

U.S. Customs and Border Protection



AGENCY INFORMATION COLLECTION ACTIVITIES:

Documentation Requirements for Articles Entered Under Various Special Tariff Treatment Provisions

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day notice and request for comments; extension of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than January 19, 2021) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0067 in the subject line and the agency name. Please use the following method to submit comments:

Email. Submit comments to: CBP_PRA@cbp.dhs.gov.

Due to COVID-19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229-1177, Telephone number 202-325-0056 or via email CBP_PRA@cbp.dhs.gov. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877-227-5511, (TTY) 1-800-877-8339, or CBP website at <https://www.cbp.gov/>.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Documentation Requirements for Articles Entered Under Various Special Tariff Treatment Provisions.

OMB Number: 1651-0067.

Current Actions: Extension.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: U.S. Customs and Border Protection (CBP) is responsible for determining whether imported articles that are classified under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 9801.00.10, 9802.00.20, 9802.00.40, 9802.00.50, 9802.00.60 and 9817.00.40 are entitled to duty-free or reduced duty treatment. In order to file under these HTSUS provisions, importers, or their agents, must have the declarations that are provided for in 19 CFR 10.1(a), 10.8(a), 10.9(a) and 10.121 in their possession at the time of entry and submit them to CBP upon request. These declarations enable CBP to ascertain whether the requirements of these HTSUS provisions have been satisfied.

These requirements apply to the trade community who are familiar with CBP regulations and the tariff schedules.

Type of Information Collection: Declarations under Chapter 98.

Estimated Number of Respondents: 19,445.

Estimated Number of Annual Responses per Respondent: 3.

Estimated Number of Total Annual Responses: 58,335.

Estimated Time per Response: 1 minute (.016 hours).

Estimated Total Annual Burden Hours: 933.

Dated: November 12, 2020.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

[Published in the Federal Register, November 18, 2020 (85 FR 73496)]

AGENCY INFORMATION COLLECTION ACTIVITIES:**Bonded Warehouse Regulations**

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 30-Day notice and request for comments; extension of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies. Comments are encouraged and must be submitted no later than December 18, 2020 to be assured of consideration.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229-1177, Telephone number 202-325-0056 or via email CBP_PRA@cbp.dhs.gov. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877-227-5511, (TTY) 1-800-877-8339, or CBP website at <https://www.cbp.gov/>.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (85 FR 55469) on September 8, 2020, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the

proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Bonded Warehouse Regulations.

OMB Number: 1651-0041.

Current Actions: CBP proposes to extend the expiration date of this information collection with no change to the burden hours or to the information collected.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: Owners or lessees desiring to establish a bonded warehouse must make written application to the U.S. Customs and Border Protection (CBP) port director of the port where the warehouse is located. The application must include the warehouse location, a description of the premises, and an indication of the class of bonded warehouse permit desired. Owners or lessees desiring to alter or to relocate a bonded warehouse may submit an application to the CBP port director of the port where the facility is located. The authority to establish and maintain a bonded warehouse is set forth in 19 U.S.C. 1555, and provided for by 19 CFR 19.2, 19 CFR 19.3, 19 CFR 19.6, 19 CFR 19.14, and 19 CFR 19.36.

Estimated Number of Respondents: 198.

Estimated Number of Annual Responses per Respondent: 46.7.

Estimated Number of Total Annual Responses: 9,254.

Estimated Time per Response: 32 minutes.

Estimated Total Annual Burden Hours: 4,932.

Dated: November 12, 2020.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

[Published in the Federal Register, November 18, 2020 (85 FR 73496)]

**COPYRIGHT, TRADEMARK, AND TRADE NAME
RECORDATIONS
(No. 10 2020)**

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

SUMMARY: The following copyrights, trademarks, and trade names were recorded with U.S. Customs and Border Protection in October 2020. A total of 199 recordation applications were approved, consisting of 8 copyrights and 191 trademarks. The last notice was published in the Customs Bulletin Vol. 54, No. 41, October 21, 2020.

Corrections or updates may be sent to: Intellectual Property Rights Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, 90 K Street, NE., 10th Floor, Washington, D.C. 20229–1177, or via email at iprrquestions@cbp.dhs.gov.

FOR FURTHER INFORMATION CONTACT: LaVerne Watkins, Paralegal Specialist, Intellectual Property Rights Branch, Regulations and Rulings, Office of Trade at (202) 325–0095.

ALAINA VAN HORN

Chief,

*Intellectual Property Rights Branch
Regulations and Rulings, Office of Trade*

CBP IPR RECORDATION — OCTOBER 2020

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnsm	Owner Name	GM Restricted
TMK 00-00425	10/26/2020	09/20/2030	CALLAWAY	CALLAWAY GOLF COMPANY	No
TMK 00-00614	10/21/2020	07/22/2030	POR LARRANAGA (Stylized)	CUBAN CIGAR BRANDS B.V.	No
TMK 01-00292	10/26/2020	10/24/2030	HONDA & WING DESIGN	HONDA GIKEN KOGYO KABUSHIKI KAISHA	No
TMK 01-00293	10/26/2020	10/24/2030	WING DESIGN	HONDA GIKEN KOGYO KABUSHIKI KAISHA	No
TMK 02-00057	10/08/2020	11/14/2030	NBA & COLOR LOGO DESIGN	NBA PROPERTIES, INC.	No
TMK 02-01002	10/08/2020	10/24/2030	ROYALS	KANSAS CITY ROYALS BASEBALL CLUB, LLC	No
TMK 03-00688	10/08/2020	09/27/2030	CROSS & SHIELD DESIGN	SWISS ARMY BRAND LTD.	No
TMK 04-01132	10/27/2020	08/08/2030	NY JETS and Design	New York Jets LLC	No
TMK 05-00620	10/21/2020	11/15/2030	MINI COOPER	BAYERISCHE MOTOREN WERKE AG-TIENGESELLSCHAFT	No
TMK 07-00760	10/16/2020	01/01/2027	TIDE	THE PROCTER & GAMBLE COMPANY	No
TMK 08-00382	10/08/2020	09/26/2027	PROFOTO	PROFOTO AB	No
TMK 09-00466	10/05/2020	01/03/2026	Configuration of a Fox Head	FOX HEAD, INC.	No
TMK 10-00744	10/08/2020	10/13/2030	SUPERWAND	Garrett Electronics, Inc.	No
TMK 10-00924	10/27/2020	12/07/2030	OAKLAND RAIDERS	RAIDERS FOOTBALL CLUB, LLC	No
TMK 10-01075	10/15/2020	11/22/2030	MIU MIU	PRADA S.A.	No
TMK 10-01087	10/16/2020	11/18/2029	GAIN	THE PROCTER & GAMBLE COMPANY	No
TMK 10-01139	10/30/2020	08/04/2030	GOYARD	GOYARD ST-HONORE	No

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Recordation No.	Effective Date	Expiration Date	Name of Cop/Tm/Trm	Owner Name	GM Restricted
TMK 10-01140	10/30/2020	08/18/2030	E. GOYARD and Design	GOYARD ST-HONORE	No
TMK 10-01141	10/30/2020	12/08/2030	GOYARD (Stylized)	GOYARD ST-HONORE	No
TMK 10-01346	10/08/2020	01/12/2031	PUCK	Arla Foods amba	No
TMK 11-00104	10/20/2020	03/21/2031	GOOD EVIL and DESIGN	MORRO LICENSING, LLC	No
TMK 11-00174	10/30/2020	12/19/2030	MARIO PARTY	Nintendo of America Inc.	No
TMK 11-00360	10/06/2020	12/21/2020	LINSTEAD MARKET JAMAICA & Design	(RESTRAINT) Cancro Ltd. CORPORATION JAMAICA Seaforth P.O. St. Thomas JAMAICA	
TMK 11-00631	10/06/2020	10/06/2030	PING	Karsten Manufacturing Corporation	No
TMK 12-00436	10/13/2020	08/05/2030	TYLENOL	JOHNSON & JOHNSON	No
TMK 12-00763	10/26/2020	04/18/2031	WARBY PARKER	JAND Inc.	No
TMK 12-00956	10/22/2020	09/27/2030	HUGO	HUGO BOSS TRADE MARKS MANAGEMENT GMBH & CO. KG	No
TMK 12-01192	10/05/2020	07/06/2030	SUN JAVA	Albani Corporation	No
TMK 15-00030	10/15/2020	01/05/2031	TEAM BEACHBODY	BEACHBODY, LLC	No
TMK 15-00652	10/26/2020	05/15/2030	PRO-THICKS	GILDAN BRANDED APPAREL SRL	No
TMK 19-00236	10/08/2020	02/02/2031	RED SOX (Stylized)	Boston Red Sox Baseball Club Limited Partnership	No
TMK 19-00742	10/13/2020	10/15/2030	H and Design	HAYWARD INDUSTRIES, INC.	No
TMK 19-01126	10/08/2020	07/07/2030	MACE (STYLIZED)	MACE SECURITY INTERNATIONAL, INC.	No

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Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 20-00867	10/01/2020	12/21/2030	CORWIN	Sage Publications, Inc.	No
TMK 20-00868	10/01/2020	11/04/2025	7J1	Trinity Apparel LLC	No
TMK 20-00869	10/01/2020	06/27/2028	SIMPSON STRONG-TIE	SIMPSON STRONG-TIE COMPANY, INC.	No
TMK 20-00870	10/01/2020	07/21/2029	SIMPSON STRONG-TIE and Design	Simpson Strong-Tie Company, Inc.	No
TMK 20-00871	10/01/2020	05/06/2027	SIMPSON STRONG-TIE & DESIGN	Simpson Strong-Tie Company, Inc.	No
TMK 20-00872	10/02/2020	04/30/2027	SIMPSON STRONG-TIE & DESIGN	Simpson Strong-Tie Company, Inc.	No
TMK 20-00873	10/02/2020	07/21/2029	SIMPSON STRONG-TIE & DESIGN	Simpson Strong-Tie Company, Inc.	No
TMK 20-00874	10/02/2020	08/03/2024	SIMPSON STRONG-TIE	SIMPSON STRONG-TIE COMPANY, INC.	No
TMK 20-00875	10/02/2020	12/06/2028	SIMPSON STRONG-TIE & DESIGN	SIMPSON STRONG-TIE COMPANY, INC.	No
TMK 20-00876	10/02/2020	04/04/2026	STRONG-TIE	SIMPSON STRONG-TIE CO. INC.	No
TMK 20-00877	10/02/2020	10/23/2029	Configuration of a Door Closer	Kason Industries, Inc.	No
TMK 20-00878	10/02/2020	06/04/2023	Configuration of a Metal Door Handle	KASON INDUSTRIES, INC.	No
TMK 20-00879	10/05/2020	03/03/2030	EVOKE	PLANT THERAPY, LLC	No
TMK 20-00880	10/05/2020	05/20/2028	SENSOR BRUTE	Trendstiar Corporation	No
TMK 20-00881	10/05/2020	11/25/2025	PROFOTO	Profoto AB	No
TMK 20-00882	10/05/2020	09/26/2022	BOWLUS	Open Think Inc.	No
TMK 20-00883	10/05/2020	10/18/2027	ROAD CHIEF	Open Think Inc.	No
TMK 20-00884	10/05/2020	10/14/2030	Flower design	Chanel, Inc.	No

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Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 20-00885	10/05/2020	11/30/2023	PRINCIPAL SECRET	Victoria Principal Productions, Inc.	No
TMK 20-00886	10/05/2020	09/26/2022	BOWLUS ROAD CHIEF	Open Think Inc.	No
TMK 20-00887	10/05/2020	12/01/2030	Tungsten Heavy Powder & Parts - Logo and Design	Tungsten Heavy Powder, Inc. DBA Tungsten Heavy Powder & Parts	No
TMK 20-00888	10/08/2020	01/31/2028	TART OPTICAL ENTERPRISES	Tart Optical Enterprises LLC	No
TMK 20-00889	10/08/2020	08/31/2026	DEPUY SYNTHES	DePuy Synthes, Inc.	No
TMK 20-00890	10/08/2020	12/24/2023	SPECTRA SELIM FIBER CO., LTD. & DESIGN	SELMIFIBER Co., Ltd.	No
TMK 20-00891	10/08/2020	12/29/2030	WOMB	KNOLL, INC.	No
TMK 20-00892	10/08/2020	06/12/2029	Womb Chair	Knoll, Inc.	No
TMK 20-00893	10/08/2020	10/30/2029	Brennivin Sidan 1935 & DESIGN	Brennivin America, LLC	No
TMK 20-00894	10/08/2020	09/23/2030	ACTIVITY KINGS	WeCool Toys, Inc.	No
TMK 20-00895	10/08/2020	08/05/2030	AVALANCHE	WeCool Toys Inc.	No
TMK 20-00896	10/08/2020	12/15/2030	ALL SEAS CAPITAL	All Seas Capital Partners LTD	No
TMK 20-00897	10/13/2020	12/22/2030	TIDYWRAP	Under the Nail, LLC	No
TMK 20-00898	10/13/2020	11/18/2030	AGOLDE	CITIZENS OF HUMANITY, LLC	No
TMK 20-00899	10/13/2020	12/10/2029	BEARABY	Somnos LLC	No
TMK 20-00900	10/13/2020	02/11/2029	VAL VITA	COTA TRENTI, JUAN FEDERICO FRANCISCO	No
TMK 20-00901	10/13/2020	12/22/2030	PHOTOSCIENCE	Photoscience Japan Corp.	No

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Recordation No.	Effective Date	Expiration Date	Name of Cop/Tm/Trm	Owner Name	GM Restricted
TMK 20-00902	10/14/2020	12/11/2028	VEKEN	ShenZhen BuXiang Network Technology Co., Ltd.	No
TMK 20-00903	10/15/2020	12/29/2025	NIOSH (stylized)	U.S. Department of Health and Human Services	No
TMK 20-00904	10/15/2020	03/31/2024	BAMBOO	Albani Corporation	No
TMK 20-00905	10/16/2020	01/06/2031	BLUE TOUCH	Albani Corporation	No
TMK 20-00906	10/19/2020	02/27/2029	PERRIN	ASMC, LTD	No
TMK 20-00907	10/19/2020	07/03/2028	HORTILED	P.L. LIGHT SYSTEMS CANADA INC.	No
TMK 20-00908	10/19/2020	08/26/2030	6 WEEKS OF THE WORK	Beachbody, LLC	No
TMK 20-00909	10/19/2020	09/30/2030	THE MINDSET MEMBERSHIP	Beachbody, LLC	No
TMK 20-00910	10/19/2020	11/18/2030	BODGROUPS	Beachbody, LLC	No
TMK 20-00911	10/19/2020	10/07/2030	YOU CAN DROP IT	Beachbody, LLC	No
TMK 20-00912	10/19/2020	10/19/2026	BIOMAT	Richway & Fuji Bio Inc.	No
TMK 20-00913	10/19/2020	12/29/2030	S SAKUMA and Design	Sakuma International America, Inc.	No
TMK 20-00914	10/19/2020	08/26/2030	COOL LIP	M/S Tejram Dharam Paul	No
TMK 20-00915	10/20/2020	02/02/2021	PISTOL PETE	MORRO LICENSING, LLC	No
TMK 20-00916	10/20/2020	08/26/2025	LYVE	SEAGATE TECHNOLOGY LLC	No
TMK 20-00917	10/20/2020	03/16/2025	LACIE	SEAGATE TECHNOLOGY LLC	No
TMK 20-00918	10/20/2020	07/25/2027	MAXTOR	Seagate Technology LLC	No
TMK 20-00919	10/20/2020	06/04/2024	NYTRO	SEAGATE TECHNOLOGY LLC	No

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Recordation No.	Effective Date	Expiration Date	Name of Cop/Tm/Tm	Owner Name	GM Restricted
TMK 20-00920	10/20/2020	06/19/2026	BARRACUDA	SEAGATE TECHNOLOGY LLC	No
TMK 20-00921	10/20/2020	12/19/2027	IRONWOLF	Seagate Technology LLC	No
TMK 20-00922	10/21/2020	12/29/2030	S SAKUMA & DESIGN	Sakuma International America, Inc.	No
TMK 20-00923	10/21/2020	01/06/2031	DECAL FREAKZ	LaLone, Julie	No
TMK 20-00924	10/21/2020	10/28/2030	NP & Design	Navepoint, LLC	No
TMK 20-00925	10/21/2020	10/28/2030	NavePoint & Design	Navepoint, LLC	No
TMK 20-00926	10/21/2020	09/30/2030	9 WEEK CONTROL FREAK	Beachbody, LLC	No
TMK 20-00927	10/21/2020	09/30/2030	THE MONTHLY FIX	Beachbody, LLC	No
TMK 20-00928	10/21/2020	03/22/2026	Configuration of a swirl design	Seagate Technology LLC	No
TMK 20-00929	10/21/2020	05/11/2030	THERMODYNE	THERMODYNE INTERNATIONAL, LTD.	No
TMK 20-00930	10/21/2020	10/21/2030	BEACHBODY ICED TEA	Beachbody, LLC	No
TMK 20-00931	10/21/2020	11/25/2030	BOD LIFE	Beachbody, LLC	No
TMK 20-00932	10/21/2020	08/05/2030	BAJA KANPACHI	Omega Azul, S. de R.L. de C.V.	No
TMK 20-00933	10/21/2020	06/26/2023	COVER MALE	MORRO LICENSING, LLC	No
TMK 20-00934	10/21/2020	03/16/2025	LACIE & Oval Design	SEAGATE TECHNOLOGY LLC	No
TMK 20-00935	10/21/2020	02/22/2022	SEAGATE	Seagate Technology LLC	No
TMK 20-00936	10/22/2020	05/25/2024	GRABBA LEAF	Michael Andrew Robinson	No
TMK 20-00937	10/22/2020	04/07/2024	GRABBA LEAF and Design	Michael Andrew Robinson	No
TMK 20-00938	10/22/2020	12/01/2030	PARK HILL	Park Hill Collections, LLC	No

