for the Poplin Entries (between entry on July 30, 2007, the issuance of the first Request for Information on June 18, 2009, the issuance of a negative NAFTA determination on October 20, 2009, a final determination on May 25, 2010, and liquidation on June 18, 2010), which led to unreasonable and unnecessary extensions. Pl.'s Resp. Br. 7–10. According to plaintiff, "the NAFTA investigation should have been conducted quickly and diligently due to the tempo-

rary nature of many of the records used to substantiate claims for NAFTA-originating treatment." Pl.'s Br. 14.[17]

The thrust of plaintiff's argument, then, is that once Customs had authority to take action, it should have done so with greater dispatch. *See* Pl.'s Br. 14 ("Customs had it within its power to issue [] Notices of Action promptly following the expiration of the [Request for Information] response deadline, but it neglected to do so. Customs should not have delayed issuing [Requests for Information], nor have waited almost a year before issuing . . . Notices of Action.").

Plaintiff endeavors to draw support for its position from *Ford Motor Co. v. United States*. In *Ford*, the Federal Circuit held that Customs improperly extended the liquidation period under 19 U.S.C. § 1504(b) because "Customs' delay in pursuing the fraud investigation and its resulting delay in liquidating the entries were not reasonable." *Ford IV*, 286 F.3d at 1341.

The Government maintains that "[g]iven the role of and the discretion afforded to Customs to verify claims and collect duties, the Court should defer to the agency regarding both the methodology employed and the time involved to resolve the NAFTA claims . . . ." Def.'s Br. 9. For defendant, plaintiff presents no evidence that Customs "did nothing to further the verification of the NAFTA claims," nor does it refute the statements of Senior Import Specialist Amaya regarding Customs' customary NAFTA verification procedures. Def.'s Br. 5. Therefore, defendant contends that, because plaintiff has cited no record evidence showing what Customs was doing, or not doing, during the time periods, it has not met its burden of proof. Moreover, the defendant asserts that it has presented sworn testimony demonstrating that the length and the manner of Customs' investigation was reasonable. Def.'s Br. 5.

A. First Extension

Plaintiff argues that the first notice of extension issued on February 2, 2008, was unreasonable because "[n]o action was taken by Customs with respect to all four (4) entries prior to [that time]." Pl.'s Resp. Br. 7.

The Government responds that Senior Import Specialist Amaya's sworn testimony demonstrates that the conduct of the investigation was reasonable and customary. *See* Def.'s Reply Br. 3 ("[In his testimony,] SIS Amaya provided an explanation not only of how NAFTA verifications are conducted in general but of how and why the NAFTA verifications for numerous entries by importer Family Warehouse were conducted as they were."). As for plaintiff's arguments, defen-

[17] Notably, plaintiff offers no proof, or even argument, that the required records in this case were particularly temporary in nature.

dant insists that "[i]nstead of demonstrating any error in our legal analysis or providing any reason for the Court to disregard the testimony of SIS Amaya, [plaintiff] consumes the bulk of its response reiterating its belief that Customs' verification . . . took too long. [Plaintiff's] support for this belief consist primarily of . . . a recitation of time periods between select agency activities in bolded text to make them appear significant." Def.'s Reply Br. 4.

The court finds that the conduct of Customs' procedures through February 2, 2008 were reasonable and that Customs' decision to extend the liquidation period on that date so that it could continue its investigation and await information regarding the importer's NAFTA claims was lawful. *See Ford IV*, 286 F.3d at 1343; *see also Ford II*, 157 F.3d at 857; *Int'l Cargo*, 15 CIT at 546–47, 779 F. Supp. at 179.

Here, Family Warehouse made a formal declaration that the imported merchandise in all four of the entries secured by plaintiff were originating goods from Mexico by adding "MX" as a prefix to the HTSUS classification subheading on its entry summaries. Amaya Decl. ¶ 6; Pl.'s Br., Ex. A-D. These summaries were received by Customs on August 10, 2007 (for the Poketin Entries) and August 9, 2007 (for the Poplin Entries). Once the importer had made this claim for NAFTA treatment, Customs was charged with the duty to either accept this claimed country of origin or deny it. Customs, however, could deny preferential NAFTA tariff treatment "only after initiation of an origin verification under § 181.72(a) . . . which results in a determination that the imported good does not qualify as an originating good . . . ." 19 C.F.R. § 181.71. Therefore, Customs could not immediately liquidate the entries because it lacked information necessary to properly evaluate the entries' claimed NAFTA status. Thus, Customs sought information regarding the origin of the fabric.

