Slip Op. 20–46

DEACERO S.A.P.I. DE C.V. AND DEACERO USA, INC., Plaintiffs, v. UNITED STATES, Defendant, and NUCOR CORPORATION, Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Court No. 17–00183
PUBLIC VERSION

[Sustaining the U.S. Department of Commerce's second remand redetermination in the administrative review of carbon and certain alloy steel wire rod from Mexico.]

Dated: April 13, 2020

Rosa S. Jeong and *Irwin P. Altschuler*, Greenberg Traurig, LLP, of Washington, DC, for plaintiffs, Deacero S.A.P.I. de C.V. and Deacero USA, Inc.

Elizabeth Anne Speck, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Tara K. Hogan*, Assistant Director, *Jeanne E. Davidson*, Director, and *Joseph H. Hunt*, Assistant Attorney General. Of Counsel on the brief was *Emma Thomson Hunter*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Alan Hayden Price, *Daniel Brian Pickard*, and *Derick G. Holt*, Wiley Rein, LLP, of Washington, DC, for defendant-intervenor, Nucor Corporation.

OPINION AND ORDER

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Commerce") second remand redetermination filed pursuant to the court's order in *Deacero S.A.P.I. de C.V. v. United States*, 43 CIT __, __, 393 F. Supp. 3d 1280 (2019) ("*Deacero II*"). *See* Final Results of Redetermination Pursuant to Ct. Remand [in *Daecero II*] Confidential Version, Oct. 29, 2019, ECF No. 71–1. ("*Second Remand Results*"); *see also Deacero S.A.P.I. de C.V. v. United States*, 42 CIT __, __, 353 F. Supp. 3d 1303, 1314–15 (2018) ("*Deacero I*").

Deacero II ruled that Commerce failed to comply with the court's instruction to produce the documents upon which it relied to corroborate the 40.52% petition rate it assigned to respondent as total facts available with an adverse inference ("AFA")[1] in the 2014–2015 administrative review of the antidumping duty ("ADD") order covering

[1] Parties and Commerce sometimes use the shorthand "adverse facts available" or "AFA" to refer to Commerce's reliance on facts otherwise available with an adverse inference to reach a final determination. However, AFA encompasses a two-part inquiry pursuant to which Commerce must first identify why it needs to rely on facts otherwise available, and second, explain how a party failed to cooperate to the best of its ability as to warrant the use of an

carbon and certain alloy steel wire rod from Mexico.[2] *See Deacero II*, 43 CIT at __, 393 F. Supp. 3d at 1281, 1285–87; *see also* Final Results of Redetermination Pursuant to Ct. Remand [in *Deacero I*], Mar. 15, 2019, ECF No. 58–1 ("*Remand Results*"); *Carbon and Certain Alloy Steel Wire Rod From Mexico*, 82 Fed. Reg. 23,190 (Dep't Commerce May 22, 2017) (final results of [ADD] admin. review and final determination of no shipments; 2014–2015) ("*Final Results*") and accompanying Decision Memo. for [the *Final Results*], A-201–830, (May 15, 2017), ECF No. 21–5 ("Final Decision Memo."); Carbon and Certain Alloy Steel Wire Rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine, 67 Fed. Reg. 65,945, 65,947 (Dep't Commerce Oct. 29, 2002) (notice of [ADD] orders) ("*ADD Order*"). The court remanded the determination to Commerce for further explanation or reconsideration consistent with its opinion.

For its second remand redetermination, Commerce placed on the record pre-initiation documents from *ADD Order*; further, Commerce has placed Deacero's margin calculations, and a table summarizing Deacero's individual transaction-specific margins in the administrative review of the *ADD Order* that immediately precedes the review at issue. *Second Remand Results* at 1–2; *see also Carbon and Certain Alloy Steel Wire Rod From Mexico*, 81 Fed. Reg. 41,521 (Dep't Commerce June 27, 2016) (amended final results of [ADD] admin. review; 2013–2014). Commerce explains that the factual information it has placed on the record demonstrates that the 40.52 percent petition rate has probative value for use as the AFA rate assigned to Deacero. *See Second Remand Results* at 2–8. For the following reasons, Commerce's *Second Remand Results* are sustained.

BACKGROUND

The court assumes familiarity with the facts of this case as set out in the prior two opinions, and here recounts only the facts relevant to the court's review of the *Second Remand Results*. *See Deacero I*, 42 CIT at __, 353 F. Supp. 3d at 1306; *Deacero II*, 43 CIT at __, 393 F. Supp. 3d at 1282–83. Commerce initiated an administrative review

adverse inference when "selecting among the facts otherwise available." *See* Section 776 of the Tariff Act of 1930, as amended, 19 U.S.C.A. § 1677e(a)–(b) (2018). The phrase "total adverse inferences" or "total AFA"encompasses a series of steps that Commerce takes to reach the conclusion that all of a party's reported information is unreliable or unusable and that, as a result of a party's failure to cooperate to the best of its ability, it must use an adverse inference in selecting among the facts otherwise available.