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Recordation No.	Effective Date	Expiration Date	Name of Cop/TmK/TmM	Owner Name	GM Restricted
TMK 20-00939	10/26/2020	05/26/2029	EXOS	Seagate Technology LLC	No
TMK 20-00940	10/26/2020	12/26/2027	FIRECUDA	Seagate Technology LLC	No
TMK 20-00941	10/26/2020	02/03/2026	RUGGED	SEAGATE TECHNOLOGY LLC	No
TMK 20-00942	10/26/2020	01/18/2027	Backup + Symbol Design	Seagate Technology LLC	No
TMK 20-00943	10/26/2020	07/14/2022	JERZEES	RUSSELL BRANDS, LLC	No
TMK 20-00944	10/26/2020	10/10/2024	5TH AVENUE	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00945	10/26/2020	01/07/2026	KIT KAT	SOCIETE DES PRODUITS NESTLE S.A.	No
TMK 20-00946	10/26/2020	11/23/2030	KRACKEL	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00947	10/26/2020	02/13/2022	MINI KISSES	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00948	10/26/2020	03/12/2023	MOUNDS	KRAFT FOODS IRELAND INTELLEC-TUAL PROPERTY	No
TMK 20-00949	10/26/2020	05/10/2028	MR. GOODBAR	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00950	10/26/2020	06/07/2030	ALMOND JOY (STYLIZED)	KRAFT FOODS IRELAND	No
TMK 20-00951	10/26/2020	09/23/2030	WATER FIRST, VEGGIES MOST	BEACHBODY, LLC	No
TMK 20-00952	10/26/2020	07/29/2030	GOLDEN ALMOND	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00953	10/26/2020	01/16/2029	REESE'S OUTRAGEOUS!	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No

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Recordation No.	Effective Date	Expiration Date	Name of Cop/TmK/TmM	Owner Name	GM Restricted
TMK 20-00954	10/26/2020	03/13/2027	REESE'S PIECES	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00955	10/26/2020	12/18/2021	REESE'S PUFFS	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00956	10/26/2020	09/12/2028	GOOD AND PLENTY (Stylized)	ICONIC IP INTERESTS, LLC	No
TMK 20-00957	10/26/2020	10/14/2028	REESE'S STICKS	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00958	10/26/2020	06/27/2028	HAVE A BREAK, HAVE A KIT KAT	Societe des Produits Nestle S.A.	No
TMK 20-00959	10/26/2020	03/13/2027	REESE'S	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00960	10/26/2020	11/05/2026	HEATH	ICONIC IP INTERESTS, LLC	No
TMK 20-00961	10/26/2020	04/03/2022	ICE BREAKERS DUO	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00962	10/26/2020	02/23/2021	ICE BREAKERS FROST	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00963	10/26/2020	08/21/2029	PAQUI	(REGISTRANT) Paqui LLC LIMITED LIABILITY COMPANY TEXAS 500 West 5th Street, Suite 900 Austin TEXAS 78730	No
TMK 20-00964	10/26/2020	10/11/2027	ICE BREAKERS Logo Design	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00965	10/26/2020	12/30/2024	ICE BREAKERS	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No

CBP IPR RECORDATION — OCTOBER 2020

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 20-00966	10/26/2020	02/28/2028	ICE CUBES	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00967	10/26/2020	04/08/2023	GHOSTBOND	Biomedical Research and Development, Inc.	No
TMK 20-00968	10/26/2020	01/20/2031	G CONSULTING LLC	G Consulting LLC	No
TMK 20-00969	10/27/2020	03/13/2027	REESE'S	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00970	10/27/2020	12/09/2028	REESTER BUNNIES	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00971	10/27/2020	11/29/2026	REESTER BUNNY	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00972	10/27/2020	01/12/2024	ROBIN EGGS	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00973	10/27/2020	04/08/2028	ROLO	Societe des Produits Nestle S.A.	No
TMK 20-00974	10/27/2020	08/31/2021	SKINNYPOP	SKINNYPOP POPCORN LLC	No
TMK 20-00975	10/27/2020	10/06/2022	SKOR	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00976	10/27/2020	02/17/2023	SPECIAL DARK	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00977	10/27/2020	01/13/2022	SYMPHONY	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00978	10/27/2020	04/26/2026	TAKE 5	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No

CBP IPR RECORDATION — OCTOBER 2020

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tm/Trm	Owner Name	GM Restricted
TMK 20-00979	10/27/2020	07/02/2029	TWIZZLERS (Stylized)	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00980	10/27/2020	09/09/2029	TWIZZLERS	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00981	10/27/2020	10/16/2026	Configuration of conically-shaped candy piece.	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00982	10/27/2020	11/17/2029	WHATCHAMACALLIT	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00983	10/27/2020	11/07/2023	WHOPPERS	ICONIC IP INTERESTS, LLC	No
TMK 20-00984	10/27/2020	02/09/2021	WINTERCOOL	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00985	10/27/2020	11/14/2027	YORK	KRAFT FOODS IRELAND INTELLEC-TUAL PROPERTY LIMITED	No
TMK 20-00986	10/27/2020	12/08/2027	ZAGNUT	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00987	10/27/2020	06/03/2022	ZERO	ICONIC IP INTERESTS, LLC	No
TMK 20-00988	10/27/2020	06/25/2026	HERSHEY'S HUGS	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00989	10/27/2020	11/18/2029	HERSHEY'S HERSHEY'S HERSHEY'S HERSHEY'S HERSHEY'S HERSHEY'S HERSHEY'S HERSHEY'S HERSHEY'S HERSHEY'S HERSHEY'S HERSHEY'S and Design	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00990	10/27/2020	10/09/2022	HERSHEY'S NUGGETS	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No

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Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 20-00991	10/27/2020	07/23/2023	Configuration of a HERSHEY'S bar	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00992	10/27/2020	03/26/2028	HERSHEY'S GOLD	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00993	10/27/2020	09/13/2027	HERSHEY'S (Stylized) Logo	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00994	10/27/2020	04/26/2030	HERSHEY'S and Design	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00995	10/27/2020	10/04/2027	HERSHEY'S SYRUP	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00996	10/27/2020	09/13/2027	HERSHEY'S	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00997	10/27/2020	09/27/2027	HERSHEY'S	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-00998	10/27/2020	01/07/2025	PAED LIJAM and Design	Saiyarth, Yongthong	No
TMK 20-00999	10/30/2020	01/04/2025	NUTRAGEOUS	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-01000	10/30/2020	07/24/2028	OATMEGA	Boundless Nutrition LLC DBA Boundless Nutrition	No
TMK 20-01001	10/30/2020	06/22/2026	ONE 1 (STYLIZED)	ONE BRANDS, LLC	No
TMK 20-01002	10/30/2020	05/18/2030	ONE 1 PLANT (STYLIZED)	ONE BRANDS, LLC	No
TMK 20-01003	10/30/2020	09/07/2026	BIG KAT	Societe des Produits Nestle S.A.	No
TMK 20-01004	10/30/2020	12/05/2029	PAYDAY	ICONIC IP INTERESTS, LLC	No

CBP IPR RECORDATION — OCTOBER 2020

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tm/Trm	Owner Name	GM Restricted
TMK 20-01005	10/30/2020	04/30/2027	PELON PELO RICO	Hershey Mexico, S.A. de C.V.	No
TMK 20-01006	10/30/2020	04/02/2028	BITS O' BRICKLE	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-01007	10/30/2020	02/26/2027	PIRATE'S BOOTY	AMPLIFY SNACK BRANDS, INC.	No
TMK 20-01008	10/30/2020	08/12/2030	AFA-TUBE	Covaris, Inc.	No
TMK 20-01009	10/30/2020	01/28/2030	POT OF GOLD	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-01010	10/30/2020	06/06/2023	BREATH SAVERS	WM. WRIGLEY JR. COMPANY	No
TMK 20-01011	10/30/2020	07/07/2029	REESE'S (STYLIZED)	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-01012	10/30/2020	12/11/2028	BROOKSIDE & Design	Hershey Canada Inc.	No
TMK 20-01013	10/30/2020	12/11/2028	BROOKSIDE Tree Logo	Hershey Canada Inc.	No
TMK 20-01014	10/30/2020	05/02/2026	BROOKSIDE	Hershey Canada Inc.	No
TMK 20-01015	10/30/2020	04/07/2025	BUBBLE YUM	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-01016	10/30/2020	05/21/2029	CADBURY CREME EGG (Stylized)	CADBURY UK	No
TMK 20-01017	10/30/2020	09/09/2027	CADBURY MINI EGGS & DESIGN	CADBURY UK	No
TMK 20-01018	10/30/2020	10/26/2027	CADBURY	CADBURY UK	No
TMK 20-01019	10/30/2020	09/14/2025	CARAMELLO	CADBURY UK	No
TMK 20-01020	10/30/2020	02/17/2026	Hershey Corporate Logo	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No

CBP IPR RECORDATION — OCTOBER 2020

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 20-01021	10/30/2020	06/13/2021	FAST BREAK	HERSHEY CHOCOLATE & CONFEC-TIONERY LLC	No
TMK 20-01022	10/30/2020	03/26/2028	ILE and Design	Industria Lojana de Especerías	No
TMK 20-01023	10/30/2020	05/14/2022	BD Veritor and Design	Becton, Dickinson and Company	No
TMK 98-00710	10/26/2020	02/07/2026	R RUSSELL ATHLETIC & DESIGN	RUSSELL BRANDS, LLC	No
COP 20-00059	10/01/2020	09/24/2040	PHONE CASE WITH TURTLE ART- WORK - ANTHONY I.O.	OPEN MIND DEVELOPMENTS CORPO- RATION	No
COP 20-00060	10/05/2020	04/05/2021	Carried by Alien "Pick me Up" Inflatable Costume	AFG Media Ltd	No
COP 20-00061	10/21/2020	10/21/2040	FIXATE (2020) A Fix Approved Cooking Show	Beachbody, LLC	No
COP 20-00062	10/21/2020	10/21/2040	THE ULTIMATE PORTION FIX (English 2020)	Beachbody, LLC	No
COP 20-00063	10/21/2020	10/21/2040	6 Weeks of the Work(English 2020)	Beachbody, LLC.	No
COP 20-00064	10/21/2020	10/21/2040	THE MONTHLY FIX (2020)	Beachbody, LLC.	No
COP 20-00065	10/26/2020	10/22/2040	Morning Meltdown (English 2020)	Beachbody, LLC.	No
COP 20-00066	10/26/2020	10/23/2040	THE FLINTSTONES (s18) REMIX - FH x 19 - ALL FAMILY- WBCP	Hanna-Barbera	No

U.S. Court of International Trade

Slip Op. 20–161

NIPPON STEEL & SUMITOMO METAL CORPORATION (NOW KNOWN AS NIPPON STEEL CORPORATION), Plaintiff, v. UNITED STATES, Defendant, NUCOR CORPORATION, Defendant-Intervenor, UNITED STATES STEEL CORPORATION, Defendant-Intervenor.

Before: Timothy M. Reif, Judge
Court No. 19–00131

[Final Determination sustained.]

Dated: November 10, 2020

Neil R. Ellis, Sidley Austin, LLP, of Washington, DC argued for plaintiff Nippon Steel & Sumitomo Metal Corporation. With him on the motion was *Richard L.A. Weiner*, *Rajib Pal*, *Shawn M. Higgins*, *Justin R. Becker*, and *Alex L. Young*.

Kelly Ann Krystyniak, Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice of Washington, DC argued for defendant United States. With her on the brief was *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of Counsel was *Jesus N. Saenz*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, Washington, DC.

Enbar Toledano, Wiley Rein LLP, of Washington, DC argued for defendant-intervenor Nucor Corporation. With her on the brief was *Alan H. Price*, *Christopher B. Weld* and *Cynthia C. Galvez*.

OPINION

Reif, Judge:

This action involves the final determination of the first administrative review conducted by the U.S. Department of Commerce (“Commerce”) of the antidumping order covering hot-rolled steel from Japan. *See Certain Hot-Rolled Steel Flat Products From Japan: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments*; 2016–2017, 84 Fed. Reg. 31025 (Dep’t of Commerce June 28, 2019) (“Final Determination”), and the accompanying Issues and Decision Memorandum (Dep’t of Commerce June 21, 2019) (“Decision Memorandum”). Before the court is a USCIT Rule 56.2 motion for judgment on the agency record filed by plaintiff Nippon Steel & Sumitomo Metal Corporation (“NSSMC” or “plaintiff”). *See* Pl.’s Mem. of Points and Authorities in Supp. of Mot. J. Agency R., ECF No. 34 (“Pl. Br.”). Plaintiff argues that the Final Determination is not supported by substantial evidence and is not in accordance with law for two reasons. First, plaintiff maintains that

the decision by Commerce to apply partial adverse facts available (“AFA”) is not supported by substantial evidence because NSSMC acted to the best of its ability in supplying Commerce with the downstream sales of its affiliated resellers. Pl. Br. at 9. Second, plaintiff argues that, even if Commerce was justified in applying partial AFA, the particular AFA that Commerce chose to apply was unreasonable because Commerce “overreached reality” and did not consider properly plaintiff’s “level of culpability.” Pl. Br. at 24, 32. This court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c). For the reasons set forth below, the court sustains the Final Determination as supported by substantial evidence and in accordance with law.

BACKGROUND

U.S. antidumping law directs Commerce to impose antidumping duties on imported goods when Commerce determines that those goods are sold in the United States at less than fair value and the U.S. International Trade Commission determines that the domestic industry manufacturing those goods is thereby “materially injured, or is threatened with material injury.” See 19 U.S.C. § 1673(2)(A)(i)–(ii) (2018); *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304, 1306 (Fed. Cir. 2017). “Sales at less than fair value are those sales for which the ‘normal value’ (the price a producer charges in its home market) exceeds the ‘export price’ (the price of the product in the United States).” *Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1322, 1326 (Fed. Cir. 2017) (quoting *Union Steel v. United States*, 713 F.3d 1101, 1103 (Fed. Cir. 2013)).

On October 3, 2016, Commerce published an antidumping order on imports of hot-rolled steel from Japan. See *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, the Republic of Korea, the Netherlands, the Republic of Turkey, and the United Kingdom: Amended Final Affirmative Antidumping Determinations for Australia, the Republic of Korea, and the Republic of Turkey and Antidumping Duty Orders*, 81 Fed. Reg. 67,962 (Dep’t. of Commerce Oct. 3, 2016) (“Order”). In the investigation’s final determination preceding the Order, Commerce applied partial AFA as a consequence of plaintiff’s failure to report downstream home market sales (“downstream sales”) for certain affiliated home market resellers (“affiliated resellers”) that resold hot-rolled steel in the home market. See *Certain Hot-Rolled Steel Flat Products from Japan: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*; 81 Fed. Reg. 53,409 (Dep’t of Commerce Aug. 12, 2016) (“Investigation Final Determination”) and the accompany-

ing Issues and Decision Memorandum (Dep't of Commerce Aug. 4, 2016) ("Investigation Decision Memorandum"). For purposes of constructing the dumping margin, Commerce used as AFA the highest NSSMC home market price of the commonly sold CONNUMS to the affiliated resellers' downstream sales. Nucor Case Brief at 18, CD 162 (Dec. 14, 2018) (citing the Investigation Decision Memorandum).

In December 2017, Commerce initiated the first administrative review of the Order, identifying the period of review as March 22, 2016 to September 30, 2017. Pl. Br. at 5; Def.'s Resp. to Pl.'s Mot. J. Agency R., ECF No. 39 ("Def. Br.") at 2. Commerce selected as mandatory respondents NSSMC and Tokyo Steel Manufacturing Co., Ltd., the two exporters/producers accounting for the largest volume of imported subject merchandise at [[]] and [[]] percent respectively. Pl. Br. at 5; Def. Br. at 3; *See* Memorandum re: "Respondent Selection for the Administrative Review of the Antidumping Order of Certain Hot-Rolled Steel Flat Products from Japan" at 4, CD 11 (Jan. 16, 2018) ("Resp. Selection Memo"). On January 19, 2018, Commerce issued its standard questionnaire for antidumping administrative reviews to NSSMC. Pl. Br. at 5; Def. Br. at 3. The questionnaire asked respondents to report downstream sales by all affiliated resellers in the home market that fail the arm's-length test. *See* Letter re: "Request for Information" at 1, CD 1 (January 19, 2018) ("Questionnaire").

Plaintiff responded to the Questionnaire on March 15, 2018. NSSMC Section B Questionnaire Response at B-1, CD 21 (Mar. 15, 2018) ("Questionnaire Response"). Plaintiff determined that sales to [[]] of its affiliated resellers failed the arm's-length test but plaintiff did not report the downstream sales of these affiliated resellers. Questionnaire Response at B-6, Exhibit B-22. Instead, plaintiff provided incoming correspondence from the affiliated resellers, as an exhibit, to illustrate plaintiff's unsuccessful attempt to obtain the downstream sales from its affiliated resellers. Questionnaire Response at B-6, Exhibit B-23. Plaintiff's outgoing letter¹ to the affiliated resellers stated, in relevant part, that [[]]. NSSMC's Section A, B, and C Supplemental Questionnaire Response at Revised Exhibit B-23, CD 62 (Aug 10, 2018) ("Supp. Quest. Response"). However, plaintiff stated in its Questionnaire Response that its affiliated resellers were "unwilling or unable to provide these data in the detail and format required by the Department." Questionnaire Response at B-6. The reasons provided by the affiliated resellers for this unwill-

¹ Plaintiff's outgoing letter was not included as an exhibit in the Questionnaire Response in the record before the court. The record reflects that Commerce was provided a copy of plaintiff's outgoing letter for the first time in the Supp. Quest. Response.

ingness or inability may be summarized as: lack of existing records containing the information; concern over the financial and labor burden to produce the information; or, an inability to access or produce the information in the format requested by Commerce due to system limitations.² Questionnaire Response at Exhibit B-23; *see also* Pl. Br. at 14–15; Def. Br. at 12.

In July 2018, Commerce sent plaintiff a supplemental questionnaire asking plaintiff to update its arm’s-length test as necessary and reiterating the need for plaintiff to report the downstream sales of all affiliated resellers that fail the test. Supp. Quest. Response at 3. The supplemental questionnaire asked plaintiff to

provide a narrative explanation that details the [[]] and the extent to which you have assisted your affiliates in compiling and preparing the downstream sales data.

Supp. Quest. Response at 3.³ Plaintiff determined that [[]] of its affiliated resellers fail the updated arm’s-length test. Def. Br. at 11 (citing Supp. Quest. Response Exhibit SB1). However, plaintiff failed to report the requested downstream sales for [[]] of those affiliated resellers.⁴ *Id.* *See also* Supp. Quest. Response at 3–5.