As to Customs' verification process, the record evidence demonstrates, and sensible business practice directs, that rather than proceeding piecemeal, Customs cumulates several entries under one verification procedure when they share the same importer, producer, and tariff subheading. *See* Amaya Decl. ¶ 8 ("NAFTA verifications are not conducted on an entry-by-entry basis as doing so would be duplicative and inefficient. Instead, a NAFTA verification is issued based on the importer, the producer of the merchandise, and the tariff subheading under which the merchandise is classified. One NAFTA verification may be sufficient to cover several entries that involve the same importer and the same merchandise made by the same producer.").

Thus, although the Poketin Entries were made on July 31, 2007, and the Poplin Entries on July 30, 2007, the last of the Family Warehouse entries with which the various fabrics were combined was not made until January 2008. *See* Amaya Decl. ¶ 6. Accordingly, Customs did not send its first verification letter for the thirty-three entries until January 2008. Even at the start of its verification, however, it became clear to Customs (due to the quantity and variety of fabrics) that it would require more time to obtain "information needed for the proper appraisement or classification of the imported . . . merchandise." 19 U.S.C. § 1504(b)(1); *see* Amaya Decl. ¶¶ 10–13. In other words, Customs issued its first notice of extension so that it would have time to obtain information necessary to properly address the NAFTA claims. *See* Amaya Decl. ¶¶ 10, 14 ("[E]ight NAFTA verifications [were] initiated between January 2008 and September 2008 . . . . Due to the variety of fabrics and the large number of entries, subsequent corrections and additions were required to the verifications. . . . In light of the multiple NAFTA verifications initiated for the Family Warehouse entries, it was more practical to allow for the conclusion of all the NAFTA verifications before making final NAFTA determinations for each individual Family Warehouse entry."). Therefore, knowing that it was embarking on a process involving numerous entries, on February 2, 2008, Customs decided to extend the liquidation period. *See* Amaya Decl. ¶¶ 10, 12; Def.'s Resp. Pl.'s Req. Admis. No. 9. Shortly thereafter, as discussed above, Customs initiated additional verification procedures, including, among others, the verification of poketin bleached woven fabric and razo bleached woven fabric. *See* Amaya Decl. ¶¶ 10–13.

As Senior Import Specialist Amaya's testimony specifies, "the NAFTA verification process is designed to give the exporter and/or producer as much time and opportunity as possible to provide information to substantiate the NAFTA claim." Amaya Decl. ¶ 21. This is because if an importation's NAFTA claim is verified, it generally receives duty-free treatment. *See* Amaya Decl. ¶ 26. Indeed, as defendant points out, "a verified claim . . . benefits the importer." Def.'s Reply Br. 7. Accordingly, the regulations regarding NAFTA verification allow "several opportunities [for the exporter or producer] to provide the requested information." Amaya Decl. ¶ 17; *see, e.g.*, 19 C.F.R. §§ 181.71-.76.

The court finds that because of the number of Family Warehouse entries constituting a variety of fabrics and Customs' knowledge of the manner and duration of its own procedure that its decision, on February 2, 2008, to extend liquidation was reasonable. Family Warehouse made thirty-three entries of fabric claiming Mexico as their

country of origin, thus seeking NAFTA treatment. Customs' reasonable practice was to cumulate entries and to send verification letters for the accumulated number of entries rather than for each entry. Customs, of course, had knowledge of the time it would ordinarily take to complete its verifications and that the time could be lengthy because the procedures provide "several opportunities" for a NAFTA claim to be supported. Amaya Decl. ¶ 17. Therefore, because the last of the thirty-three entries was made on January 7, 2008, and because Customs clearly needed time to complete its work, it was not an abuse of discretion for Customs, even at the early date of February 2, 2008, to extend the period in which to liquidate in order to make sure proper verification proceedings were commenced and completed.