[2] For its initial remand redetermination, Commerce placed copies of the Federal Register notice announcing the initiation of its ADD investigation as well as the public version of the Wire Rod from Mexico Initiation Checklist on the record. *See Remand Results* at 6; Placement Wire Rod from Mexico Less Than Fair Value (LTFV) Notice of Initiation & Accompanying Public Version Wire Rod from Mexico Initiation Checklist on R., PRR 1, bar code 3790294–01 (Feb. 6, 2019) ("Initiation Notice" and "Initiation Checklist").

covering subject merchandise entered during the period of October 1, 2014, through September 30, 2015, with respondent Deacero S.A.P.I de C.V. ("Deacero" or "respondent") listed as one of the companies to be reviewed. *See Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 80 Fed. Reg. 75,657, 75,658 (Dep't Commerce Dec. 3, 2015). Commerce, pursuant to section 776 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677e,[3] used total AFA to calculate Deacero's final dumping margin after determining that Deacero impeded its review process. *See Deacero II*, 43 CIT at __, 393 F. Supp. 3d at 1282; *see also* Final Decision Memo. at 4–8, 12. Commerce chose the highest margin alleged in the 2001 petition—40.52%—as Deacero's final weighted-average dumping margin. *See* Final Decision Memo. at 8–9 & n.33; *Final Results*, 82 Fed. Reg. at 23,190.

The court sustained Commerce's total-AFA determination, *see Deacero I*, 42 CIT at __, 353 F. Supp. 3d at 1307–12, 1314, but twice remanded for further explanation or reconsideration Commerce's decision to rely on the 40.52% rate due to the lack of record information that would corroborate that rate, as required by 19 U.S.C. § 1677e(c)(1) and 19 C.F.R. § 351.308(d) (2015).[4] *See id.* at __, 353 F. Supp. 3d at 1312–15; *Deacero II*, 43 CIT at __, 393 F. Supp. 3d at 1285–87. In both instances, the record documents upon which Commerce relied contained conclusory pronouncements that did not demonstrate the probative value of the 40.52% petition rate. *See Deacero I*, 42 CIT at __, 353 F. Supp. 3d at 1313–15; *Deacero II*, 43 CIT at __, 393 F. Supp. 3d at 1283–87.[5]

Commerce filed the *Second Remand Results* on October 30, 2019. On remand, Commerce placed on the record the following pre-initiation documents:

> (1) the business proprietary and public versions of Volume II of the Petition; (2) the business proprietary and public versions of three supplements to the Petition that the petitioner placed on the record of the underlying investigation prior to the Wire Rod from Mexico LTFV Initiation; (3) the business proprietary and public versions of a memorandum to the file filed prior to the

[3] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition. Citations to 19 U.S.C. § 1677e, however, are to the unofficial U.S. Code Annotated 2018 edition, which reflects the amendments made to 19 U.S.C. § 1677e by the Trade Preferences Extension Act of 2015 ("TPEA"). *See* Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, 129 Stat. 362 (2015).

[4] Further citations to Title 19 of the Code of Federal Regulations are to the 2015 edition.

[5] In *Deacero I*, Commerce relied on conclusions contained in a Federal Register notice, *see* Final Decision Memo. at 8–9 (citing *ADD Order*), and in *Deacero II*, Commerce supplemented the administrative record with, and relied on, conclusions stated in the Initiation Notice and Initiation Checklist. *See Remand Results* at 6–7; Initiation Notice; Initiation Checklist.

> Wire Rod from Mexico LTFV Initiation in which Commerce interviewed the market researcher who obtained the home market price quotes contained in the Petition; and (4) an ex parte memorandum to the file in which Commerce officials discussed questions regarding affidavits and foreign market researchcontained in petition supplemental questionnaires issued to the petitioner.