In its response, NSSMC directed Commerce to a revised exhibit from NSSMC’s Questionnaire Response. The revised exhibit contained additional incoming correspondence from some of the affiliated resellers dated March or April 2018, which appears to respond to “<The reason why we cannot provide further information>”.⁵ Supp. Quest. Response at Rev. Exhibit B-23.

Before the court, the United States (“Government” or “defendant”) notes that “Nippon Steel included as an exhibit the same letter it had provided in its Questionnaire Response, setting forth its previous unsuccessful attempt to solicit the requested sales data.” Def. Br. at 4 (citing Supp. Quest. Response at Rev. Exhibit B-23). Defendant argues, “The record thus indicated that Nippon Steel made only a single attempt to acquire the information, making no additional efforts after

² The [[]] affiliated resellers that did not report downstream sales provided explanations individually as to the reasons that they were unable to provide NSSMC with the downstream sales. The explanations were: [[]] Questionnaire Response at Exhibit B-23.

³ In the Supplemental Questionnaire Response on the record, NSSMC restates the questions by Commerce presumably found in the supplemental questionnaire and then responds to each question in turn.

⁴ The resellers that did not report downstream sales included the following, along with the ownership stake held by NSSMC: [[]] *See* Supp. Quest. Response at Revised Exhibit SB-1 (P.R. 128–129; C.R. 274–275).

⁵ Excerpts from the additional incoming correspondence are as follows: [[]]

the issuance of the supplemental questionnaire.”⁶ *Id.* In response, NSSMC contends that it contacted its affiliated resellers before Commerce initiated this review, and that NSSMC and its Japanese counsel, hired to manage the data collection efforts, “made repeated written requests, as well as numerous telephone calls, to each of the affiliated resellers.” Pl. Br. at 11–12 (citing Supp. Quest. Response at 4). In the Supplemental Questionnaire Response, plaintiff noted that it sent each affiliated reseller a database containing “all of the information in NSSMC’s possession related to sales of subject merchandise to that reseller during the []” Supp. Quest. Response at 4.

On November 14, 2018, Commerce published its preliminary determination. *See Certain Hot-Rolled Steel Flat Products From Japan: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2016–2017*, 83 Fed. Reg. 56813 (Dep’t of Commerce Nov. 14, 2018) (“Preliminary Determination”), and the accompanying Issues and Decision Memorandum at 1 (Dep’t of Commerce Nov. 1, 2018) (“Preliminary Decision Memorandum”). Commerce preliminarily determined that the downstream sales were missing from the record and that NSSMC had failed to act to the best of its ability in providing this information to Commerce. Preliminary Decision Memorandum at 12. On the basis that NSSMC had failed to act to the best of its ability, Commerce determined that the application of partial AFA was warranted and preliminarily applied the highest NSSMC home market product matching CONNUM-specific price as AFA. *Id.* As a result, Commerce preliminarily calculated an estimated weighted-average dumping margin of 0.54 percent for NSSMC. Preliminary Determination.

On December 14, 2018, and December 21, 2018, NSSMC submitted its administrative case brief and its rebuttal brief, respectively. Pl. Br. at 6; Def.-Intervenor Nucor Corp.’s Resp. Br., ECF No. 41 (“Def.-Inter. Br.”) at 6. NSSMC argued that Commerce erred by applying partial AFA to the downstream sales of affiliated resellers. *See* NSSMC’s Case Brief at 5–15, CD 148 (Dec. 14, 2018). In its rebuttal brief, NSSMC argued that, if Commerce were to continue to apply partial AFA, Commerce should apply partial AFA to the downstream sales of only those affiliated resellers that the record indicates were capable of providing the requested downstream sales but were unwilling to do so. *See* NSSMC’s Rebuttal Brief at 18, CD 167 (Dec. 21, 2018).

⁶ Notably, defendant’s position before the court differs from the characterization by Commerce of what the record shows during the administrative review: “The fact that the record shows that Nippon Steel contacted all of its affiliated resellers with multiple rounds of correspondence and telephone calls, even before the review was initiated, does not change the fact that the necessary home market price data are missing from the record.” Preliminary Decision Memorandum at 12.

On June 28, 2019, Commerce issued its Final Determination, in which Commerce determined that it would continue to apply partial AFA to the downstream sales of affiliated resellers due to the failure of NSSMC to act to the best of its ability. Decision Memorandum at 15–16. Commerce also made changes to the AFA methodology used for NSSMC and Tokyo Steel Manufacturing Co., Ltd., the other mandatory respondent. *See* Final Determination. Instead of continuing to apply the highest NSSMC home market price of a sale of a product with a matching CONNUM, Commerce applied the highest NSSMC home market price of a sale of a product within the commonly sold CONNUMs, Decision Memorandum at 15–16, consistent with Commerce’s methodology in the Investigation Final Determination. Def.-Inter. Br. at 7. Commerce explained that looking only to the sales of products in the home market with a matching CONNUM provided a “more limited pool from which to select an appropriate AFA rate.” Decision Memorandum at 16. Commerce further explained, “[t]o ensure that the selected AFA rate will induce cooperation, we find it appropriate to evaluate a broader pool, i.e., the respondent’s home market sales, in selecting an AFA rate for these unreported sales.” Decision Memorandum at 16. Applying this AFA methodology, Commerce calculated an estimated weighted-average dumping margin of 7.64 percent for NSSMC. *See* Final Determination. After publication of the Final Determination, NSSMC timely commenced this action on January 27, 2020, to challenge the Final Determination in this first administrative review. Pl. Br. at 7.

STANDARD OF REVIEW

The court has jurisdiction over an action filed by an interested party challenging the final determination by Commerce in an administrative review of an antidumping duty order. 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c). In reviewing a determination under section 516a of the Tariff Act of 1930, as amended, the court reviews the administrative record based on the substantial evidence standard, giving deference to “Commerce’s special expertise in administering the anti-dumping law[s].” *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1335 (Fed. Cir. 2002) (citations omitted). The court will uphold a determination by Commerce unless it is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). *See also Micron Tech. Inc. v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997). Substantial evidence is “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson v.*

Perales, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

When reviewing an action by Commerce, the court looks for “a reasoned analysis or explanation for an agency’s decision An explicit explanation is not necessary, however, where the agency’s decisional path is reasonably discernible.” *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369–70 (Fed. Cir. 1998) (citations omitted). “An agency finding may still be supported by substantial evidence even if two inconsistent conclusions can be drawn from the evidence.” *Dongtai Peak Honey Indus. Co. v. United States*, 777 F.3d 1343, 1349 (Fed. Cir. 2015) (citation omitted).

Determination by Commerce to Apply Partial AFA

LEGAL FRAMEWORK

When conducting an antidumping investigation or an administrative review of an antidumping order, Commerce solicits information from the respondents — both foreign producers and exporters — to determine whether dumping has occurred and, if so, to calculate a dumping margin. When necessary information is not available on the record, Commerce must select from “facts otherwise available” to fill any gaps in the record and complete the investigation or administrative review. 19 U.S.C. § 1677e(a). Once Commerce has determined that it is necessary to select from “facts otherwise available” to fill a gap in the record, Commerce then evaluates whether to apply an adverse inference, also commonly known as adverse facts available or AFA. 19 U.S.C. § 1677e(b). Commerce may decide to apply AFA when it “finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information.” 19 U.S.C. § 1677e(b).

I. The Best of Its Ability Standard

To determine whether Commerce may apply AFA to a respondent under 19 U.S.C. § 1677e(b), the Federal Circuit in *Nippon Steel Corp.* established a standard that requires Commerce, based on both an objective and subjective showing, to determine whether the respondent had acted to the “best of its ability.” *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

The objective element asks whether a reasonable respondent “would have known that the requested information was required to be kept and maintained.” *Id.* at 1376. The objective element assumes that a respondent is “familiar with the rules and regulations that apply to the import activities undertaken.” *Id.* at 1382. It requires that respondents:

(a) take reasonable steps to keep and maintain full and complete records documenting the information that a reasonable importer should anticipate being called upon to produce; (b) have familiarity with all of the records it maintains in its possession, custody, or control; and (c) conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question to the full extent of the importers' ability to do so.

Id. The Federal Circuit made clear, “while the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping.” *Id.*

The subjective element has two aspects. First, it requires that Commerce make a subjective showing that the respondent under investigation or review has failed to produce promptly the requested information. *Id.* Second, it requires that the “failure to fully respond is the result of the respondent’s lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records.” *Id.* at 1382–83. As such, “An adverse inference may not be drawn merely from a failure to respond, but only under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made; i.e., under circumstances in which it is reasonable to conclude that less than full cooperation has been shown.” *Id.* at 1383. Finally, whether a respondent intended to comply with its statutory obligations is irrelevant for determining whether the application of AFA is appropriate when information is missing from the record. *Id.* (noting the requirement to apply AFA is “simply a failure to cooperate to the best of the respondent’s ability, regardless of motivation or intent”).

II. Maximum Efforts Regarding Affiliates

U.S. antidumping law defines “affiliated persons” to include multiple relationships. 19 U.S.C. § 1677(33). One definition is that of a shareholder or stockholder, “[a]ny 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.” 19 U.S.C. § 1677(33)(E).

This Court has addressed “affiliated persons” in the context of the best of its ability standard. In *Kawasaki*, this Court recognized that Commerce has a “general practice of attributing failure of an affiliate to the respondent.” *Kawasaki Steel Corp. v. United States*, 24 CIT

684, 694, 110 F. Supp. 2d 1029, 1038 (2000). In *Hyundai Steel Co.*, this Court determined that an “assessment of whether [a respondent] put forth its maximum efforts to investigate and obtain the requested information from its records, necessarily must assess whether [it] could or should have been able to obtain the information in its affiliate’s possession.” *Hyundai Steel Co. v. United States*, 42 CIT __, __, 319 F. Supp. 3d 1327, 1345 (2018) (internal quotation omitted). Further, this Court has also determined, and the Federal Circuit affirmed, that a respondent has the burden to show that it could not compel its affiliate to provide the necessary information. *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 24 CIT 841, 846 (2000), *aff’d*, 298 F.3d 1330 (Fed. Cir. 2002).

DISCUSSION

Commerce determined under § 1677e(a) that necessary information, the downstream sales of the affiliated resellers, was not available on the record. Decision Memorandum at 16. Commerce described the missing information as “fundamental data, without which Commerce cannot perform the dumping calculation required by the statute.” *Id.* As such, Commerce is required to gap fill using facts otherwise available to continue its administrative review. 19 U.S.C. § 1677e(a). To determine whether the facts otherwise available should have an adverse inference, Commerce analyzed whether plaintiff “failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce].” 19 U.S.C. § 1677e(b).

Commerce determined that plaintiff “failed to cooperate to the best of its ability in obtaining these companies’ downstream sales” because plaintiff had “ownership leverage” and “establishes the prices of sales to its affiliates.” Decision Memorandum at 16. As a result, Commerce concluded that plaintiff was in a position to induce the affiliated resellers to report their downstream sales. *Id.* On review, the court looks at the record and the objective and subjective showings supplied by Commerce to determine whether the determination by Commerce was supported by substantial evidence. *See Nippon Steel Corp.*, 337 F.3d at 1382.

In the instant case, the objective question is what would be expected of a reasonable respondent in respect of obtaining from the affiliated resellers and providing to Commerce information on down-

stream sales by those affiliated resellers?⁷ Commerce expected plaintiff to be able to obtain the downstream sales from its affiliated resellers because of its “ownership leverage.” See Decision Memorandum at 16. Plaintiff has an ownership stake between [[]] percent in the majority of the affiliated resellers.⁸ Def. Br. at 14; Pl.’s Reply in Supp. of Mot. J. Agency R., ECF No. 43 (“Pl. Reply Br.”) at 6. In addition to a substantial ownership interest in the affiliated resellers, Commerce determined that plaintiff is the top exporter/producer, accounting for [[]] percent of the total U.S. imports of the subject merchandise during the period of review. Resp. Selection Memo at 4. Taking the record as a whole, Commerce reasonably inferred that the ownership interest and strong market position constitute leverage and reasonably expected that plaintiff could obtain the downstream sales from its affiliated resellers.

While the objective showing is satisfied, Commerce missed an opportunity to highlight yet an additional reason that it reasonably expected plaintiff to be able to provide these downstream sales. In particular, the court is puzzled as to the reason that Commerce failed to punctuate in its Decision Memorandum that this respondent in the administrative review, now plaintiff, had specific notice that Commerce would request its affiliated resellers’ downstream sales in a review. In its Decision Memorandum, Commerce summarized an argument from petitioner’s rebuttal brief stating “[i]n the original investigation, Commerce applied partial AFA to Nippon Steel for its failure to report affiliated downstream sales, [sic] for the same reason, Commerce should continue to apply partial AFA to Nippon Steel on these unreported affiliated downstream sales in this administrative review.” Decision Memorandum at 15. The record of this proceeding demonstrates that Commerce asked for the downstream sales in the investigation. *Id.* See also Def.-Inter. Br. at 17. That fact would indicate to a reasonable respondent that Commerce would likely want this same information in a subsequent review.

Turning to the subjective showing, Commerce reasonably determined that plaintiff did not put forth its “maximum efforts” to obtain the downstream sales as required by statute because Commerce found that NSSMC was “in a position to induce these companies to report their downstream sales,” and failed to induce or attempt to

⁷ There is no dispute that the resellers are “affiliated” under the definition of § 1677(33). “Nippon Steel’s ownership interest of the [[]] unreported affiliated resellers ranged from [[]].” Def. Br. at 14.

⁸ Defendant states that NSSMC’s ownership interest in the [[]] unreported affiliated resellers in the majority of cases was “over [[]].” Def. Br. at 14. Plaintiff responds that “NSSMC held a minor, non-controlling ownership share (no more than [[]%) in all but one of the [[]] affiliated resellers to which the Department applied AFA.” Pl. Reply Br. at 6.

induce its affiliated resellers. See Decision Memorandum at 16. To make a subjective showing, Commerce is required to show that: (1) plaintiff failed to produce promptly the downstream sales; and, (2) this failure by plaintiff was “the result of the respondent’s lack of cooperation in either (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records.” *Nippon Steel Corp.*, 337 F.3d at 1382–83.

Commerce stated in its Preliminary and Final Determinations that plaintiff failed to produce the downstream sales. Decision Memorandum at 16. The fact that the downstream sales were not produced is undisputed; the court turns to whether the record supports the determination by Commerce that plaintiff failed to meet either the “(2)(a)” or “(2)(b)” elements as identified by the Federal Circuit in *Nippon Steel Corp.* 337 F.3d at 1382–83.

Plaintiff makes several arguments as to the reasons that it acted to the best of its ability. First, NSSMC contends that it put forth its “maximum efforts” because it: contacted the affiliated resellers before Commerce initiated this review; hired Japanese counsel to manage the data collection efforts; “made repeated written requests, as well as numerous telephone calls, to each of the affiliated resellers” and sent each affiliated reseller a database containing the relevant sales from plaintiff to the affiliated reseller. Pl. Br. at 11–12 (citing Supp. Quest. Response at 4). Plaintiff argues that it is not responsible for the unwillingness or inability of its affiliated resellers to provide their downstream sales. See Pl. Br. at 13.

Plaintiff appears to overstate the extent of its efforts. The court’s review of the record reveals that plaintiff sent one letter to its affiliated resellers. See Supp. Quest. Response at Rev. Exhibit B-23. Defendant’s brief reflects the record in this respect. See Def. Br. at 12. There is a modest reference in Commerce’s Preliminary Decision Memorandum that alludes to other facts not contained in the record. Preliminary Decision Memorandum at 12. As those ostensible facts do not appear in the record, there is no basis for the court to consider them. The court notes that when discussing the efforts of a respondent in the context of a best of its ability analysis, Commerce and defendant must take care to portray the record accurately and consistently throughout the administrative proceeding and before this court.

Defendant likens the instant matter to that reviewed by the Court in *Kawasaki Steel Corp.*, 110 F. Supp. 2d at 1038. In *Kawasaki Steel Corp.*, the Court sustained Commerce’s decision to apply AFA because the record demonstrated that Kawasaki possessed the ability to in-

fluence its affiliate but took a “hands-off” approach by “merely opt[ing] to exchange correspondence with its affiliate and then acquiesc[ing] to any communication from [its affiliate] that could be interpreted as a sign of resistance” in obtaining the requested data. *Kawasaki Steel Corp.*, 110 F. Supp. 2d at 1037–38.

In the instant case, Commerce reasonably determined that NSSMC possessed the ability to influence its affiliated resellers due to its “ownership leverage.” See Decision Memorandum at 16. Commerce therefore reasonably expected plaintiff to utilize its “ownership leverage” to obtain the downstream sales from its affiliated resellers. The record reveals that plaintiff sent one letter to its affiliated resellers requesting their downstream sales; the record does not show that plaintiff exerted its “ownership leverage” to induce compliance. See Supp. Quest. Response at Rev. Exhibit B-23. While some additional incoming correspondence dated March to April 2018 indicates that there may have been some additional outreach by plaintiff, the record is devoid of any information that plaintiff exerted any leverage to induce, or attempt to induce, the affiliated resellers to provide their downstream sales. In fact, there is nothing in the record showing that NSSMC made any efforts to address its affiliated resellers’ concern over the financial and labor burden to produce the information or to address its affiliated resellers’ alleged inability to access or produce the information in the format requested by Commerce due to system limitations. It is plaintiff’s burden to create an “adequate record before Commerce,” *Hyundai Steel Co.*, 319 F. Supp. 3d at 1345, and yet plaintiff challenges Commerce’s determination on the basis of largely undocumented assertions and a record revealing one outgoing letter. Consequently, it was reasonable for Commerce to determine that plaintiff’s efforts amounted to less than full cooperation and that NSSMC should have provided more forthcoming responses to Commerce containing more data from its resellers.