B. Second Extension

i. The Length and Manner of Customs' Investigation Were Reasonable

Following the February 2, 2008 extension, Customs discovered errors in some of the merchandise's entry papers. *See, e.g.,* Amaya Decl. ¶¶ 11–12 ("[Exportadora Deisy] advised on August 27, 2008, in response to the initial NAFTA verification, that due to a clerical error, the producer of the [razo bleached] fabric was not Vizuette, but Textiles Raamsa. . . . It was [also] discovered that several entries of poketin bleached woven fabric . . . involved a different claimed producer, [Textycom]."). Accordingly, on October 7, 2008, Customs issued three Requests for Information to determine who actually produced the affected entries. One of these requests, sent to Exportadora Deisy, involved the Poketin Entries at issue here. Amaya Decl. ¶¶ 12–13.

On December 1, 2008, Customs issued an additional Request for Information to Textycom, the Poketin Entries' producer, to determine the fabric's origin.[18] After receiving no response from Textycom, on December 31, 2008, Customs issued a Notice of Action to Exportadora Deisy, informing it of Customs' attempted verification. On February 2, 2008, having received no origin information from either Textycom or Exportadora Deisy, Customs sent a second Notice of Action to Exportadora Deisy, informing it that the fabric did not qualify for NAFTA treatment.

On April 4, 2009, nearly four months before the time period for liquidation would have run following the first notice of extension, Customs issued its second one-year extension for the Poketin Entries in order to "await[] delinquent responses to its request for informa-

[18] There appeared to be some confusion about the producer of the fabric because the invoices on Family Warehouse's entry summaries listed Textycom as producer, but the Certificate of Origin did not.

tion" and "obtain the information to determine how to properly classify the merchandise." Pl.'s Statement ¶ 11; Def.'s Resp. Pl.'s Req. Admis. No. 8. Pursuant to this extension, the Poketin Entries would have to be liquidated by July 31, 2010.

By June 2009, most of the verification procedures were drawing to a close, and Customs determined that, due to the variety of fabrics involved, it should, in accordance with its usual practice, reexamine all of the entries. Amaya Decl. ¶¶ 14–15. During this reexamination, it was learned that no verification procedure had been initiated for, among other entries, the Poplin Entries at issue here. Amaya Decl. ¶ 15. Accordingly, on June 18, 2009, Customs sent a Request for Information to producer Textiles Raamsa. Amaya Decl. ¶ 15. Because it received no response from the producer, on July 21, 2009, Customs issued a Notice of Action to Exportadora Deisy, informing it that Customs had attempted verification and that the producer failed to respond. July 21, 2009 Notice of Action. Accordingly, unless Exportadora Deisy or Textiles Raamsa provided the requested origin information, Customs would deny NAFTA treatment. Shortly thereafter, on July 25, 2009, while awaiting a response, Customs issued its second one-year liquidation extension. *See* Def.'s Resp. Pl.'s Req. Admis. No. 9. Pursuant to this extension, the Poplin Entries would have to be liquidated by July 30, 2010.

Plaintiff takes issue with Customs' verification procedure leading up to this second liquidation extension and the investigation that followed.[19] In particular, plaintiff argues that "Customs' 23 month delay in issuing the [Request for Information] on June 18, 2009 [for the Poplin Entries] necessitated the need, in light of the various 30-day time restraints for NAFTA verification under the Customs Regulations, for Customs to extend the liquidations of [the Poplin Entries]." Pl.'s Resp. Br. 7. Plaintiff also seems to argue that events that took place, or did not take place, after the second extension demonstrated that the decision to extend liquidation was unreasonable. Pl.'s Resp. Br. 8.