Second Remand Results at 2, 4–8 (footnotes omitted and italics removed); New Factual Info. Memo. ("NFI Memo."), CRRR 1, bar code 3886959–01 (Sept. 4, 2019), NFI Memo. at Attach. 1.A, CRRR 2, bar code 3886959–02 (Aug. 31, 2001) ("Petition"); NFI Memo. at Attachs. 1.B, 1.C pt.1–pt. 2, and 1.D, CRRRs 3–6, bar codes 3886959 03–06 (Sept. 4, 2019) ("Sept. 6th Supplemental Filing," "Sept. 10th Supplemental Filing," and "Sept. 17th Supplemental Filing," respectively); NFI Memo. at Attach. 1.E, CRRR 7, bar code 3886959–07 ("Telephone Memo."); NFI Memo. at Attach. 1.F, CRRR 8, bar code 3886959–08 ("Sept. 17th Ex Parte Memo.").[6] Further, Commerce placed on the record "Deacero's margin calculations from the 2013–2014 [antidumping] administrative review," *Second Remand Results.* at 7 (citing NFI Memo. at Attachs. 2.A.–2.L, CRRRs 9–23, bar codes 3886959–09–23 (Sept. 23, 2019); Amendment to NFI Memo. at Attachs. 2.H., 2.K.1, CRRRs 25, 26, bar codes 3891062–02–03)), "as well as a summary table that lists the individual margin transactions calculated for Deacero in the 2013–2014 administrative review." *Id.* at 2, 6 (citing NFI Memo. at Attach. 2L, CRRR 23, bar code 3886959–23 (Sept. 4, 2019)).

Deacero and Deacero USA, Inc. (collectively, "Plaintiffs") argue that Commerce failed to satisfy the statutory corroboration requirement because its analysis of the record documents fails to demonstrate the probative value of the 40.52% rate. *See* Pls. [Deacero] and Deacero USA, Inc.'s Cmts. Opp'n Remand Redetermination Confidential Ver-

[6] On September 5, 2017, Defendant filed indices to the public and confidential administrative records underlying Commerce's final determination. These indices are located on the docket at ECF Nos. 21–2–3. On April 1, 2019, Defendant filed indices to the public and confidential administrative records underlying Commerce's remand redetermination. These indices are located on the docket at ECF Nos. 61–2–3. On November 13, 2019, Defendant filed indices to the public and confidential administrative records underlying Commerce's second remand redetermination. These indices are located on the docket at ECF Nos. 73–2–3. All references to documents from the initial administrative record are identified by the numbers assigned by Commerce in the September 5th indices, *see* ECF No. 21, and preceded by "PD" or "CD" to denote the public or confidential documents. All references to the administrative record for the first remand determination are identified by the numbers assigned in the April 1st indices, *see* ECF No. 61, and preceded by "PRR" or "CRR" to denote remand public or confidential documents. All references to the administrative record for the second remand determination are identified by the numbers assigned in the November 13th indices, *see* ECF No. 73, and preceded by "PRRR" or "CRRR" to denote remand public or confidential documents.

sion, Dec. 13, 2019, ECF No. 77 ("Pls.' Br."). Plaintiffs also assert that further remand would be futile and request the court to instruct Commerce to select an "AFA rate from average weighted margins calculated for Deacero or another respondent in a prior segment." *See* Pls.' Br. at 1–2, 15–17. Defendant-Intervenor Nucor Corporation ("Nucor") filed comments supporting the agency's position. *See* Def.-Intervenor [Nucor's] Cmts. [*Second Remand Results*] Revised Confidential Version at 6–15, Dec. 13, 2019, ECF No. 80 ("Nucor's Br.").

JURSIDCTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2012). Commerce's antidumping determinations must be in accordance with law and supported by substantial evidence. 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

DISCUSSION

Deacero argues that Commerce has failed to corroborate the petition rate with independent sources. *See* Pls.' Br. at 1–2, 7–13. Defendant and Defendant-Intervenor counter that the pre-initiation documents, as well as documents used to calculate transaction specific margins in the 2013–2014 review, suffice to corroborate the petition rate. *See* Def.'s Resp. Cmts. [*Second Remand Results*] at 5–6, 9–20, Jan. 31, 2020, ECF No. 82; Nucor's Br. at 6–14. For the following reasons, Commerce's determination in the *Second Remand Results* complies with the court's remand order, is supported by substantial evidence, and is sustained.

When Commerce relies on secondary information not obtained in the course of an investigation or review, such as allegations in a petition, Commerce must, to the extent practicable, corroborate[7] that information from independent sources reasonably at its disposal.[8] 19 U.S.C. § 1677e(c)(1); *see also* Uruguay Rounds Agreement Act,

[7] When corroborating an AFA rate, Commerce need not demonstrate that the AFA rate is reflective of an alleged commercial reality. *See* 19 U.S.C. § 1677e(d)(3); *see also Özdemir Boru San. ve. Tic. Ltd. Sti. v. United States*, 41 CIT __, 273 F. Supp. 3d 1225, 1247-48 (2017).