For its second argument, plaintiff claims that it is not in a position to induce its affiliated resellers because it owns only minority shares in some of the affiliated resellers. Pl. Br. at 16. The applicable statute provides that even minority shares that are 5 percent or more are sufficient to prove affiliation, and as such, an indication of control. See 19 U.S.C. § 1677e(33). In addition to ownership interest, plaintiff has a strong position in the Japanese steel market as indicated by plaintiff supplying [] percent of imports during the period of review. See Resp. Selection Memo at 4. Based on the record before the court, Commerce made a reasonable determination that plaintiff had “own-

ership leverage,” from which Commerce inferred that NSSMC was in a position to induce its affiliates.⁹ Decision Memorandum at 16. Again, it is plaintiff’s burden under *Ta Chen* to put information on the record that contradicts the Final Determination and shows plaintiff’s inability to induce action by its affiliated resellers.

Relatedly, plaintiff attempts to shift the burden as stated by the Court in *Ta Chen* by arguing that Commerce needed to demonstrate that NSSMC would have been successful in its attempts to induce its affiliated resellers before Commerce could apply partial AFA. *See* Pl. Br. at 17. The court is unpersuaded by plaintiff’s argument. It is plaintiff that has the burden to show that it acted to the best of its ability to comply with Commerce’s requests.

The best of its ability standard does not require that a respondent in an investigation or review achieve perfection or total success. Rather, the standard requires that a respondent use its maximum efforts.

In the instant case, NSSMC did not exert maximum efforts. *See Nippon Steel Corp.*, 337 F.3d at 1382. Based on the record, Commerce had a reasonable expectation that plaintiff would have been able to obtain the downstream sales of its affiliated resellers due to plaintiff’s “ownership leverage.” Decision Memorandum at 16. Commerce made an objective showing as to ownership leverage as set out in *Nippon Steel Corp.* *See Nippon Steel Corp.*, 337 F.3d at 1382. As a consequence, plaintiff had the obligation either to use its “maximum efforts” to obtain the downstream sales or to put on the record information that demonstrated that Commerce’s expectation was not reasonable. *See Id.* at 1382–1383. Plaintiff did neither. As a consequence, Commerce’s application of partial AFA was reasonable because NSSMC did not act to the best of its ability.

Selection of AFA by Commerce

LEGAL FRAMEWORK

After Commerce determines that necessary information is missing from the record and that a respondent has not acted to the best of its ability and, on that basis, to apply AFA, Commerce selects the appropriate information for AFA. “The Department’s practice when selecting an adverse rate from among the possible sources of information is

⁹ “Moreover, the record shows that Nippon Steel has ownership leverage as well as an absolute veto power over whether to sell to, or continue to do business with, an affiliate. In fact, it is Nippon Steel that establishes the prices of sales to its affiliates, thus, Nippon Steel is in a position to make these sales at arm’s-length prices or not. Based on this information, we continue to find that Nippon Steel is in a position to induce these companies to report their downstream sales.” Decision Memorandum at 16.

to ensure that the margin is sufficiently adverse so as to effectuate the purpose of the facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner.” *Shandong Mach. Imp. & Exp. Co. v. United States*, 34 CIT 1001, 1006 (2010) (internal citations and quotations omitted). When making an adverse inference, Commerce may rely on information derived from “the petition, . . . a final determination in the investigation under this title, . . . any previous review . . . or determination . . . , or . . . any other information placed on the record.” 19 U.S.C. § 1677e(b)(2).

In 2015, Congress passed the Trade Preferences Extension Act (TPEA), which among other things, modified several provisions of § 1677e, which governs the application of AFA. First, the TPEA provides that Commerce is not required to determine, or make any adjustments to, a weighted average dumping margin to account for the factual information that a respondent might have provided but did not. *See* 19 U.S.C. § 1677e(b)(1)(B). Second, the modified statute states that when selecting AFA, Commerce is “not required for purposes of [corroboration] or for any other purpose . . . to demonstrate that the . . . dumping margin used by the administering authority reflects an alleged commercial reality of the interested party.” 19 U.S.C. § 1677e(d)(3).

Section 1677e, before and after the enactment of the TPEA, requires that Commerce corroborate AFA when Commerce relies on *secondary* information or information not obtained in the pertinent segment of the investigation or review. *See* 19 U.S.C. § 1677e(c)(1). To “corroborate” information means that Commerce has ascertained that the information has “probative value.” *Papierfabrik August Koehler SE v. United States*, 843 F.3d 1373, 1380 (Fed. Cir. 2016).

This Court has repeatedly held that Commerce is not required to corroborate *primary* information, that is, information on the record obtained in the investigation or review in question. *See BMW of N. Am. LLC v. United States*, 44 CIT __, __, 437 F. Supp. 3d 1336, 1341 (2020) (“Commerce need not corroborate the use of information on the record that was obtained during the instant segment of the proceeding (i.e., primary information)”; *see also Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1349 (Fed. Cir. 2016) (“§ 1677e(c) unambiguously does not require Commerce to corroborate primary information.”). Although Commerce is not required to corroborate primary information, Commerce may not select as AFA information that is unreasonable.

DISCUSSION

Plaintiff presents two overarching arguments as reasons that the AFA selected by Commerce is not supported by substantial evidence. First, plaintiff argues that the AFA is an “overreach of reality” because the transaction selected: (A) was of a product of a “form, CONNUM, and specification different and more expensive than nearly all of the sales for which AFA was applied”; and, (B) was “impermissibly small.” Pl. Br. at 24. Second, plaintiff contends that the AFA selected was unreasonable because Commerce failed to properly consider plaintiff’s “level of culpability.” Pl. Br. at 32–34.

I. The AFA Selected by Commerce Is Reasonable

The inquiry into whether Commerce “overreach[es] reality” in selecting AFA pertains to the long standing objective of AFA, to balance accuracy with deterrence. *See BMW of N. Am. LLC v. United States*, 926 F.3d 1291, 1300 (Fed. Cir. 2019) (“The AFA rate is intended to be a reasonably accurate estimate of the respondent’s actual rate, albeit with some built-in increase intended as a deterrent to non-compliance. While a higher adverse margin creates a stronger deterrent, Commerce must not overreach reality in seeking to maximize deterrence.” (citing *De Cecco*, 216 F.3d at 1032.)). An assessment of whether AFA “overreach[es] reality” in the post-TPEA legal landscape does not equate to or revive the pre-TPEA inquiry into whether the resulting dumping margin reflects a “commercial reality.” *See* 19 U.S.C. § 1677e(d)(3)(B).

In the instant case, plaintiff contests the AFA on the grounds that it was: (A) of a product with a “form, CONNUM, and specification different and more expensive than nearly all of the sales for which AFA was applied”; and, (B) “impermissibly small.” Pl. Br. at 24. On this basis, plaintiff asserts that the AFA selected by Commerce was unreasonable.

The court turns to determining whether the sale on which the AFA is based is unreasonable. In making this determination, the court reiterates the “broad discretion” afforded to Commerce in selecting AFA. *Hyundai Steel Co.*, 319 F. Supp. 3d at 1355. This Court has found that “true outliers based on the nature of the transaction or product involved” should be excluded. *Id.* at 1355–1356 (finding AFA based on primary information unreasonable when “defendant acknowledged[d] that the sale in question was invoiced differently because of the nature of the product, recognizing that it was atypical of Hyundai Steel’s U.S. sales.”) In doing so, the Court has cautioned that the exclusion of outlier transactions is not an imposition of a “repre-

sentational test.” *Id.* at 1356. “Congress did not require Commerce to select adverse facts that ‘reflect a certain amount of sales, yield a particular margin, fall within a continuum according to the application of particular statistical methods, or align with standards articulated in other statutes and regulations.’” *Id.* at 1355 (citing *Nan Ya Plastics*, 810 F.3d at 1347).

In the instant case, Commerce selected as AFA the highest home market sales price of the commonly-sold CONNUMs. Def. Br. at 20. Commerce applied this AFA to the unreported downstream sales. *Id.* Significantly, Commerce used primary information — plaintiff’s own data on the record. Def. Br. at 20; *see also* Decision Memorandum at 16. While *Hyundai Steel Co.* demonstrates that the use of primary information is not in itself a guarantee against finding AFA to be unreasonable, plaintiff has a challenging burden to demonstrate the reason that the use for AFA of plaintiff’s own data, supplied to Commerce in the immediate proceeding, is not supported by substantial evidence.

Further, Commerce utilized the AFA methodology from the investigation when it elected to look to the pool of “commonly-sold CONNUMs” for selecting AFA instead of only “matching CONNUMS” as it did in the Preliminary Determination. Def. Br. at 20; *see also* Final Determination. Commerce’s application of a methodology that was used in the investigation is consistent with its normal practice. *See Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States*, 25 CIT 1150, 1169, 178 F. Supp. 2d 1305, 1327 (2001) (quoting *Cinsa, S.A. de C.V. v. United States*, 21 CIT 341, 349, 966 F. Supp. 1230, 1238 (1997) (“Commerce can reach different determinations in separate administrative reviews but it must employ the same methodology or give reasons for changing its practice.”)).

In short, Commerce has wide discretion in selecting AFA. In this case, Commerce used primary information and applied a consistent methodology. Both are reasonable practices when selecting AFA.

In laying out its case, plaintiff first argues that the AFA sale is not supported by substantial evidence because it was of a product of a “form, CONNUM, and specification different and more expensive than nearly all of the sales for which AFA was applied”. Pl. Br. at 24. Plaintiff argues that it was impermissible for Commerce to use an AFA sale of a product whose form was a square or a rectangle, rather than a coil. Pl. Br. at 24–25. Plaintiff implies that a sale in coil form would have been the appropriate form for the application of AFA because “virtually all” (i.e., [[]] percent) of the sales for which AFA was applied were in coil form. *See* Pl. Br. at 24–25. On this point, defendant-intervenor argues that because NSSMC did not put infor-

mation regarding the downstream sales on the record “there is no way to determine whether NSSMC’s unreported resellers cut NSSMC’s coiled steel into sheets or subjected it to any other additional processing before resale.” Def-Inter. Br. at 25.

The record indicates that form was the seventh factor out of nine examined by Commerce to compare products. Preliminary Decision Memorandum at 17. Plaintiff does not indicate any concerns with the other eight factors that Commerce considered, specifically, the six to which Commerce gave a greater weight when comparing products. As Commerce explained, “In making product comparisons, we matched foreign like products based on prime versus nonprime merchandise and the physical characteristics reported by the respondents in the following order of importance: paint, carbon, quality, strength, thickness, width, form, pickled and pattern.” *Id.* Plaintiff’s criticism of form feeds its criticism of the CONNUM selected by Commerce because form is one of the nine “product characteristics” used in identifying CONNUMs. Pl. Br. at 26. Therefore, in plaintiff’s view, because the form of the AFA sale did not match “virtually all” of downstream sales, the CONNUM selected was also improper. *See* Pl. Br. at 24–26. Commerce points out that “The CONNUMH¹⁰ Commerce selected to fill the gap of missing sales contained [[]] of sales.” Def. Br. at 20. Accordingly, Commerce argues that selecting an AFA sale from this CONNUM was not unreasonable. *Id.* at 20–21.

Plaintiff also asks the court to find that the AFA sale is unreasonable based on price. *See* Pl. Br. at 26–27. Plaintiff argues that the “specification was one of the most expensive sold by NSSMC” and that the CONNUM selected was “one of the most expensive sold by NSSMC in the entire home market sales database” after comparing averages. Pl. Br. at 26–27. Plaintiff states that Commerce used as AFA in the Final Determination, “the highest priced sale of this CONNUM” [[]] yen/MT when all but one other sale was less than [[]] yen/MT. Pl. Br. at 26.

Defendant and defendant-intervenor argue that Commerce has the discretion to choose an AFA sale with the highest price. *See* Def. Br. at 20; Def.-Inter. at 21. Defendant infers this discretion from § 1677e(d)(2)–(3), which authorizes Commerce to rely on the highest prior dumping margin. Def. Br. at 20. Defendant points out that Commerce’s selection of the highest price as AFA was the same methodology used in the investigation. Def. Br. at 20. Defendant-intervenor argues that “Commerce routinely assigns as AFA the high-

¹⁰ Defendant refers to the control number as “CONNUMH” for the home market in its brief whereas plaintiff and defendant-intervenor use the generic term “CONNUM.”

est price available.” Def.-Inter. at 21 (quoting several issue and decision memorandums in which Commerce assigned the “highest available price” as AFA).

Plaintiff argues that the AFA sale is “impermissibly small.” Plaintiff explains that the price selected as AFA represented an outlying transaction that comprised only [] of NSSMC’s sales and, therefore, is “too small for use as AFA.” Pl. Br. at 29. To bolster its argument, plaintiff seeks to liken the instant case to the *Dongguan* cases, in which this Court found that the dumping margins resulting from the application of product-specific AFA used by Commerce were based on “impermissibly small” percentages of sales ranging from 0.007% to 0.379%. *Dongguan Sunrise Furniture Co. v. United States*, 37 CIT 489, 492–493 n.3, 904 F. Supp. 2d 1359, 1363 n.3 (2013). Plaintiff points out that these “impermissibly small” percentages are substantially larger than the [] at issue in this case. Pl. Br. at 31.

However, the *Dongguan* cases differ from the instant matter in three crucial respects. First, the *Dongguan* cases preceded the enactment of TPEA and, accordingly, Commerce was required at that time to demonstrate that the AFA was a “commercial reality” — a feat that is harder to prove with a smaller sale size. In the instant matter, with the enactment of the TPEA, Commerce is no longer required to determine a respondent’s “commercial reality.”

Plaintiff’s argument on *Dongguan* is not persuasive also for a second reason: namely, the resulting dumping margins in the *Dongguan* cases were significantly higher, ranging from 130 to over 200 percent, whereas the resulting dumping margin in the instant case is much smaller at 7.64 percent. *Dongguan*, 904 F. Supp. 2d at 1364. The *Dongguan* court suggested that a sliding scale analysis is appropriate in determining whether a sale is “impermissibly small” when the Court said, “A larger percentage of a party’s sales is needed to support a very high margin in order for Commerce to be able to demonstrate that the sales relied on are representative of the respondent’s commercial reality.” *Id.*

Finally, in the first *Dongguan* case, the Court remanded the case to Commerce because in addition to the number of sales being “impermissibly small,” the data utilized to compute AFA were another respondent’s data, despite the availability in that case of plaintiff’s own data. *Dongguan Sunrise Furniture Co. v. United States*, 36 CIT 860, 873, 865 F. Supp. 2d 1216, 1233–34 (2012). In this case, by contrast, Commerce used plaintiff’s own data, supplied to Commerce in the immediate proceeding. As to the sales used as a basis for AFA, as defendant points out, the statute does not provide and the Court has not determined an acceptable percentage of sales “upon which to base

an AFA rate.” Def. Br. at 21. Additionally, the Court has not determined that a dumping margin is unsupported by substantial evidence based on an AFA’s percentage of sales alone.

In conclusion, aside from showing that the AFA sale selected by Commerce is small, plaintiff has not shown that the AFA sale is unreasonable. Significantly, “The SAA also states that Commerce does not have to prove that the facts available are the best alternative information. ‘Rather, the facts available are information or inferences which are reasonable to use under the circumstances.’” *Ta Chen*, 24 CIT at 850, citing SAA at 869, 1994 U.S.C.C.A.N. at 4198. Commerce acted reasonably in its selection of AFA.

II. Commerce Articulated a Reasonable Rationale for Its Selection of AFA

Plaintiff argues that the AFA selected was unreasonable because Commerce failed to consider properly the plaintiff’s “level of culpability.” Pl. Br. at 32–34. The objective of the application of AFA is to strike a balance between accuracy and deterrence. *See BMW of N. Am. LLC*, 926 F.3d at 1300 (citing *De Cecco*, 216 F.3d at 1032). In *BMW*, the Federal Circuit explained that “case law establishes that Commerce must consider the totality of the circumstances in selecting an AFA rate, including, if relevant, the seriousness of the conduct of the uncooperative party.” *BMW*, 926 F.3d at 1302 (remanding the case when Commerce failed to “address how the procedural irregularities surrounding the administrative review process affected its view of BMW’s level of culpability” and, therefore, left the Federal Circuit unable to ascertain whether Commerce properly selected an AFA rate that was reasonable.) Consequently, not only is it important that Commerce consider the “totality of the circumstances,” but Commerce also must articulate its rationale for selecting AFA so that the court may ascertain whether Commerce’s selection and application of the particular AFA is supported by substantial evidence. *Id.*

Plaintiff states that its dumping margin increased by a multiple of 14 from the Preliminary Determination to the Final Determination. Pl. Br. at 34. However, the more relevant comparison is between NSSMC’s dumping margin in the investigation and the margin in this review. As § 1677e(d)(1)(B) makes clear, Commerce could have applied the 4.99 percent dumping margin in the Investigation Final Determination to NSSMC in the administrative review. However, as defendant-intervenor notes and the record demonstrates, the investigation dumping margin did not achieve the deterrent objective because the information missing from the record in this administrative review is the very same information that Commerce requested and that plaintiff failed to provide in the investigation. Def.-Inter. Br.

at 23. Commerce articulated its purpose for selecting this particular AFA — to pick an AFA sufficiently adverse to induce cooperation where the investigation’s AFA had not achieved that goal:

In the Preliminary Results, we applied the highest Nippon Steel home market product matching CONNUM-specific price for unaffiliated customers to these unreported affiliated companies’ resales. In *Hot Rolled from Japan*, we applied the highest Nippon Steel home market unaffiliated sales price to all unreported affiliated companies’ resales. The matching CONNUM-specific home market provides a more limited pool from which to select an appropriate AFA rate. To ensure that the selected AFA rate will induce cooperation, we find it appropriate to evaluate a broader pool, *i.e.*, the respondent’s home market sales, in selecting an AFA rate for these unreported sales.

Decision Memorandum at 16. Consequently, the record indicates that Commerce calculated and applied a dumping margin higher than 4.99% to achieve a deterrent effect, where the 4.99% had failed to do so in the Investigation Final Determination. Commerce articulated a reasonable rationale for its selection of the particular AFA rate.

CONCLUSION

In the 2003 film, *LOST IN TRANSLATION*,¹¹ Charlotte, played by Scarlett Johansson opposite Bill Murray, says of their time in Japan, “let’s never come here again because it will never be as much fun.”

* * *

Commerce’s decision to apply partial AFA and the AFA Commerce selected in the Final Determination are reasonable. Therefore, the court sustains Commerce’s Final Determination. Judgment will enter accordingly.