The Government responds that, as with the first extension, plaintiff has failed to satisfy its burden of proof because it has not "introduce[d] evidence . . . showing very significant periods in which the agency took *no action* regarding its investigation." Def.'s Br. 13 (emphasis added). For the Government, this claimed failure of proof defeats plaintiff's case. Moreover, the defendant again asserts that

[19] Plaintiff maintains that there were three extensions. According to the Defendant's Responses to Plaintiff's Requests for Admission, however, although Customs issued three extension notices to plaintiff, the liquidation period was only extended twice, as the goods were liquidated during the second extension period. *See* Def.'s Resp. Pl.'s Req. Admis. No. 9; Compl. ¶ 28.

plaintiff, by presenting no evidence, is impermissibly trying to shift the burden of proof onto the Government. Defendant argues that "[n]othing in International Fidelity's submission refutes either the facts provided by [Special Import Specialist Amaya] or the legal determination that the court should find necessarily follow[s] from those facts." Def.'s Br. 7. In other words, according to defendant, International Fidelity "fails to provide a basis for the Court to find, as a matter of law, that the timing of the NAFTA verifications relating to any of the entries at issue here" was "unreasonable" and that the Government has offered sworn testimony that it behaved reasonably. Def.'s Reply Br. 9, 10 ("[W]hile [plaintiff] 'submits' that it has shown 'very significant time periods in which Customs took no action regarding its investigations,' all that [plaintiff] has actually done is compile a bunch of dates, without context.").

The Government points to record evidence that, it claims, establishes that, because of the extensive variety and quantity of the fabrics involved, the verification and liquidation process required additional time to ensure accuracy. *See* Def.'s Br. 7. As with the first extension, the Government argues that because Customs does not initiate verification procedures on an entry-by-entry basis, it is reasonable that some Family Warehouse entries were not acted on immediately, since they would presumably receive the same NAFTA treatment as other entries involving the same fabric, producer, and importer which were already undergoing a NAFTA verification. *See* Def.'s Br. 7; Amaya Decl. ¶¶ 8, 14–15.

In making its case, the Government points out that the first verification letters for the thirty-three entries were mailed in January 2008, just before the first notice of extension. The Government also notes that because the responses to Customs' letters answered some questions but prompted others, more inquiries were sent and the last response on the record was received on September 21, 2009. *See* Amaya Decl. ¶ 10 ("[S]ubsequent corrections and additions were required to the [January 2008-September 2008] verifications."); Oct. 20, 2009 Notice of Action.

As with the first extension, it cannot be said that Customs abused its discretion by issuing the second notice of extension. Following February 2, 2008, when Customs extended the liquidation period for the first time, substantial activity took place. The first verification letter was sent in January 2008, and following its first extension, Customs commenced several subsequent verifications of the importer's claims for NAFTA treatment. *See* Amaya Decl. ¶¶ 10–13, 15–16. During this time, Customs sent Requests for Information and Notices of Action between the months of January 2008 and September 2008,

on October 7, 2008, December 1, 2008, December 31, 2008, and February 2, 2009—all before Customs' decision to grant the second extension for the Poketin Entries on April 11, 2009.

Moreover, on April 11, 2009, and July 25, 2009, when it extended liquidation a second time, Customs was aware that it had not yet commenced its procedures leading to the proper classification of the fabrics. As defendant points out, once NAFTA determinations were sent to Exportadora Deisy on February 2, 2009 (for the Poketin Entries) and October 20, 2009 (for the Poplin Entries), efforts to decide classification issues were commenced. Def.'s Reply Br. 8 n.3; Amaya Decl. ¶¶ 22–23 ("While the completion of a NAFTA verification will resolve the question of preferential treatment under NAFTA, additional information may still be required before an entry can be liquidated. . . . Several of the Family Warehouse entries involved tariff subheadings . . . that were not consistent with the invoice descriptions of the imported goods.").

For the Poketin Entries, this process began with a Request for Information sent to Family Warehouse on June 17, 2009, asking for additional invoice information for the fabric. The investigation ended when Customs received no response and sent its September 23, 2009 Notice of Action informing Family Warehouse of the classification change. For the Poplin Entries, although the record is unclear about Customs' investigation, Customs ultimately determined—following its October 20, 2009 denial of NAFTA treatment—that the fabric would be classified as poplin unbleached woven fabric 100 percent cotton, as evidenced by its May 25, 2010 Notice of Action. Finally, the Poketin Entries were liquidated on June 18 and July 16, 2010, and the Poplin entries were both liquidated on June 18, 2010. In each case, liquidation occurred before the expiration of the second extension.[20]

According to plaintiff, the seven-month delay between Customs' first negative NAFTA determination for the Poplin Entries on October 20, 2009, and its final denial of NAFTA treatment on May 25, 2010, was unreasonable. Pl.'s Br. 12. Additionally, plaintiff maintains that Customs should not have waited four months after the final denial of NAFTA treatment for the Poketin Entries to issue a Request for Information concerning classification. Pl.'s Resp. Br. 8. Finally, plaintiff argues that the additional nine months (from September 23, 2009 to June 18 and July 16, 2010) Customs took to liquidate the Poketin Entries after determining classification was unreasonable.

[20] The period of time between the final decision on classification and liquidation does appear to be quite long; however, the reasonableness of the delay has no bearing on whether the decision to extend liquidations for a second time on April 11, 2009, was an abuse of discretion at the time it was made. *See St. Paul*, 6 F.3d at 770.

See Pl.'s Resp. Br. 8. Any events subsequent to the issuance of the second notice of extension on April 11 and July 25, 2009, are, of course, irrelevant to the question of whether Customs' decision was reasonable when made. Even if they could be said to be relevant, however, these facts would not help plaintiff's case.

Following the closing of the NAFTA verifications, as was Customs' practice, a reexamination was conducted to insure that nothing had fallen through the cracks. Senior Import Specialist Amaya's testimony shows that it was after this reexamination of the Family Warehouse entries in June 2009 that Customs commenced verification procedures for the subject Poplin Entries. This late beginning for the verification of the Poplin Entries resulted from the entries having been overlooked in Customs' earlier procedures. In other words, the entries were not "covered" by any of the earlier NAFTA verifications. *See* Amaya Decl. ¶¶ 14–15.

Once Customs realized in June 2009 that no verification procedure had been initiated for entries of unbleached poplin woven fabric produced by Textiles Raamsa (including the Poplin Entries), it promptly sent a Request for Information on June 18, 2009, and a follow-up Notice of Action on July 21, 2009. Customs apparently decided that it would need more than nine days to await any response from the exporter, and therefore, on July 25, 2009, reasonably determined that it should extend the Poplin Entries' liquidation period for a second time.

In fact, following these notices of extension, an additional Notice of Action was sent on October 20, 2009, for the Poplin Entries. Indeed, Customs received a response from the exporter as late as September 21, 2009, two months *after* the liquidation period for the Poplin Entries was extended a second time. *See* Oct. 20, 2009 Notice of Action. Moreover, after denying NAFTA treatment on February 2, 2009 for the Poketin Entries and October 20, 2009 for the Poplin Entries, because it now mattered that the fabrics be correctly classified, Customs began to collect information to properly classify the entries. Therefore, it is evident that Customs was not idle after the second extension was made. That is, while it might be argued that Customs should have realized that the Poplin entries had not been the subject of verification, the delay in commencing the verification did not result from inaction.

Here, the facts are different from those found in *Ford*. *Ford* involved an ongoing fraud investigation arising from eleven entries of foreign engines and transmissions. *Ford IV*, 286 F.3d at 1337. In *Ford*, the investigation spanned from August 1986 to March 1990, during which time the liquidation period was extended for thirty-six

months following the lapse of the initial one-year deadline. *Id.* at 1341–42. The goods were liquidated in December 1989. *Id.* at 1342. As to the investigation, the Federal Circuit noted that "the first 30 months of the 44-month investigation . . . saw almost no substantive work and two periods of inactivity totaling 22 months . . . ." *Id.* at 1343. Moreover, in *Ford*, the record established that Customs agents were aware that they needed information to properly appraise and classify the merchandise, and yet waited years before requesting it. *Ford II*, 157 F.3d at 856 ("Although [the] evidence shows that [the Customs agent] felt he needed more information, it also raises the question of why three years had passed without even a request to Ford for that information. Indeed, the record does not show that [the agent] ever requested more documents . . . ."). Here, the facts are distinguishable from *Ford* as the Government has demonstrated there was continual, if not consistent, activity relating to NAFTA treatment for the entries and their classification. The facts also show that Customs tried to obtain information from new sources after previous requests went unanswered.