Dated: November 10, 2020
New York, New York

/s/ Timothy M. Reif
TIMOTHY M. REIF, JUDGE

¹¹ *LOST IN TRANSLATION* (Focus Features 2003).

Slip Op. 20–163

PRO-TEAM COIL NAIL ENTERPRISE, INC. AND PT ENTERPRISE INC.,
 Plaintiffs, Unicatch Industrial Co., Ltd., et al., Consolidated
 Plaintiffs, and S.T.O. INDUSTRIES, INC., Plaintiff-Intervenor, v.
 UNITED STATES, Defendant, and MID CONTINENT STEEL & WIRE, INC.,
 Defendant-Intervenor.

Before: Mark A. Barnett, Judge
 Consol. Court No. 18–00027

[Remanding the U.S. Department of Commerce’s remand results issued in connection with the first administrative review of the antidumping duty order on certain steel nails from Taiwan.]

Dated: November 16, 2020

Ned H. Marshak, Max F. Shutzman, Andrew T. Schutz, Dharmendra Choudhary, and Eve Q. Wang, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY, for Plaintiffs Pro-Team Coil Enterprise, Inc. and PT Enterprise Inc.; Consolidated Plaintiffs Unicatch Industrial Co., Ltd. and TC International, Inc.; and Consolidated Plaintiffs Hor Liang Industrial Corp. and Romp Coil Nails Industries Inc.

Ronald M. Wisla, Fox Rothschild LLP, of Washington, DC, for Plaintiff-Intervenor S.T.O. Industries, Inc.

Sosun Bae, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Ethan P. Davis*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Vania Wang*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Adam H. Gordon and *Ping Gong*, The Bristol Group LLC, of Washington, DC, for Defendant-Intervenor Mid Continent Steel & Wire, Inc.

OPINION AND ORDER**Barnett, Judge:**

In this consolidated action, five sets of plaintiffs¹ each challenged aspects of the final results of the U.S. Department of Commerce’s (“Commerce” or “the agency”) first administrative review of the antidumping duty order on certain steel nails from Taiwan. *See Certain Steel Nails From Taiwan*, 83 Fed. Reg. 6,163 (Dep’t Commerce Feb. 13, 2018) (final results of antidumping duty admin. review and partial rescission of admin. review; 2015–2016) (“*Final Results*”), ECF No. 20–2, and accompanying Issues and Decision Mem, A-583–854 (Feb. 6, 2018) (“I&D Mem.”), ECF No. 20–3. The matter is before the

¹ The five sets of plaintiffs consist of lead Plaintiffs Pro-Team Coil Nail Enterprise, Inc. and PT Enterprise Inc. (together, “Pro-Team”); Consolidated Plaintiffs Unicatch Industrial Co., Ltd. and TC International, Inc. (together, “Unicatch”); Consolidated Plaintiff PrimeSource Building Products, Inc. (“PrimeSource”); Consolidated Plaintiffs Hor Liang Industrial Corp. and Romp Coil Nails Industries (together, “Hor Liang”); and Plaintiff-Intervenor S.T.O. Industries, Inc. (“S.T.O. Industries”).

court following Commerce's first redetermination upon remand, *see* Final Results of Redetermination Pursuant to Court Remand ("Remand Results"), ECF No. 71-1,² issued in response to the court's resolution of five motions for judgment on the agency record pursuant to U.S. Court of International Trade ("CIT") Rule 56.2, *see Pro-Team Coil Nail Enter. v. United States*, 43 CIT ___, 419 F. Supp. 3d 1319 (2019). The court remanded Commerce's use of total facts otherwise available with respect to Pro-Team, *id.* at 1330-34; sustained Commerce's use of total neutral facts otherwise available with respect to Unicatch but remanded Commerce's use of an adverse inference when selecting from among the facts otherwise available (referred to as "adverse facts available" or "AFA"), *id.* at 1336-40; declined to reach Hor Liang's first claim seeking a recalculation of the rate assigned to non-examined respondents on remand given the absence of a live dispute, *id.* at 1340; and declined to resolve Hor Liang's second claim regarding Commerce's summary denial of their ministerial error allegation on mootness grounds, *id.*

On remand, Commerce reconsidered its use of total facts otherwise available with respect to Pro-Team and, instead, used Pro-Team's reported data and calculated a company-specific dumping margin of zero percent. Remand Results at 6-8, 32. With respect to Unicatch, Commerce provided additional explanation supporting its use of total AFA to determine Unicatch's dumping margin and continued to select the 78.17 percent dumping margin alleged in the petition as the AFA rate. *Id.* at 8-15, 20-28, 32. For the all-others rate applicable to the non-examined respondents, such as Hor Liang, Commerce calculated the simple average of Pro-Team's zero percent margin and Unicatch's 78.17 percent margin to assign these respondents a rate of 39.09 percent. *Id.* at 15-16, 28-32.

Unicatch submitted comments opposing Commerce's use of total AFA and its selection of the petition rate. Confidential Consol. Pls., [Unicatch] Cmts. on Redetermination ("Unicatch's Opp'n Cmts"), ECF No. 84.³ Hor Liang submitted comments opposing Commerce's method of calculating the all-others rate. Confidential Consol. Pls., [Hor Liang] Cmts. on Redetermination ("Hor Liang's Opp'n Cmts."), ECF No. 77.

² The administrative record associated with the Remand Results is divided into a Public Remand Record ("PRR"), ECF No. 72-2, and a Confidential Remand Record ("CRR"), ECF No. 72-3. Parties submitted joint appendices containing record documents cited in their comments on the Remand Results. *See* Public Remand J.A., ECF No. 94; Confidential Remand J.A. ("CRJA"), ECF No. 93. The court references the confidential version of the relevant record documents, unless otherwise specified.

³ S.T.O. Industries filed comments agreeing with and incorporating by reference Unicatch's comments. Pl.-Int.'s Cmts. in Opp'n to Remand Results, ECF No. 79. PrimeSource did not file comments on the Remand Results.

Pro-Team submitted comments supporting the Remand Results with respect to its zero percent rate. [Pro-Team’s] Cmts. Sup[p]orting Remand, ECF No. 86. Defendant United States (“the Government”) and Defendant-Intervenor Mid Continent Steel & Wire, Inc. (“Mid Continent”) urge the court to sustain the Remand Results in their entirety. Def.’s Resp. to the Parties’ Cmts. Upon [Commerce’s] Remand Redetermination (“Gov’t’s Reply Cmts.”), ECF No. 87; Def.-Int. [Mid Continent’s] Cmts. in Supp. of Final Remand Results, ECF No. 88.

For the following reasons, the court sustains Commerce’s redetermination with respect to Pro-Team⁴ and use of AFA with respect to Unicatch. However, the court remands Commerce’s selection of the petition rate as AFA because Commerce did not adequately corroborate that rate. Accordingly, the court defers resolution of Hor Liang’s arguments regarding the all-others rate.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018),⁵ and 28 U.S.C. § 1581(c).

The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). “The results of a redetermination pursuant to court remand are also reviewed for compliance with the court’s remand order.” *SolarWorld Ams., Inc. v. United States*, 41 CIT ___, ___, 273 F. Supp. 3d 1314, 1317 (2017) (quoting *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT ___, ___, 968 F. Supp. 2d 1255, 1259 (2014)).

DISCUSSION

I. Commerce’s Use of Total AFA for Unicatch and Selection of Unicatch’s AFA Rate

A. Relevant Background

The court presumes familiarity with the facts and procedural history set forth in *Pro-Team* and summarizes below the relevant facts.

In the underlying administrative review, Commerce selected Unicatch as a mandatory respondent. Remand Results at 4. Commerce issued Unicatch a section D questionnaire that contained detailed

⁴ In the absence of any challenge to Commerce’s redetermination respecting Pro-Team, the court will not further discuss that aspect of the Remand Results.

⁵ All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are to the 2018 edition, unless stated otherwise.

instructions for preparing a complete cost reconciliation. *Pro-Team*, 419 F. Supp. 3d at 1334; *see also* Remand Results at 4. Upon examining Unicatch's section D cost response, Commerce issued a supplemental questionnaire instructing Unicatch to "revise its cost reconciliation to reconcile the sales from Unicatch's audited financial statements to the extended total cost of manufacturing in Unicatch's submitted cost database." Remand Results at 4. In response, Unicatch explained "that its initial worksheet reconciled the cost of sales to Unicatch's cost of production for both subject and non-subject merchandise." *Id.* at 4–5 & n.20 (citation omitted). Commerce issued a second supplemental questionnaire repeating its request for a revised cost reconciliation and further requesting explanations and documentary support for each reconciling item. *Id.* at 5 & n.21 (citation omitted). Unicatch submitted a revised cost reconciliation "that ended with the cost of production for subject and non-subject merchandise." *Id.* at 5 & n.22 (citation omitted). In its administrative rebuttal brief, Unicatch explained how Commerce could use record information to complete the reconciliation. *Pro-Team*, 419 F. Supp. 3d at 1335.

"For the *Final Results*, Commerce disregarded Unicatch's submitted data and determined a dumping margin based on total AFA." *Id.* at 1335–36. *Pro-Team* remanded that determination. *Id.* at 1340. The court explained that "Commerce based its decision to use an adverse inference on Unicatch's failure to submit a complete cost reconciliation" but otherwise failed to either address "evidence demonstrating Unicatch's attempts to comply with Commerce's supplemental questionnaire[s] or apprise the court of its reasons for nevertheless finding less than full cooperation." *Id.* at 1339.

In the redetermination, Commerce continued to find that Unicatch failed to "cooperate to the best of its ability and that it potentially benefitted from its lack of cooperation." Remand Results at 8. Commerce stated that the agency issued "multiple requests" that "contain[ed] clear instructions on what information was necessary." *Id.* at 11; *see also id.* at 24–25. Commerce explained that it reasonably "expect[ed] more forthcoming responses" from Unicatch, *id.* at 11, but Unicatch "simply did not put forth the effort or cooperation to respond fully to Commerce's requests for a complete cost reconciliation," *id.* at 12. Further supporting its determination, Commerce explained, was Unicatch's provision of instructions for completing the reconciliation, which demonstrated that Unicatch "understood how to provide the requested information" but "chose not to do so." *Id.* Even then, Commerce found, Unicatch's instructions "failed to directly link to the antidumping cost database" and Commerce confronted "significant

discrepancies” when it attempted to complete the reconciliation. *Id.* Commerce further found that Unicatch’s failure to provide a cost reconciliation “would benefit Unicatch” because it precluded Commerce from conducting a below cost sales analysis or asking follow-up questions, thus inhibiting the agency’s ability to make a proper determination whether dumping has occurred. *Id.* at 14. Commerce also found that Unicatch’s failure to provide the complete reconciliation allowed Unicatch to “control[] the pace and schedule for Commerce’s work.” *Id.* at 22.

With respect to the AFA rate assigned to Unicatch, Commerce explained that its “practice is to select, as an AFA rate, the higher of: (1) the highest dumping margin alleged in the petition, or (2) the highest calculated rate from any previous segment of a proceeding under an [antidumping] order.” *Id.* at 15 & n.60 (citations omitted); *see also id.* at 27. Commerce further explained that it “select[ed] the highest dumping margin alleged in the petition, 78.17 percent,” in light of “Unicatch’s multiple failures to supply a complete reconciliation and to ensure that Unicatch does not obtain a more favorable result by failing to cooperate than if it had fully cooperated.” *Id.* at 15. Commerce rejected the highest calculated rate from the investigation as insufficient to induce cooperation.⁶ *Id.* Commerce referred to its explanation in the Issues and Decision Memorandum regarding the agency’s corroboration of the AFA rate. *Id.* According to Commerce, that explanation demonstrated that the AFA rate “(1) was determined to be reliable in the pre-initiation stage of the investigation; and (2) is relevant based on information derived from the petition that gave rise to the investigation.” *Id.* at 15 & n.62 (citing I&D Mem. at Cmt. 2).

B. Commerce’s Use of an Adverse Inference is Supported by Substantial Evidence and Reasoned Explanation

At issue here is whether Commerce’s use of an adverse inference is supported by substantial evidence and reasoned explanation. *See*

⁶ In the investigation, Commerce calculated rates for the two mandatory respondents in the amount of zero percent and 2.24 percent, respectively. *Certain Steel Nails From Taiwan*, 80 Fed. Reg. 28,959, 28,961 (Dep’t Commerce May 20, 2015) (final determination of sales at less than fair value). Following litigation before the CIT, Commerce revised the 2.24 percent rate to 2.16 percent. *Certain Steel Nails From Taiwan*, 82 Fed. Reg. 55,090, 55,091 (Dep’t Commerce Nov. 20, 2017) (notice of court decision not in harmony with final determination in less than fair value investigation and notice of am. final determination); *Mid Continent Steel & Wire, Inc. v. United States*, 41 CIT ___, 273 F. Supp. 3d 1161 (2017). That rate is nonfinal because the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) concluded that Commerce must reconsider one aspect of its calculation of that rate. *See Mid Continent Steel & Wire, Inc. v. United States*, 940 F.3d 662, 673–75 (Fed. Cir. 2019). Commerce’s redetermination is pending before the CIT. *See Mid Continent Steel & Wire, Inc., et al. v. United States, et al.*, Court No. 15-cv-00213 (CIT June 16, 2020).

Unicatch's Opp'n Cmts. at 4–13; Gov't's Reply Cmts. at 8–11; *Pro-Team*, 419 F. Supp. 3d at 1336–39 (sustaining Commerce's use of total facts otherwise available). Commerce may use an inference that is adverse to the interests of a respondent when Commerce determines that the respondent "has failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b). "Compliance with the 'best of its ability' standard is determined by assessing whether a respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). As discussed, Commerce determined that Unicatch's conduct in this case did not satisfy the "best of its ability" standard because Unicatch failed to submit a complete cost reconciliation despite "multiple requests" that "contain[ed] clear instructions on what information was necessary." Remand Results at 11. While Unicatch argues that Commerce's use of an adverse inference is unsupported by substantial evidence, Unicatch's Opp'n Cmts. at 1–13, those arguments lack merit.

Unicatch argues that it mistakenly believed that its cost reconciliation was complete and that its mistake does not merit an adverse inference. *Id.* at 4–13. Here, however, on three occasions Commerce instructed Unicatch to end its reconciliation with its total submitted cost of manufacturing, and in each corresponding response Unicatch failed to do so. Remand Results at 11–15. While the statute "does not require perfection and recognizes that mistakes *sometimes* occur, it does not condone inattentiveness [or] carelessness." *Nippon Steel*, 337 F.3d at 1382 (emphasis added). After three detailed requests for a complete cost reconciliation, Commerce reasonably expected "more forthcoming responses" from Unicatch. Remand Results at 11.⁷

Unicatch further argues that Commerce overreached in using an adverse inference because Unicatch "sought to correct its deficiencies in responding to a supplemental questionnaire," Unicatch's Opp'n Cmts. at 6 & n.6 (quoting *Mannesmannrohren-Werke AG v. United States*, 23 CIT 826, 842, 77 F. Supp. 2d 1302, 1316 (1999)), and any noncompliance was not "willful or deliberate," *id.* at 6 & n.7 (quoting

⁷ Commerce characterizes Unicatch's conduct as intentional, stating, for example, that "Unicatch repeatedly refused to provide Commerce with a complete cost reconciliation." Remand Results at 13; *see also, e.g., id.* at 24. While the record supports Commerce's finding that Unicatch failed to cooperate *fully* with Commerce's request for a complete cost reconciliation, Commerce did not identify substantial evidence demonstrating that Unicatch deliberately withheld information. *Cf., e.g., id.* at 12 (stating that Unicatch "simply did not put forth the effort or cooperation to respond fully"). That discrepancy does not change the outcome, however, because it is well-settled that "[t]he statutory trigger for Commerce's consideration of an adverse inference is simply a failure to cooperate to the best of respondent's ability, regardless of motivation or intent." *Nippon Steel*, 337 F.3d at 1383.

Fujian Mach. and Equip. Imp. & Exp. Corp. v. United States, 25 CIT 1150, 1177, 178 F. Supp. 2d 1305, 1334 (2001)); see also *id.* at 12. Unicatch's reliance on *Mannesmannrohren-Werke AG* and *Fujian Machinery* is misplaced. In each case, the court sustained Commerce's use of adverse facts available in the subsequent redetermination that further explained why an adverse inference was merited in connection with conduct not unlike the facts of this case. See *Fujian Mach. and Equip. Imp. & Exp. Corp. v. United States*, 27 CIT 1059, 1067–68, 276 F. Supp. 2d 1371, 1378–79 (2003) (sustaining Commerce's use of AFA based on record evidence of “multiple failures” to provide requested information the respondent was able to provide); *Mannesmannrohren-Werke AG v. United States*, 24 CIT 1082, 1090–91, 120 F. Supp. 2d 1075, 1081–83 (2000) (sustaining Commerce's use of AFA when the respondent simply repeated deficient information following Commerce's requests for clarification in two supplemental questionnaires).

Unicatch also argues that “Commerce should have clarified . . . the precise format for the information required” or again requested the complete cost reconciliation “in its Third Supplemental Questionnaire.” Unicatch's Opp'n Cmts. at 7 (citing *Mukand, Ltd. v. United States*, 767 F.3d 1300, 1306 (Fed. Cir. 2014) (a case in which Commerce issued four supplemental questionnaires and provided a sample chart for the respondent to complete before applying AFA)). The Federal Circuit's decision in *Mukand* to sustain Commerce's use of AFA did not, however, rest on the number of questionnaires Commerce issued or Commerce's provision of a sample chart. Rather, the appellate court explained that the respondent's evasiveness and sudden production of requested information following Commerce's use of AFA in its preliminary determination justified Commerce's use of an adverse inference in the final determination. *Mukand*, 767 F.3d at 1307.

While *Mukand* is factually distinct, the appellate court noted that Commerce reasonably expected “more accurate and responsive answers to the questionnaire[s]” that sought information that is “fundamental” to “the dumping analysis.” *Id.* So too here, reliable and complete cost information is necessary for Commerce to “calculate constructed value[,] . . . establish a basis for comparison to U.S. price,” and, ultimately, calculate an accurate dumping margin. *Pro-Team*, 419 F. Supp. 3d at 1339. Thus, Commerce was within its discretion to use an adverse inference in order to incentivize Unicatch to cooperate more fully in providing this information in future reviews. See *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1360 (Fed. Cir. 2017) (explaining that, in the absence of subpoena power, “the adverse facts

statute . . . provide[s] respondents with an incentive to cooperate with Commerce’s [administrative review]” (alteration and citations omitted). Accordingly, Commerce’s use of an adverse inference is sustained.