The defendant, then, has presented record evidence that, at the time the decision was made to issue each of the notices of extension, Customs was reasonable in its conclusion that more time would be needed to obtain information "for the proper appraisement or classification of the imported . . . merchandise" contained in the four entries. 19 U.S.C. § 1504(b)(1). Plaintiff, on the other hand, has produced evidence tending to prove just two things (1) that Customs extended the time for liquidation twice;[21] and (2) that the time between entry and liquidation was 1,054 days for the Poplin Entries; 1,053 days for Poketin Entry '17–1; and 1,081 days for Poketin Entry '18–9. What plaintiff has not pointed to is any evidence that Customs abused its discretion not acting with reasonable dispatch to complete the many tasks it had before it during the periods between the fabrics' entry and the issuance of Requests for Information and Notices of Action to further its investigation. *See Ford II*, 157 F.3d at 855 ("[I]n the face of evidence by Customs of its customary practices, the burden of persuasion require[s] the importer to introduce affirmative evidence that Customs had not followed the customary practice . . . ."

[21] As discussed briefly above, while plaintiff maintains the liquidation period was extended three times—on (1) February 2, 2008; (2) April 11 and July 25, 2009; and (3) April 10, 2010—defendant notes that these were the dates on which Customs issued notices of extension and because the entries at issue here were all liquidated within the second liquidation extension period, the third notice of extension is irrelevant. *See* Def.'s Reply Br. 3 n.2 ("Notice and extension dates are not the same—notice always precedes extension. Here, although three extension notices were issued for each entry, those notices turned out to be unnecessary as all of the entries were liquidated before the end of the extension period heralded by the second notices."); Def.'s Resp. Pl.'s Req. for Admis. No. 9.

(citing *St. Paul*, 6 F.3d 769–70)). Therefore, the court cannot find that the periods between should be characterized as "inactive," and therefore, it cannot be said that Customs' NAFTA verification and classification procedure timeframe was unreasonable.

Plaintiff attempts to bolster its claim by suggesting that the regulations pertaining to NAFTA verifications demand a shorter timeframe than those for the submission of cost data (as Customs required in *St. Paul*). Pl.'s Resp. Br. 6 ("In this case rather, there are short consecutive thirty (30) day procedural deadlines proscribed by the Customs Regulations pertaining to NAFTA verifications. Unlike the lengthy six (6) month actual cost data requirement in *St. Paul Fire* or the delays associated with other agencies (*e.g.* antidumping investigation conducted by the Department of Commerce) the Customs Regulations pertaining to NAFTA verifications allow for Customs to solely control the NAFTA verification within the bounds of a tight timeframe."). Plaintiff, however, mischaracterizes the thirty-day periods cited in the NAFTA regulations as "deadlines" instead of the minimum amount of time that must expire before action may be taken. For example, 19 C.F.R. § 181.72(d)(1) provides "[i]f the exporter or producer . . . fails to respond to a verification letter or questionnaire . . . within 30 calendar days from the date on which the letter or questionnaire was sent, or such longer period as may be specified in the letter or questionnaire, Customs shall send a follow-up verification letter or questionnaire to that exporter or producer." As defendant points out, while the regulations relating to NAFTA verifications describe how Customs must act following the expiration of the thirty-day period, they do not prescribe a period during which Customs must act—only the verification letter's recipient. Indeed, it is to the importer's benefit for Customs to await NAFTA responses, and hence, the regulations specifically allow multiple opportunities for exporters or producers to respond. Amaya Decl. ¶ 17. Accordingly, although Customs may act after the thirty-day period has passed, it is not mandated to do so. *See, e.g.*, 19 C.F.R. §§ 181.71-.76.

Accordingly, plaintiff's argument that the length of time that expired between entry and liquidation proved that defendant abused its discretion when extending the time for liquidation is without merit.

ii. Customs Did Not Have Actual Knowledge That It Would Receive No Response

International Fidelity also contends that it has satisfied its burden of demonstrating that Customs acted unlawfully, at least with regard

to the Poplin Entries, by citing evidence that Customs "*knew* that [Textiles Raamsa] would not substantiate that its goods qualified for NAFTA treatment . . . ." Pl.'s Br. 12 (emphasis added). Therefore, plaintiff maintains that Customs abused its discretion by extending the liquidation period a second time. Pl.'s Br. 11–12. To support this claim, International Fidelity points to a 2008 NAFTA determination involving Family Warehouse that it maintains should have alerted Customs that "it would not receive a response to its NAFTA verification inquiries from Textiles Raamsa." Pl.'s Resp. Br. 4.