C. Commerce’s Selection of the 78.17 Percent AFA Rate Must Be Reconsidered

When using an adverse inference to select from among the facts otherwise available, Commerce may rely “on information derived from--(A) the petition, (B) a final determination in the investigation . . . , (C) any previous [administrative] review . . . , or (D) any other information placed on the record.” 19 U.S.C. § 1677e(b)(2). If Commerce “relies on secondary information”—that is, information that was not “obtained in the course of an investigation or review”—Commerce must, “to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal.” *Id.* § 1677e(c)(1). Corroboration does not require Commerce “to estimate what the . . . dumping margin would have been if [Unicatch] had cooperated” or “demonstrate that the . . . dumping margin used by the [agency] reflects an alleged commercial reality of [Unicatch].” *Id.* § 1677e(d)(3). Additionally, Commerce “is not required to determine, or make any adjustments to, a . . . weighted average dumping margin based on any assumptions about information the interested party would have provided if [Unicatch] had complied with the request for information.” *Id.* § 1677e(b)(1)(B).

Unicatch argues that the data underlying the petition rate “had no relationship with actual prices and costs of Taiwan nails sold to the United States” in any segment of this proceeding and the petition rate is aberrant in light of the rate Commerce calculated for Pro-Team during the remand proceeding. Unicatch’s Opp’n Cmts. at 15–16. The court understands Unicatch to argue that the petition rate was insufficiently corroborated. The Government argues that Commerce’s selection of the petition rate is lawful and supported by substantial evidence. Gov’t’s Reply Cmts. at 12–14.

“Corroborat[ion] means that the [agency] will examine whether the secondary information to be used has probative value.” 19 C.F.R. § 351.308(d). Commerce evaluates the information’s probative value by “examin[ing] the reliability and relevance of the information to be used.” I&D Mem. at 21 & n.83 (citation omitted).

Commerce supported its determination that the petition rate “is reliable for purposes of this review” by way of reference to the agency’s pre-initiation examination of the information provided in the petition and corresponding discussion in the notice regarding Commerce’s initiation of the investigation. *Id.* at 21–22 & nn.86–87 (citing

Certain Steel Nails From India, the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, the Republic of Turkey, and the Socialist Republic of Vietnam, 79 Fed. Reg. 36,019, 36,019–23 (Dep’t Commerce June 25, 2014) (initiation of less-than-fair-value investigations). Commerce further determined that the petition rate is relevant, explaining:

The petitioner calculated normal value for the petition based on the experience of a surrogate producer of nails, adjusted for known differences between the surrogate producer and the industry of Taiwan, during the proposed [period of investigation]. The petitioner relied on financial statements of a producer of comparable merchandise operating in Taiwan to determine depreciation, [selling, general and administrative expenses], financial expenses, and profit rates. In calculating export price, the petitioner based U.S. price on a resale price from a distributor/trading company to its downstream customer in the U.S. during the period of investigation Based on the price quote by an unaffiliated distributor, the petitioner deducted from these prices movement expenses consistent with the sales delivery terms and adjusted for mark-ups from the distributors/trading companies. Based on this information, we determine that the dumping margin alleged in the Petition is relevant.

Id. at 22 (internal footnote citations omitted).

The court cannot conclude that Commerce adequately corroborated the petition rate. Corroboration requires a petition rate to meet a different standard than is necessary at the pre-initiation stage of an investigation. *Compare* 19 U.S.C. § 1677e(c) and 19 C.F.R. § 351.308(d) (discussed above), *with* 19 U.S.C. § 1673a(c)(1)(A)(i) (directing Commerce, upon receipt of a petition and before initiating an investigation, to use readily available sources to examine “the accuracy and adequacy of the evidence provided in the petition” and “determine whether the petition alleges the elements necessary for the imposition of a duty under [19 U.S.C. §] 1673 . . . and contains information reasonably available to the petitioner supporting the allegations”).⁸ Commerce has recognized this different standard in

⁸ Commerce’s regulations also direct petitioners in an antidumping proceeding to include in the petition “factual information” for Commerce to calculate export price, constructed export price, and normal value. 19 C.F.R. § 351.202(b)(7)(B); *see also* 19 C.F.R. § 351.203(b)(1) (stating agency requirements for determining sufficiency of the petition).

other administrative determinations. *See, e.g.*, Issues and Decision Mem. for the Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Certain Lined Paper Prods. from Indonesia, A-560–818 (Aug. 16, 2006), available at <https://enforcement.trade.gov/frn/summary/indonesia/E6-13470-1.pdf> (last visited Nov. 16, 2020) (finding that Commerce’s corroboration of a petition rate in an investigation met “the higher standard applicable to preliminary and final determinations” as compared to pre-initiation). Thus, “Commerce’s determination that the . . . petition rate[was] sufficient to warrant initiation of an investigation is not the same as finding [that rate] reliable for determining a rate after the investigation has been concluded.” *Yantai Xinke Steel Structure Co. v. United States*, 36 CIT 1035, 1042 (2012).⁹

“[T]he petition constitutes . . . ‘an allegation of dumping, not a determination of dumping.’” *Id.* (quoting *Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v. United States*, 35 CIT 1161, 1173 (2011)). Consistent with that observation, the statute exempts Commerce from the corroboration requirement when it selects as an AFA rate “any dumping margin” used “in a separate segment of the same proceeding.” 19 U.S.C. § 1677e(c)(2). Commerce did not, however, use this petition rate in the original investigation, *see supra* note 6; thus, the rate remains an “unverified allegation[]” that is subject to the corroboration requirement before Commerce may utilize it. Uruguay Round Agreements Act, Statement of Administrative Action (“SAA”), H.R. Doc. No. 103–316, vol. 1, at 870 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4199 (“Secondary information may not be entirely reliable because, for example, as in the case of the petition, it is based on unverified allegation.”).¹⁰

Here, Commerce has overlooked information reasonably at its disposal that could inform the reliability and relevance of the petition rate—such as data underlying the rates Commerce calculated for mandatory respondents in the investigation or the instant review. *See* 19 U.S.C. § 1677e(c)(1) (instructing Commerce to corroborate secondary “information from independent sources that are reasonably at [its] disposal”). Thus, Commerce’s determination that the petition rate is reliable and relevant for purposes of this administrative re-

⁹ While *Yantai Xinke* addressed—and rejected—Commerce’s use of a simple average of the petition rates to calculate the rate assigned to separate rate respondents pursuant to 19 U.S.C. § 1673d(c)(5)(B) and, thus, did not address 19 U.S.C. § 1677e(c)(1), 36 CIT at 1039–43, the court’s opinion is nevertheless instructive for its insight into the limitations of Commerce’s pre-initiation evaluation of a petition rate when the agency seeks to rely on that rate later in the proceeding.

¹⁰ The SAA “shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements Act.” 19 U.S.C. §3512(d).

view, based on nothing more than its pre-initiation review of the data, is unsupported by substantial evidence and reasoned explanation. Accordingly, Commerce must reconsider or further explain its corroboration of the petition rate.

Unicatch also argues that Commerce failed to conduct the analysis discussed in *BMW of North America LLC v. United States*, 926 F.3d 1291 (Fed. Cir. 2019) to ensure that the AFA rate was not punitive. Unicatch’s Opp’n Cmts. at 13–15. Here, as previously noted, Commerce followed its practice of selecting the higher of the highest dumping margin alleged in the petition or the highest rate from any prior segment of the proceeding, i.e., the investigation. Remand Results at 14. Commerce largely ignored Unicatch’s arguments that the 78.17 percent rate was punitive, aberrational, and lacking consideration of the totality of the circumstances or the seriousness of Unicatch’s conduct. Cmts. in Resp. to Draft Results of Redetermination Pursuant to Court Remand (Feb. 26, 2020) at 15–21, CRR 5, PRR 10, CRJA Tab 31 (discussing, *inter alia*, *BMW*, 926 F.3d at 1301). At most, Commerce pointed to Unicatch’s “multiple failures to supply a complete reconciliation” to support the selection of the petition rate over the highest calculated investigation rate, Remand Results at 15, which is the same rationale Commerce supplied for its use of AFA, *see id.* at 11.

Because the court is remanding Commerce’s selection of the petition rate as AFA, the court defers further consideration of Unicatch’s arguments that the selected petition rate was unduly punitive. On remand, Commerce may only continue to rely on the petition rate if the agency identifies substantial evidence supporting its corroboration of the rate and the agency’s use of that rate is otherwise lawful. Alternatively, Commerce may choose another source of adverse facts available, in which case it must corroborate that information if so required, *see* 19 U.S.C. § 1677e(c), and, as necessary, adhere to the requirements set forth in 19 U.S.C. § 1677e(d)(2).¹¹

¹¹ Unicatch relies on the court’s discussion of section 1677e(d)(2) in *POSCO v. United States*, 42 CIT ___, ___, 296 F. Supp. 3d 1320, 1349 (2018), to support its argument that Commerce must conduct further analysis of the petition rate. *See* Unicatch’s Opp’n Cmts. at 14. In *POSCO*, the court explained that subsection (d)(2) directs Commerce to base its selection of the dumping margin, which may include the highest margin specified under subsection (d)(1), on an “evaluation . . . of the *situation* that resulted in [the agency] using an adverse inference.” 296 F. Supp. 3d at 1349 (quoting 19 U.S.C. § 1677e(d)(2)) (alterations original). Subsection (d)(2), however, applies when Commerce is “carrying out paragraph (1),” i.e., subsection (d)(1). 19 U.S.C. § 1677e(d)(2). Subsection (d)(1) contemplates Commerce’s use, as AFA, of “any dumping margin from any segment of the proceeding under the applicable antidumping order.” *Id.* § 1677e(d)(1)(B). Here, Commerce instead relied on the rate alleged in the petition and section 1677e(d)(2) is inapplicable at this time.

II. Commerce's Calculation of the Rate Assigned to Non-Examined Companies

Hor Liang argues, *inter alia*, that the 39.09 percent all-others rate derived from the simple average of Pro-Team's zero percent rate and Unicatch's 78.17 percent rate is not reasonably reflective of Hor Liang's dumping margin and is aberrational and punitive. Hor Liang's Opp'n Cmts. at 8–9. Because the court is remanding Commerce's selection of the 78.17 percent rate for Unicatch, the court will defer resolution of Hor Liang's arguments pending Commerce's second remand redetermination.

CONCLUSION

In accordance with the foregoing, it is hereby

ORDERED that Commerce's Remand Results are sustained with respect to Commerce's calculation of a weighted-average dumping margin of zero percent for Pro-Team; it is further

ORDERED that Commerce's Remand Results are sustained with respect to Commerce's use of an adverse inference with respect to Unicatch; it is further

ORDERED that Commerce's Remand Results are remanded with respect to Commerce's selection of Unicatch's AFA rate in accordance with this opinion; it is further

ORDERED that the court defers resolution of all challenges to the all-others rate pending Commerce's second redetermination; it is further

ORDERED that Commerce shall file its remand redetermination on or before February 16, 2021; it is further

ORDERED that subsequent proceedings shall be governed by USCIT Rule 56.2(h); and it is further

ORDERED that any comments or responsive comments must not exceed 4,000 words.

Dated: November 16, 2020

New York, New York

/s/ Mark A. Barnett

MARK A. BARNETT, JUDGE

Slip Op. 20–164

STARKIST Co., Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy M. Reif, Judge
Court No. 14–00068

[Denying plaintiff's Rule 56 motion for summary judgment and granting defendant's Rule 56 cross-motion for summary judgment.]

Dated: November 18, 2020

Michael E. Roll and Brett Ian Harris, Roll & Harris LLP, for plaintiff.*Alexander Vanderweide*, Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of Washington, D.C., for defendant United States. With him on the brief was *Justin R. Miller*, Attorney-in-Charge, *Jeanne E. Davidson*, Director, and *Ethan P. Davis*, *Acting Assistant Attorney General*. Of Counsel was *Sheryl A. French*, Office of the Assistant Chief Counsel, U.S. Customs and Border Protection.**OPINION****Reif, Judge:**

Plaintiff StarKist Co. (“StarKist” or “plaintiff”), an importer of tuna fish products, challenges a decision by United States Customs and Border Protection (“Customs”) to classify four tuna salad products under subheading 1604.14.10 of the Harmonized Tariff Schedule of the United States (HTSUS),¹ which covers prepared or preserved fish, specifically “[f]ish, whole or in pieces, but not minced . . . [I]n airtight containers: In oil,” and carries a 35% *ad valorem* duty.

Customs liquidated the entries in question on different dates from February through May 2013, and StarKist filed two separate protests to challenge the tariff classification at liquidation. On January 22, 2016, plaintiff filed a complaint regarding the appropriate classification of these products. Plaintiff argues that the products at issue are correctly classified under subheading 1604.20.05, which covers “prepared meals” that are not “minced,” and carries a 10% *ad valorem* duty. Alternatively, plaintiff argues that the products are correctly classified under subheadings 1604.14.22 and 1604.14.30, which cover tuna that is not “minced” and not “in oil,” and carry 6% and 12.5% *ad valorem* duties, respectively. The question presented is which of these subheadings properly covers the subject merchandise.

BACKGROUND

This dispute involves the classification of four StarKist tuna fish products. Pl.’s Statement of Material Facts Not in Issue ¶¶ 1, 3–4

¹ All citations to the HTSUS, including Chapter Notes and General Notes, are to the 2013 edition.

(“Pl. Stmt. Facts”); Def.’s Resp. to Pl.’s Statement of Material Facts Not in Issue ¶¶ 1, 3–4 (“Def. Resp. Pl. Stmt.”). The four products at issue are: Tuna Salad Chunk Light (Lunch-to-Go pouches); Tuna Salad Albacore (Lunch-to-Go pouches); Tuna Salad Albacore (24 retail pouches); and Tuna Salad Albacore (60 retail pouches). The subject merchandise contains cooked tuna mixed with celery, water chestnuts and a starch-based dressing. *Id.* Tuna Salad Albacore contains albacore tuna and white meat mayo, while Tuna Salad Chunk Light contains non-albacore tuna and light meat mayo. Pl. Stmt. Facts ¶¶ 3–4; Def. Resp. Pl. Stmt. ¶¶ 3–4. The subject merchandise is exported to the United States in two different forms: as retail pouch packs, which contain individual pouches of tuna, or as Lunch-to-Go kits, which include a tuna pouch and a mint, spoon, napkin and crackers. Pl. Stmt. Facts ¶ 2; Def. Resp. Pl. Stmt. ¶ 2.

All four varieties of the subject merchandise undergo the same four steps in manufacturing: (1) garnish preparation, (2) the dressing phase, (3) the tuna phase, and, (4) the filling and finishing phase. Pl. Stmt. Facts ¶ 5; Def. Resp. Pl. Stmt. ¶ 5. During the garnish preparation phase, celery and water chestnuts are hand mixed. *Id.* During the dressing phase, a mayo base dressing and relish are hand mixed with the blended celery and water chestnuts. *Id.* The white meat mayo and the light meat mayo, which comprise the mayo base dressing for the Tuna Salad Albacore and the Tuna Salad Chunk Light, respectively, are purchased as finished products from an entity unrelated to StarKist. Pl. Stmt. Facts ¶¶ 27, 30; Def. Resp. Pl. Stmt. ¶¶ 27, 30. No additional oil is added to either mayo base beyond its ingredients. Pl. Stmt. Facts ¶ 30; Def. Resp. Pl. Stmt. ¶ 30. Both mayo base products contain approximately 12 to 13 percent soybean oil. *Id.* ¶¶ 28–29.²

During the tuna phase, tuna is chopped to a thickness of 0.8–1.0 inches for the Albacore, and 1.0–1.5 inches for the Chunk Light. Pl. Stmt. Facts ¶¶ 21–22, 25; Def. Resp. Pl. Stmt. ¶¶ 21–22, 25. The chopped tuna is then hand mixed with the mayo base dressing, relish, celery, and water chestnuts. *Id.* ¶¶ 5, 21, 24, 33. More than 82% of Tuna Salad Chunk Light contains fish meat with a surface area of less than 0.3 square centimeters, and more than 58% of the Tuna Salad Albacore contains fish meat with a surface area of less than 0.3 square centimeters. *Id.* ¶¶ 34–35. The mayo base containing oil is added to the tuna during the hand mixing process. Pl. Stmt. Facts ¶ 33; Def. Resp. Pl. Stmt. ¶ 33.

² Plaintiff asserts that the light meat mayo base contains 12.18 percent soybean oil. Defendant disagrees and posits that it contains 12.82 percent soybean oil. Pl. Stmt. Facts ¶ 29; Def. Resp. Pl. Stmt. ¶ 29. The difference is immaterial for classification.

Finally, in the filling and finishing phase, metal funnels are used to fill each pouch with the mixture of tuna, celery, water chestnuts and dressing that is created from the prior steps. *Id.* ¶ 5. No additional oil is added to the final phase of packaging or to any stage of production. *Id.* ¶¶ 5, 30, 33. The parties generally agree on the total percentage of oil by weight in each finished tuna product. As a result of the addition of the mayo base during the tuna phase, that is 4% for the Tuna Salad Albacore and approximately 5% for the Tuna Salad Chunk Light. *Id.* ¶¶ 32–33.³

STANDARD OF REVIEW

Customs' protests are reviewed *de novo* by the court. 28 U.S.C. § 2640(a)(1) (2018). This court has jurisdiction under 28 U.S.C. § 2640(a)(1) because plaintiff contests Customs' denial of plaintiff's protest over the proper classification of the merchandise at issue.

Summary judgment is permitted when “there is no genuine dispute as to any material fact . . .” USCIT R. 56(a). The court must decide materiality by determining whether any factual disputes are material to the resolution of the action. *Anderson v. Liberty Lobby, Inc.*, 477 US. 242, 247–48 (1986). In making this determination, “all evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable factual inferences should be drawn in favor of the nonmoving party.” *Dairyland Power Coop. V. United States*, 16 F.3d 1197, 1202 (Fed. Cir. 1994) (citations omitted). Here, the court does not find any disputes as to material issues of fact, so summary judgment is appropriate to resolve the dispute over the classification.