The determination plaintiff refers to concerned an entry of razo bleached woven fabric not involved in this action[22] (the "Razo Bleached Entry"). During the course of the verification proceedings for that entry, Customs sent a Request for Information to Mexican exporter, Exportadora Deisy, seeking to establish the origin of the fabric. Amaya Decl. ¶ 11. On August 27, 2008, Exportadora Deisy informed Customs that it had inaccurately identified the producer of the Razo Bleached Entry and the actual producer was Textiles Raamsa (the producer of the Poplin Entries at issue here). As a result, on October 7, 2008, Customs sent a Request for Information to producer Textiles Raamsa concerning the Razo Bleached Entry. Amaya Decl. ¶ 11. Textiles Raamsa, however, failed to respond to that request. Ultimately, after receiving nothing from Textiles Raamsa concerning the origin of the Razo Bleached Entry, Customs denied duty-free treatment and liquidated the entry on July 17, 2009. Def.'s Resp. Statement ¶ 7.

International Fidelity argues that, because the Poplin Entries shared the same manufacturer, exporter, and importer as the Razo Bleached Entry, Customs knew that no information would be forthcoming regarding the origin of the Poplin Entries. Pl.'s Br. 12. In other words, plaintiff argues once Customs denied duty-free treatment for the Razo Bleached Entry based on Textiles Raamsa's failure to respond, it knew that these same parties would not respond to verification requests in relation to the Poplin Entries at issue here. For plaintiff, because Customs "knew or should have known" that producer Textiles Raamsa's behavior in the Razo Bleached Entry investigation would be replicated in other verification requests Customs had no "reasonable basis" to extend the liquidation period a second time, and should have initiated a verification proceeding for the Poplin Entries sooner. Pl.'s Resp. Br. 5 ("Had Customs initiated its NAFTA verification review for [the Poplin Entries] on or about December 1, 2008, the time it knew or should have known that information from Textiles Raamsa would not be forthcoming, Customs

[22] Entry number 726–1320047–5.

would not have needed to extend the liquidations of these two (2) entries a second time."); Pl.'s Resp. Br. 11 ("Customs had prior actual knowledge involving another entry . . . that the information it requested with respect to [the Poplin Entries] would not be provided.").

The Government maintains that there is a "high bar against challenges to extensions of liquidations under Section 1504(b)," which "cannot be overcome by merely asserting that there were no response[s] to requests for information" in an unrelated proceeding. Def.'s Br. 9, 11. According to defendant, in order for it to be found to have actual knowledge, plaintiff "would have to demonstrate that Customs was notified that the information requested in the NAFTA verifications would not be submitted" in order to prevail. Def.'s Br. 11. In other words, for the Government, International Fidelity would have to show that Customs had actual knowledge that the requested origin information would not be submitted.

The Government further contends that its negative NAFTA determination in this case was "based on a lack of verifying information, not on 'actual knowledge' that no response would ever arrive." Def.'s Reply Br. 6. That is, the government insists that Customs' decision to deny duty-free treatment did not result from it being "'actually' advised that Textiles Raamsa would not be responding to the agency's inquiries regarding [the Razo Bleached Entry,]" but rather, because Textiles Raamsa's failure to respond resulted in the claims not being substantiated within the required timeframe. Def.'s Reply Br. 6. Accordingly, for the Government, "[g]iven that Customs did not even possess 'actual knowledge' that its request for information would never have been answered regarding [the Razo Bleached Entry], it would be impossible for Customs to have 'actual knowledge' that similar information would not be provided for other entries." Def.'s Reply Br. 6.