The court's review of classification cases is limited to the record before the court. 28 U.S.C. § 2640(a). “The plaintiff has the burden of establishing that the government's classification of the subject merchandise was incorrect . . .” *Lerner New York, Inc. v. United States*, 908 F. Supp. 2d 1313, 1317–18 (CIT 2013). But, “plaintiff does not bear the burden of establishing the correct classification; instead, it is the court's independent duty to arrive at the ‘correct result’ . . .” *Id.* (quotations in original) (citations omitted).

The determination of whether an imported item has been properly classified involves a two-step analysis. *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (Fed. Cir. 1994). First, the court must “ascertain[] the proper meaning of specific terms within the tariff

³ Because the parties dispute the oil content of the light meat mayo base, the parties' calculations for the oil content of the Tuna Salad Chunk Light products as a whole also differ slightly. Plaintiff contends that the total percentage of oil by weight is 4.59% and defendant argues that it is 4.83%. Pl. Stmt. Facts ¶ 32; Def. Resp. Pl. Stmt. ¶ 32. This difference is immaterial for classification.

provision,” and, second, “determin[e] whether the merchandise at issue comes within the description of such terms as properly construed.” *BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1376 (Fed. Cir. 2011). The first step is a question of law, while the second is a question of fact. *Pillowtex Corp. v. United States*, 171 F.3d 1370, 1373 (Fed. Cir. 1999).

LEGAL FRAMEWORK

The General Rules of Interpretation (“GRIs”) of the HTSUS govern the proper classification of merchandise entering the United States. The GRIs “are applied in numerical order.” *ABB, Inc. v. United States*, 421 F.3d 1274, 1276 n. 4 (Fed. Cir. 2005). GRI 1 states that “classification shall be determined according to the terms of the headings and any relative section or chapter notes.” GRI 3(a) applies specifically to items in a set put up for retail sale (such as the lunch-to-go pouches). It states that “when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.” According to GRI 3(b), “goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character.”

Finally, GRI 6 states, “the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable.” Further, “the relative section, chapter and subchapter notes also apply, unless the context otherwise requires.”

The HTSUS has the force of statutory law. *Aves. In Leather, Inc. v. United States*, 423 F.3d 1326, 1333 (Fed. Cir. 2005). Absent contrary legislative intent, tariff terms are to be understood according to their common and commercial meanings. *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003). When interpreting a tariff term, the court may rely on its own understanding of the term and on secondary sources such as scientific authorities and dictionaries. *North Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001).

Additional U.S. Notes to the HTSUS are also “considered to be statutory provisions of law for all purposes.” *Del Monte Corp. v. United States*, 730 F.3d 1352, 1355 (Fed. Cir. 2013) (internal quota-

tions omitted) (citations omitted). These are “legal notes that provide definitions or information on the scope of the pertinent provisions or set additional requirements for classification purposes” *Id.*

The court may also refer to the Explanatory Notes to the Harmonized Commodity Description and Coding System, developed by the World Customs Organization (WCO) (“ENs”). ENs may guide the interpretation of a tariff term since they are “intended to clarify the scope of HTSUS subheadings and to offer guidance in their interpretation,” even though the ENs are not controlling. *Len-Ron Mfg. Co.*, 334 F.3d at 1309. The ENs are “generally indicative of the proper interpretation of a tariff provision.” *Degussa Corp. v. United States*, 508 F.3d 1044, 1047 (Fed. Cir. 2007).

DISCUSSION

I. Competing Tariff Provisions

Chapter 16 of the HTSUS covers “preparations of meat, of fish or of crustaceans, molluscs or other aquatic invertebrates.” In determining the classification of the subject merchandise, the parties agree that the products are appropriately classified under Heading 1604 of the HTSUS, which covers “[p]repared or preserved fish; caviar and caviar substitutes prepared from fish eggs.” However, the parties disagree on the proper subheading applicable to the subject merchandise. The subheadings under Heading 1604 can be separated into three categories. The first grouping, subheadings 1604.11 – 1604.19, is limited to “fish, whole or in pieces, but not minced.” The second, consisting of only 1604.20, covers “[o]ther prepared or preserved fish; prepared meals,” which includes “minced” fish. The third category, “caviar and other substitutes,” covers subheadings 1604.31–32.

The “not minced” category is divided by type of fish, with tuna and skipjack covered by subheading 1604.14, a subheading that is further subdivided depending on whether the product is “in oil” (1604.14.10), “not in oil” (1604.14.22), or “other” (1604.14.30). As such, the question of whether the product is “minced” is a threshold question. Within HTSUS 1604.14, the question of whether the product is “in oil” follows if the product is determined to be “not minced.”

II. Positions of the Parties

A. Plaintiff

Plaintiff claims that the subject merchandise is correctly classified under subheading 1604.20.05 as prepared meals that are “minced” and that the court need not reach the question of whether it is in “in oil.”³ Pl.’s Mem. in Supp. of Pl. Mot. for Summ. J. (“Pl. Br.”) at 17–18,

22–23. *See* Am. Compl. ¶ 21. Plaintiff argues against classification in subheading 1604.14 on the basis that subheading 1604.14 covers tuna that is “not minced.” According to plaintiff, tuna is “minced” when its production involves chopping and cutting cooked tuna into small pieces, Pl. Br. at 19, and that process accurately characterizes the production process for the subject merchandise. *Id.* The HTSUS does not define the term “minced,” so plaintiff introduces dictionary definitions of the term to support the proposition that the subject merchandise is minced. *Id.* at 18.

In the absence of a defined tariff term, plaintiff cites six dictionary definitions to support what it deems as the “common and popular” meaning of the term “minced.” *Id.* at 18–20. Plaintiff argues that the dictionary definitions of “minced” fit the description of the subject merchandise. *Id.* at 19, 21. The referenced dictionaries define “minced” with the term “small,” and Customs likewise describes the chopped tuna pieces as “small.” *Id.*; Pl. Stmt. Facts ¶ 37. Thus, plaintiff claims that this connection supports the argument that the subject merchandise includes “minced” tuna. Pl. Br. at 19–20. Additionally, Plaintiff emphasizes that only two of the six dictionary definitions reference size requirements and none of the dictionary definitions specifies a uniformity requirement. Pl.’s Opp. to Def.’s Cross-Mot. for Summ. J., at 8–9, 10–12. Thus, plaintiff argues that the term “minced” does not demand specific measurement requirements. *Id.*

Further, plaintiff argues that because the subject merchandise is “minced,” it should be classified under subheading 1604.20.05. Pl. Br. at 22–23. Plaintiff claims that the subject merchandise is correctly classified under subheading 1604.20.05 because the minced tuna products constitute “prepared meals” that consist of more than 20 percent by weight of tuna, vegetables and sauce. *Id.* The Explanatory Notes to Chapter 16 provide that “food preparations fall in this chapter provided that they contain more than 20 percent by weight of . . . fish.” *Id.* Given the record before the court, plaintiff claims that the subject merchandise is correctly classified under 1604.20.05.

Alternatively, plaintiff argues that if the court concludes that the subject merchandise is not “minced,” then the subject merchandise should be classified under subheading 1604.14.22 or 1604.14.33, rather than subheading 1604.14.10, because the tuna is not “in oil.” Subheading 1604.14.10 requires that the tuna be packed “in oil.” Plaintiff’s argument is that the subject merchandise *includes* oil, but it is not *packed* “in oil.”⁴ *Id.* at 23. *See* Am. Compl. ¶ 24. Plaintiff opposes classification under subheading 1604.14.10 on the basis that oil was used to prepare the subject merchandise, but that it is not “packed in oil.” Pl. Br. at 28–29. Plaintiff supports this assertion

through application of HTSUS Chapter 16 Additional U.S. Note 1, which provides that “for the purposes of this chapter, the term ‘in oil’ means packed in oil or fat, or in added oil or fat and other substances, whether such oil or fat was introduced at the time of packing or prior thereto.” *Id.* at 23.

Plaintiff also relies on the distinction between preparation and packing made by the court in *Richter Bros.*, which held that oil used in the preparation phase alone does not render the product “packed in oil.” *Richter Bros., Inc. v. United States*, 44 C.C.P.A. 128 (1957); Pl. Br. at 26–27. The *Richter Bros.* court reasoned that this distinction gave effect to the revision of Paragraph 718(a) of the Tariff Act of 1930, which resulted in the insertion of the phrase “prepared or preserved in any manner” before “packed in oil.” *Richter Bros.*, 44 C.C.P.A. at 131. Plaintiff contends that the preparation phase includes not only cooking, but also mixing the cooked tuna with the oil-based mayonnaise dressing, since the mixing process occurs prior to packing. Pl. Br. at 28. For this reason, based on *Richter Bros.*, the presence of oil in the product — resulting solely from “preparation,” according to plaintiff — does not properly result in classification of the product as “in oil.”

B. Defendant

Defendant claims that the subject merchandise is properly classified under subheading 1604.14.10, because it is comprised of tuna fish that is not “minced” and is packed “in oil.” See *Def.’s Mem. in Supp. of Its Cross-Mot. for Summ. J. and Resp. in Opp’n to Pl.’s Mot. for Summ. J.* (“Def. Br.”) at 6. On this basis, defendant opposes plaintiff’s motion and files a cross-motion for summary judgment.

Defendant argues that the fish is packed in oil because the “pre-cooked tuna pieces are mixed with oil-based mayonnaise dressings,” which means that the tuna salad pouches are packed “in oil” for tariff purposes. *Id.* at 6. Defendant cites case law and Additional U.S. Note 1 to Chapter 16 of the HTSUS to support its claim. *Id.* Defendant notes that Additional Note 1 does not require a specific quantity or proportion of oil for fish to be considered packed “in oil”; Additional Note 1 does not limit when, how, or for what purpose oil is added; nor does it “distinguish between oil that is alone in a packing medium and oil that is mixed with other ingredients.” *Id.* at 10. Defendant argues that two cases — *Strohmeyer & Arpe Co. v. United States*, 5 Ct. Cust. App. 527 (1917) and *Del Monte Corp. v. United States*, 885 F. Supp. 2d 1315, 1319–20 (CIT 2012), *aff’d*, 730 F.3d 1352 (Fed. Cir. 2013) — support the proposition that “any amount of oil introduced in a tuna salad mixture, base, dressing, packing medium or sauce, renders that

tuna product packed ‘in oil’ for tariff purposes.” *Id.* at 10–11.

Further, defendant argues that a third case relied upon by plaintiff — *Richter Bros.* — should be distinguished, because the fish at issue in *Richter Bros.* was fried in oil and packaged in a brine that contained no oil. *See id.* at 20–21. In *Richter Bros.*, the Customs Court found that when no oil was used in the actual packing process and as much of the frying oil as possible was drained from the fish after frying, the product would not be considered “packed in oil.” Because the subject merchandise in this case is in fact packaged in a soybean oil-based mayonnaise dressing, defendant argues that the subject merchandise should be classified as “packed in oil.” *Id.* at 11–12.

With respect to whether the fish is “minced,” defendant argues that it is not “because the pieces of tuna in the pouches are not the product of a minced cut, nor of a minced size, shape, or texture.” *Id.* at 1. The HTSUS does not define the term “minced,” so defendant relies on dictionary definitions and culinary sources to rebut plaintiff’s claim that the court should interpret “minced” simply as “very small.” *See id.* at 13, 17–20. Defendant argues that the culinary and dictionary sources from which plaintiff draws its definition of “minced” are properly understood as supporting defendant’s proposed classification, because these sources — collectively summarized — describe a mince “as the smallest sized pieces that can be measurably cut — an approximate, uniform 1/16th x 1/16th x 1/16th — and not chunky.” *Id.* at 19–20.

Defendant applies its definition of “minced” to the subject merchandise, which defendant notes was analyzed by Customs’ laboratory and found to contain pieces spanning a wide range of sizes, from immeasurably small to twelve times the size of a minced cut. *Id.* at 14. While “a portion of the measured tuna was ostensibly in the approximate range of a mince size, a predominant characteristic of a mince are uniform pieces cut to size.” *Id.* at 15. Defendant argues that Customs’ findings demonstrate that the pieces are not uniformly cut, and that this lack of consistency suggests that the tuna is not minced. *See id.* at 15–16. Further, defendant asserts that plaintiff’s production records show that StarKist does not *intend* for the tuna to be minced — “rather, [plaintiff] intends for the tuna pieces to be chunky.” *Id.* at 6. Defendant argues that the production process is intended to produce tuna pieces that are chunky and vary in size and shape, “not the uniform product of an exacting minced cut.” *Id.* at 16.

In addition to arguing that the fish has been packed in oil and that it is not minced for HTSUS purposes, defendant also responds to plaintiff’s argument for application of subheading 1604.20 by noting

that this subheading is a residual classification: it is intended to cover instances in which another subheading does not more specifically cover the merchandise in question. *See id.* at 12–13. Since the subject merchandise “is specifically described by HTSUS subheading 1604.14 as pieces of fish, it cannot be classified in the residual “other” subheading of HTSUS, 1604.20.” *Id.* at 13.

III. Classification of the Subject Merchandise

The subject merchandise is properly classified under HTSUS 1604.14.10 because the subject merchandise consists of “fish, whole or in pieces, but not minced” and is “in oil.” The products at issue are correctly described as “in pieces, but not minced” because, while consisting partially of very small pieces, they vary significantly in shape, size and texture. The pieces are also not produced by a minced cut, but rather by a process that includes both chopping and hand-mixing, which indicates that even the small pieces are not truly minced.

The determination of whether a product is “in oil” depends on whether the oil was added during the preparation phase or afterwards, during the packing phase. In this case, the oil was added to StarKist’s products during the packing phase after the preparation of the tuna. Therefore, the products are properly classified as “in oil.” The court begins by analyzing whether the subject merchandise is “minced” or not, and then turns to the question of whether it is packed “in oil.”

A. Minced

Based on the interpretive guidance of GRI 1 and GRI 6, all of the subject merchandise at issue is properly classified under HTSUS 1604.14.10, which covers “fish, whole or in pieces, but not minced” that is “in oil.” The subheadings within Heading 1604 fit into three main categories: (1) “Fish, whole or in pieces, but not minced” (1604.11–19); (2) “Other prepared or preserved fish” (1604.20); and (3) “Caviar” (1604.31–32). The product is not caviar and “other” provisions are intended to function as residual classifications. *See, e.g., Orlando Food Corp. v. United States*, 140 F.3d 1437, 1442 (Fed. Cir. 1998) (using an “other” sub-heading as a “catch-all” provision, appropriate when other classifications are not satisfactory). Therefore, the threshold question in this case is whether the subject merchandise consists of “fish, whole or in pieces, but not minced,” such that classification under HTSUS 1604.14 is proper. Specifically, the question is whether the tuna, in its entirety, is properly classified as minced.

The term “minced” is not defined under the HTSUS, so the court analyzes several different factors to interpret the meaning of

“minced” under the statute and applies them to determine whether the tuna is correctly classified as minced. Specifically, the court examines (1) whether the pieces, based on their size and physical characteristics, collectively, should be considered “minced,” and, (2) whether the tuna pieces are the product of a minced cut. Based on these factors, the court concludes that the subject merchandise as a whole is properly categorized as “in pieces, but not minced.”

1. The Size and Physical Characteristics of the Tuna Pieces Are Not Consistent with a “Mince”

The subject merchandise consists of various pieces of tuna that vary significantly in size, shape and texture. Customs Laboratory Report; Deposition of Luis Quinones (“Quinones Dep.”). The subject merchandise includes some tuna pieces equivalent in size to a minced piece, as well as pieces substantially larger. *See* Customs Laboratory Report at 4; *see also* Quinones Dep. at 14, 22; Ex. 9 (showing histogram pages of Laboratory analysis). The language of the tariff — specifically, the phrase “in pieces, but not minced” — suggests the possibility of small pieces, including pieces that are equivalent in size to a “minced piece.” The language does not, by its own terms, specifically exclude from “[f]ish, whole or in pieces, but not minced” the presence of very small pieces. Thus, the fundamental character of the tuna still may be chunky, despite the incidental presence of very small pieces.

While this case does not implicate GRI 3(b) on the question of whether the tuna is minced,⁴ the inquiry — determining which pieces of tuna form the essence of the subject merchandise — ultimately bears sufficient resemblance to a test of “essential character” such that an “essential character” analysis is informative here. This Court has previously held that the essential character of an entry is “that attribute which strongly marks or serves to distinguish what it is. Its essential character is that which is indispensable to the structure, core or condition of the article, i.e., what it is.” *Oak Laminates D/O Oak Materials Group v. United States*, 8 CIT 175, 180, 628 F. Supp. 1577 (1984) (citing *United China & Glass Co. v. United States*, 293 F. Supp. 734, 61 Cust. Ct. 386, C.D. 3637, C.D. 3637 (1968)). Applying this concept to the product at issue, the court must consider whether the minced pieces of the subject merchandise define the character of the subject merchandise. Altogether, the pieces equivalent in size to a mince do not predominate to such an extent that they “distinguish what it is.” *See id.*

⁴ To implicate GRI 3(b), the subject merchandise would have to be, *prima facie*, classifiable under two or more subheadings. Here, the product must either be minced or not minced; the product as a whole may not be classified as both.

Plaintiff and defendant propose different formulas to determine the precise meaning of “minced” under the statute. Neither formula provides a basis for the court to find that the subject merchandise as a whole should be considered minced. Plaintiff’s preferred definition for minced “includes food products that have been chopped or cut into very small pieces with a surface area of 1/16 of an inch or less.” Pl. Br. at 22. Defendant favors a definition that emphasizes uniformity of texture and shape. Def. Br. at 13. For defendant, “[a] mince is not just tiny or very small pieces, but the smallest sized pieces that can be measurably cut” Def. Br. at 13.

Neither plaintiff’s nor defendant’s framework provides a basis on which the court may conclude that minced pieces define the character of the subject merchandise. According to plaintiff, through its formula, “significantly more than 82% of one product [Tuna Salad Chunk Light] has the requisite surface area to meet the requirement of “minced” and “significantly more than 58%” of the other product [Tuna Salad Albacore] contains the requisite surface area. Pl. Br. at 21. Even these proportions, however, do not meet the plaintiff’s own definition of minced, which states that food products must have been chopped or cut into pieces “with a surface area of 1/16 of an inch or less.” Pl. Br. at 22 (emphasis supplied). Plaintiff’s definition of a minced cut suggests that there is a limit to the size — measured by surface area — of what constitutes a “minced” piece, and as defendant notes, some of the pieces are as much as twelve times that size. *See* Customs Laboratory Reports; Quinones Dep. While some of the pieces are the size of a “mince,” according to plaintiff’s own definition, the variation in the surface area of the pieces shows that the subject merchandise’s character as a whole should not be considered minced because it contains pieces that are varied in size and shape.

The subject merchandise also does not meet defendant’s definition of minced. Even without specific measurements to define a “mince,” the wide range of piece sizes and lack of uniformity contribute to the conclusion that the product is not minced. Significantly, these larger pieces impart the fundamental character of the tuna as a whole, which is comprised of pieces of varying sizes, lacks uniformity and contains chunks. *See* Laboratory Photos. Indeed, as noted above, some of the pieces are substantially larger than others, and the overall consistency is “chunky.” *See* Laboratory Reports; Quinones Dep. A mince, according to both parties’ definitions, is small and relatively uniform in size, which suggests that a mince is not chunky in texture or shape. However, in StarKist’s products, the presence of certain tuna pieces equivalent in size to minced tuna is purely inci-

dental; the defining character is more accurately described as chunky, with pieces of varying size. One variety of the products at issue is even marketed as “Tuna Salad *Chunk Light*.” (Emphasis supplied). As such, “minced” does not properly characterize the subject merchandise as a whole, no matter which definition is used.

2. The Tuna Pieces Are Not the Product of a Minced Cut

The tuna here is not the product of a minced cut, which further compels classification as “in pieces, but not minced.” The tariff language — specifically, the use of the verb form of “minced” rather than the noun “mince” — suggests that the process by which the pieces are created is critical to determining whether they fall within the meaning of the provision.

Both plaintiff’s and defendant’s definitions of “minced” involve consideration of not only the *size* of the pieces but also the *process* by which StarKist cuts or chops the tuna to produce those small pieces. As noted above, defendant’s definition states that “[a] mince is not just tiny or very small pieces, but the smallest sized pieces that can be measurably cut” Def. Br. At 13. In other words, a mince is the product of cutting pieces as small as they can be cut. Plaintiff’s definition “includes food products that have been chopped or cut into very small pieces with a surface area of 1/16 of an inch or less.” Pl. Br. at 22. This definition is even more explicit that cutting or chopping must serve as the method that produces the small pieces; the process of cutting is as integral to this definition as the small size of the resulting pieces. Thus, based on both definitions, the small pieces of a minced cut are the product of a purposeful process that involves cutting or chopping. Taking into account the size, shape and texture characteristics of what constitute minced pieces as well as the process by which they are produced, the court concludes that mincing may be defined as cutting or chopping into very small pieces.

While StarKist’s production process involves some chopping, Morales Decl. ¶¶ 30–34; Exhibits C and D, ECF No. 60, its process for producing the tuna pieces differs sharply from mincing. Here, for both the Albacore and the Chunk Light tuna, cooked tuna loins are passed through a chopper with four blades, set to achieve a thickness chunk of 0.8–1.0 inches for Albacore and 1.0–1.5 inches for Chunk Light. Morales Decl. ¶ 34. An operator then hand-folds the tuna pieces and the mayonnaise-based dressing for about 18–20 minutes, breaking up some of the larger pieces. Morales Decl. ¶ 30 and Exhibits C and D. Thus, the pieces produced by the chopping are substantially larger than the plaintiff’s own “1/16 of an inch or less” definition of minced. It is only when an operator hand-blends the tuna with the dressing,

after the chopping phase is already complete, that the requisite “very small pieces” are produced. The formation of these pieces by hand-blending — rather than the chopping that characterizes production of a minced cut — illustrates that the subject merchandise is not the product of a minced cut.

The products at issue in this case are properly classified as “not minced” because they consist of pieces that are varied in size, some of which are significantly larger than “very small” or “1/16 of an inch”; and because the small pieces are not the product of a minced cut but of a hand-blending process. As such, the fish is properly classified under HTSUS 1604.14.10 because the subject merchandise consists of fish that is “in pieces, but not minced.”

B. In Oil

HTSUS Subheading 1604.14 contains three categories at the six-digit level: 1604.14.10 covers “tunas and skipjack, in airtight containers, *in oil*,” 1604.14.22 covers “tunas and skipjack, in airtight containers, *not in oil*,” and 1604.14.30 covers “other: albacore in foil or other flexible containers; other: in foil or other flexible containers; other.” (Emphasis supplied). The tuna products at issue are “in oil,” so the correct classification is 1604.14.10.

1. Any Amount of Oil Is Sufficient to Render a Product Packed in Oil

To qualify as “in oil” under HTSUS Heading 1604, Additional U.S. Note 1 clarifies that the subject merchandise must be “packed” in oil. HTSUS Chapter 16, Additional Note 1. However, the Note does not provide specific guidance as to how much oil must be present in the packing medium for fish to be packed “in oil.” In 2013, the Court of Appeals for the Federal Circuit (“Federal Circuit”) provided guidance on this issue. In *Del Monte Corp. v. United States*, the merchandise at issue was three varieties of tuna fillets and strips packed in a sauce. 730 F.3d 1352 (Fed. Cir. 2013). The tuna was processed separately from the sauce, which was added only after the tuna was placed into its packaging. *Id.* at 1353. The sauce contained sunflower oil, which constituted a range between 3.1 and 12.4 percent of the sauce’s weight across the three products. *Id.* The court ruled that the products were properly classified as “in oil” because the tuna was not cooked in oil and the sauce was added after the cooking process:

Del Monte’s products were properly classified as “in oil” under subheading 1604.14.10 according to Additional U.S. Note 1. It is undisputed that the tuna is not cooked in oil, that the tuna is placed in the packaging after being prepared without using any

oil, and that a sauce containing some oil is then added to the pouch. That is sufficient to describe the Lemon Pepper and Lightly Seasoned varieties as tuna “packed . . . in added oil . . . and other substances” and thus to bring the goods within the scope of subheading 1604.14.10.

Id. at 1355. The court interpreted Additional U.S. Note 1 to clarify that “goods are considered ‘in oil’ even if the liquid substance does not consist entirely of oil, and [Additional U.S. Note 1] sets no minimum threshold for the amount of oil that must be present.” *Id.* (internal quotations in original). The court relied on this interpretation in holding that even a very small percentage of oil, between 0.62 and 2.48 percent of the total weight of the merchandise, was sufficient for the merchandise to be classified as packed “in oil.” *See id.*

2. A Product is Packed in Oil If the Oil is Added After the Preparation of the Product

Additional Note 1 to HTSUS Chapter 16 places no temporal requirements on when the addition of oil occurs to render a product “in oil.” Note 1 also specifically covers oil “introduced at the time of packing or prior thereto” and case law further substantiates the plain language of the statute. This Court’s predecessor, the United States Customs Court, first had occasion to interpret the term “in oil” in 1915, when that court held that a fish product that contained oil was properly classified as “in oil” without regard to whether the oil originated from the cooking process or the sauce. *Strohmeyer & Arpe Co.*, 5 U.S. Cust. App. at 527. In *Strohmeyer*, the plaintiff manufactured a fish product that was both fried in oil and packed in a tomato sauce that contained oil. *Id.* The final product contained approximately 5.7 percent oil, with an indeterminate small share that originated from the frying oil. The court held that it did not matter how the oil came to be present in the tomato sauce — the mere presence of oil in the packing medium (i.e., the tomato sauce) was sufficient for the merchandise to be considered “packed” in oil. *Id.*

Over 40 years later, the court qualified its holding in *Strohmeyer* and determined that a clear distinction exists between the preparation and packing stages for the purposes of the tariff provision. In *Richter Bros.*, the fish product was fried in oil but not mixed with any dressing that itself contained oil. 44 C.C.P.A. at 128. “It appears that whatever oil was contained in the tins in which the herring were packed, if indeed there was any, consisted of the natural oil of the fish, plus any residue from the herring oil and tallow in which the fish were fried.” *Id.* at 129. The court cited revisions to Paragraph 718(a) of the Tariff Act of 1930, which resulted in the addition of the phrase

“prepared or preserved in any manner” before “packed in oil.” *Id.* at 130. The court interpreted the revision as clarifying that the provision does not include fish products in which no oil was added after the fish was “prepared or preserved.” *Id.* The court relied on this interpretation in holding that fish, which was fried in oil, drained, and then packed in a liquid without oil, was not “packed in oil” because “no oil whatever [*sic*] was used in the actual packing process.” *Id.* at 131. The key contribution of the *Richter Bros.* court to the precedent of *Strohmeyer* is the distinction between oil added during the preparation stage and oil added during the packing stage. That distinction results in the implication that the preparation stage ends after cooking.

The summation of these prior cases is that if the fish is cooked in oil and no oil is present in the dressing (as in *Richter Bros.*) then the fish cannot be said to be “packed” in oil for HTSUS purposes. But if the fish is mixed with a dressing or sauce that contains oil — as in *Strohmeyer* and *Del Monte*— then it is considered “packed” in oil, regardless of the cooking method. Therefore, *Richter Bros.* and *Del Monte* stand for the proposition that the addition of oil after the fish is prepared (cooked) renders the fish “in oil.” There is a window of time — which begins after the fish is cooked and ends when the package itself is closed — and the addition of any oil within this time period renders the product “in oil.” The introduction of oil during the packing “or prior thereto,” but after cooking, renders the product “in oil.”

3. StarKist’s Products are Packed In Oil

It is undisputed that StarKist’s products contain enough oil to be considered “in oil” for tariff classification purposes because any amount of oil is sufficient. In addition, the oil is added to StarKist’s products after the preparation stage, so the products are “packed” in oil. Therefore, classification under HTSUS 1604.14.10 is proper.

i. StarKist’s Products Contain Enough Oil To Be Classified as In Oil

The subject merchandise at issue falls squarely within HTSUS 1604.14.10 as fish “in oil.” The tariff provision does not set a minimum oil content threshold. Moreover, the presence of oil in this case is not seriously in dispute, and the oil content of the subject merchandise here is very similar to the oil content of the products at issue in *Del Monte*, which were found to be “in oil.” *See* 730 F.3d at 1355.

The subject merchandise in this case contains tuna fish that is packed in a mayonnaise dressing. The parties agree that the white meat mayo base dressing used in the Tuna Salad Albacore products

contains 12.82 percent soybean oil by weight. Pl. Stmt. Facts ¶¶ 31–32; Def. Resp. Pl. Stmt. ¶¶ 31–32. The parties disagree about the oil content of the light meat mayo base dressing used in the Tuna Salad Chunk Light products. Pl. Stmt. Facts ¶ 29; Def. Resp. Pl. Stmt. ¶ 29. Plaintiff contends the light meat mayo base contains 12.18 percent oil by weight, while defendant argues the light meat mayo base contains 12.82 percent oil by weight. *Id.* However, this slight discrepancy is immaterial because any amount of oil is sufficient. *See Del Monte*, 730 F.3d at 1355.

In addition, the parties agree that the Tuna Salad Albacore products have a total oil content of 4.42 percent by weight. Pl. Stmt. Facts ¶ 32; Def. Resp. Pl. Stmt. ¶ 32. The parties disagree about the total oil content of the Tuna Salad Chunk Light products because of the disagreement about the oil content of the light meat mayo base dressing, but the difference between the oil content levels is also immaterial because any amount of oil is sufficient. *See Del Monte* 730 F.3d at 1355; Pl. Stmt. Facts ¶ 32; Def. Resp. Pl. Stmt. ¶ 32. Therefore, the oil content of StarKist’s finished products is well beyond the threshold articulated by the court in *Del Monte* as sufficient to render those products “in oil.” *See* 730 F.3d at 1355 (holding that a total oil content of only 0.62 percent by weight was enough for a product to be “in oil”).

ii. The Oil in StarKist’s Products is Added After the Preparation Phase

The facts in this case are similar to *Del Monte*—tuna products that were not fried or otherwise prepared in oil but were mixed with a dressing that contained oil. Plaintiff attempts to distinguish the present case from *Del Monte* by contending that StarKist’s products are combined with the dressing in the preparation phase, before they are placed in the packaging (the packing phase). Pl. Br. at 28. Plaintiff contends that the merchandise in this case is more like that in *Richter Bros.* because here the dressing containing oil was added during the preparation phase, as in *Richter Bros.* — not during the packing phase as with the products in *Del Monte*. *Id.*

To reach this conclusion, plaintiff advances a novel argument that the preparation phase includes an additional step beyond cooking, namely, hand-mixing the tuna with the dressing containing oil. *Id.* It follows from plaintiff’s argument that the preparation stage continues until the product is physically placed in its packaging (the packing phase). *Id.* However, plaintiff mistakenly conflates preparation of the finished product — tuna salad — with preparation of the fish itself. The operative term in HTSUS Heading 1604 is “prepared or preserved fish.” The plain reading of this term is that “prepared or

preserved” modifies the word “fish.” Plaintiff’s argument that preparation refers instead to the product as a whole misconstrues the plain meaning of Heading 1604. Plaintiff’s interpretation also directly conflicts with the interpretation of the *Richter Bros*’ court that the term “prepared or preserved in any manner” refers to the fish itself, not the entire manufacturing process of the finished product.

In addition, no prior case has held that the preparation phase includes the addition of other ingredients after cooking. See *Richter Bros.*, 44 C.C.P.A. at 129 (finding that “after the fish had been cooked, as much of the oil as possible was drained off . . . the preceding steps relate to preparation, as distinct from packing”); see *Del Monte*, 730 F.3d at 1353 (finding that “the tuna is not cooked or prepared in oil and is processed separately from the sauce”). Plaintiff’s reading of the statute here requires that the court interpret this provision in a way that belies the plain language of the statute and is inconsistent with prior case law.

StarKist carries out the preparation phase by cooking the tuna in a “pre-cooker” that does not use oil. Pl. Stmt. Facts ¶ 12–15. After the cooking phase, the tuna is chopped into smaller pieces and hand-mixed with the mayonnaise dressing, which contains oil. Pl. Stmt. Facts ¶ 22. The mixture is then physically placed in its packaging (“Filling and Finishing Phase”). Pl. Stmt. Facts ¶ 5.

During oral argument, plaintiff argued that the “or prior thereto” language “was inserted . . . to catch a situation where [*sic*] you have a pouch that you first fill with oil and then add fish. That’s certainly considered to be in oil, because the oil is part of the packing process.” Transcript of Oral Argument at 40.

Additional U.S. Note 1 makes clear that a product is properly considered to be “in oil” regardless of “whether such oil . . . was introduced at the time of packing *or prior thereto*.” (Emphasis supplied). Plaintiff would like the court to draw an arbitrary distinction between the addition of oil before the fish is placed in its packaging and afterwards. However, if the tuna in *Del Monte* was combined with the oil-based dressing in a separate container minutes before being placed in the pouch, plaintiff’s interpretation would lead to the result that the fish is not “in oil” because the oil was not introduced within the confines of the packaging.

The distinction proffered by plaintiff is not supported either by the plain meaning of the Note, or the holdings in *Richter Bros.* and *Del Monte*. The hypothetical adapted from *Del Monte* bears great similarity to the process used to make StarKist’s products. Classifying StarKist’s products as “not in oil” simply because the oil was intro-

duced in a large container before the mixture was transferred to several smaller containers would narrow without support the language of Note 1.

The products in this case are properly classified as “in oil” under HTSUS 1604.14.10. Both the Chunk Light and Albacore products contain enough oil to be considered “in oil.” In addition, classification under 1604.14.10 is proper because the oil was added to the cooked fish as a separate dressing after preparation and prior to packing.

D. Classification of the Lunch-To-Go-Pouches

As noted previously, some of the subject merchandise is imported in the form of “Lunch-to-Go” kits. These kits include crackers, mint, napkins and a spoon, in addition to the tuna. Pl. Stmt. Facts ¶ 2. Therefore, the kits consist of materials that are properly classifiable under five different HTSUS headings. When goods are, *prima facie*, classifiable under two or more headings, GRI 3 applies to the classification. Under GRI 3(a), when “two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods.” That is the case here, as it is undisputed that the to-go pouches constitute “a set put up for retail sale.” Pl. Br. 29–31. Def. Br. 22–23.

Accordingly, the “Lunch-to-go” kits are classified according to GRI 3(b). GRI 3(b) specifies that the product “shall be classified as if they consisted of the material or component which gives them their essential character.” Here again, it is undisputed that of the retail kit components, it is the tuna that imparts its essential character. Pl. Br. 29–31. Def. Br. 22–23. Therefore, the “Lunch-to-go” kits are properly classified under the same tariff provision as the tuna pouches: sub-heading 1604.14.10

CONCLUSION

In the 2002 Walt Disney Feature Animation, *Lilo & Stitch*, Lilo, voiced by Daveigh Chase, arrives late to her hula dance class.⁵ Lilo’s sister does not see a difference between feeding Pudge a peanut butter sandwich or a tuna sandwich — both, after all, are food. Lilo, however, points out that while the sandwich has many components, it is, first and foremost, fish. The following conversation ensues between Lilo and her hula teacher, voiced by Kunewa Mook:

Hula Teacher: “Lilo, why are you all wet?”

Lilo: “It’s sandwich day. Every Thursday I take Pudge the fish a

⁵ LILO & STITCH (Walt Disney Animation Studios 2002).

peanut butter sandwich . . .”

Hula Teacher: “Pudge” is a fish?”

Lilo: “And today we were out of peanut butter. So I asked my sister what to give him, and she said ‘a tuna sandwich’. I can’t give Pudge tuna!”

Lilo (*whispering*): “Do you know what tuna *is* ?”

Hula Teacher: “Fish?”

Lilo: [*hysterical*] “It’s fish! If I give Pudge tuna, I’d be an abomination!”

Just like Lilo in *Lilo and Stitch*, the court must nibble on the question of what constitutes the essence of an item. While the subject merchandise consists of different components it is, first and foremost, “prepared or preserved fish,” which, viewed in its entirety, is “not minced” and “in oil.”

Dated: November 18, 2020

New York, New York

/s/ Timothy M. Reif

TIMOTHY M. REIF, JUDGE

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