In addition, the Government emphasizes that under plaintiff's knowledge theory, Customs would be forced to speculate about whether verifying information would be forthcoming. Def.'s Br. 11–12 ("Although the lack of a response with regard to inquiries made for one entry may increase the possibility of no responses for inquiries made for other entries, it does not rise to the level of actual knowledge by Customs that no information would be forthcoming for the four entries in this case."). For defendant, if plaintiff's argument were to be credited, it would create "a new obligation for Customs," one not considered by the Federal Circuit in *St. Paul*, that would "require the agency to speculate as to a party's intent to respond to a Customs request for information." Def.'s Br. 12. Therefore, the Government maintains that, absent specific facts establishing Customs knew the

information would not be provided—which defendant maintains are lacking here— Customs cannot be found to have abused its discretion in issuing a second notice of extension to await the requested information. Def.'s Br. 11–12.

The court finds that plaintiff has not shown that the second extension was an abuse of discretion based on Customs' knowledge that Exportadora Deisy and Family Warehouse would not respond to its inquiries. First, International Fidelity offers no record evidence that Customs had actual knowledge that Textiles Raamsa would not submit the requested origin information prior to granting the extension. *See St. Paul*, 6 F.3d at 769 ("[Plaintiff has] to prove that [the importer] or someone else, notified Customs that the required [information] would *not* be submitted." (emphasis in original)). Rather, International Fidelity simply claims that Customs could be found to have actual knowledge, based on the Razo Bleached Entry investigation, that Textiles Raamsa would not submit any information. An exporter or producer's failure to respond to one verification request, however, simply does not provide actual knowledge that it will not respond to another.

Nor could it be said that the failure to respond to a verification request established a pattern from which Customs could be charged with knowledge that it would not receive responses to its inquiries. Although the Razo Bleached Entry and the Poplin Entries shared the same importer, exporter, and manufacturer, the entries did not involve the same fabric. Textiles Raamsa's failure to produce substantiating evidence regarding the origin of the Razo Bleached Entry in no way confirmed that it would similarly fail to substantiate a NAFTA claim for the Poplin Entries. Importantly, Customs has "*no duty to inquire whether the required information will be forthcomin*g, and Customs may employ the full four-year period unless it has actual knowledge that the required information will not be submitted." *St. Paul*, 6 F.3d at 770 (emphasis added).

Without knowing why Textiles Raamsa failed to respond in the one instance, it is not possible to charge Customs with knowledge of what the producer might do in another case. Therefore, although Customs could have speculated that Textiles Raamsa would not submit the requested information based on prior behavior, plaintiff has not shown that Customs had actual knowledge that its inquiries would not gain a response. *See St. Paul*, 6 F.3d at 770. Even if plaintiff's proposed "should have known" standard were the law (and plaintiff has cited no case indicating that it is), International Fidelity's arguments would fail under these facts. That is, plaintiff has simply not

shown, by the one instance cited, that Customs could be charged with knowledge that its queries would be met with silence.

CONCLUSION

The court finds that Customs did not abuse its discretion by issuing either the first or second notice of extension because, even six months after the subject merchandise's entry, Customs was aware that it would not be able to make proper NAFTA verifications and classification determinations and liquidate the subject merchandise before the expiration of the initial one-year liquidation period. *See* 19 U.S.C. § 1504(a)(1). It is apparent that Customs was seeking "information needed for the proper appraisement or classification of the imported . . . merchandise" and did not abuse its discretion in doing so. 19 U.S.C. § 1504(b)(1). In addition, the court finds that Customs' second liquidation extension was not an abuse of discretion because Customs determined it was more efficient to accumulate Family Warehouse's entries for purposes of NAFTA verification and to resolve any questions regarding NAFTA treatment prior to settling classification issues. Importantly, plaintiff has not shown that Customs issued these extensions following the "elimination of all possible grounds" for their issuance. *St. Paul*, 6 F.3d at 768. Thus, plaintiff has not met its burden to bring this case within the "narrow limitation" imposed on Customs' discretion to extend the liquidation period. *See id.*

Finally, as to the time it took Customs to liquidate following the second extension, the court notes that liquidation occurred after Customs' decision to extend the liquidation period, and therefore, is not relevant to the question of whether Customs abused its discretion in deciding to extend the liquidation period for the subject merchandise.

Thus, for the reasons stated above, plaintiff's motion for summary judgment is denied, and the defendant's cross-motion for summary judgment is granted. Judgment will be entered accordingly.

Dated: May 30, 2017
New York, New York

/*s*/ *Richard K. Eaton*
RICHARD K. EATON, JUDGE