[8] The court bases its review of Commerce's corroboration upon the record of the proceeding, which consists of

> (i) a copy of all information presented to or obtained by the Secretary, the administering authority, or the Commission during the course of the administrative proceeding, including all governmental memoranda pertaining to the case and the record of ex parte meetings required to be kept by section 1677f(a)(3) of this title; and

Statement of Administrative Action, H.R. Doc. No. 103–465, vol. 1, at 870 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4199 ("SAA"); 19 C.F.R. § 351.308(c)(1)(i) (listing, as a source of "[s]econdary information," information derived from "[t]he petition"). Commerce must, where practicable, corroborate secondary information because, as in the case of [information derived from] the petition, such information is "based on unverified allegations[.]" SAA at 870, 1994 U.S.C.C.A.N. at 4199. Corroboration means establishing that the rate is probative; more specifically, that is reliable and relevant to the respondent. *See Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1354 (Fed. Cir. 2015).

Secondary information is corroborated with independent sources such as "published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation or review." SAA at 870, 1994 U.S.C.C.A.N. at 4199; *see also* 19 C.F.R. § 351.308(d). The statute directs Commerce to corroborate the rate to the extent practicable with independent sources reasonably at its disposal. 19 U.S.C. § 1677e(c)(1). Moreover, nothing bars Commerce from considering evidence proffered by parties with an interest in the outcome of Commerce's determination. Indeed, the SAA suggests examples such as "published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation or review." SAA at 870, 1994 U.S.C.C.A.N. at 4199. The statute empowers Commerce to use secondary information so long as Commerce corroborates it to the extent practicable with independent sources reasonably at its disposal. A source's independence does not stem from who submits it, but rather from who generates it. *See KYD, Inc. v. United States*, 607 F. 3d 760, 765 (Fed. Cir. 2010) (concluding that import statistics, price quotations, and affidavits from officials in a third-party company, attached to an antidumping petition, were independent sources) ("*KYD*").

Commerce has corroborated the petition rate with independent sources reasonably at its disposal to the extent practicable. *See* 19

(ii) a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.

19 U.S.C. § 1516a(b)(2)(A)(i)–(ii). Commerce's regulations require it to maintain "the official record of each segment of the proceeding[ ]" that will form the record reviewed by this Court. 19 C.F.R. § 351.104(a)(1). The official record will contain,

> all factual information, written argument, or other material developed by, presented to, or obtained by the Secretary during the course of a proceeding that pertains to the proceeding. . . . [and] government memoranda pertaining to the proceeding, memoranda of ex parte meetings, determinations, notices published in the Federal Register, and transcripts of hearings. The official record will contain material that is public, business proprietary, privileged, and classified.

Id.

U.S.C. § 1677e(c)(1); SAA at 870, 1994 U.S.C.C.A.N. at 4199. Here, Commerce selects the highest margin alleged in the petition as Deacero's AFA rate. *See* Final Decision Memo. at 8 (citations omitted). Commerce placed on the record pre-initiation documents upon which it relies to corroborate the petition rate used in this proceeding. *See Second Remand Results* at 5. Specifically, in addition to providing business proprietary and public versions of the Petition, Commerce also placed on the record three supplements to the Petition. *See* Sept. 6th Supplemental Filing; Sept. 10th Supplemental Filing; Sept. 17th Supplemental Filing. Commerce also submitted a memorandum reflecting a telephone interview with the market researcher who obtained the home market price quotes contained in the Petition, *see* Telephone Memo., and a memorandum summarizing an ex parte meeting between Commerce officials and counsel to petitioners where the parties discussed questions regarding the affidavits and foreign market research petitioners supplied to support the petition. *See* Sept. 17th Ex Parte Memo. All of these documents were generated during Commerce's process of vetting the information presented at the pre-initiation stage. *See Second Remand Results* at 2, 4–8; *see also* NFI Memo.; Sept. 6th Supplemental Filing; Sept. 10th Supplemental Filing; Sept. 17th Supplemental Filing; Telephone Memo.; Sept. 17th Ex Parte Memo.

Although the provenience of the sources implicates the involvement of the petitioners, petitioners did not generate all of the information in these sources. In response to Commerce's attempts to test the veracity of the pre-initiation documents, petitioners submitted the Sept. 6th Supplemental Filing, which included a declaration of petitioner's foreign consultant who personally attested to having obtained information on prices for sales of carbon steel wire rod in Mexico by speaking to various industry sources, *see* Sept. 6th Supplemental Filing at Ex. 1. Although it was later confirmed that the foreign consultant's research was commissioned by the petitioners, *see* Telephone Memo. at 2, the consultant compiled the information by speaking to "knowledgeable industry sources." Sept. 6th Supplemental Filing at Ex. 1.[9] Petitioners compiled the Sept. 10th Supplemental Filing by drafting further responses to Commerce's questions regarding the petition, and attaching an array of original and revised documents to support those responses, *see generally* Sept. 10th Supplemental Filing.[10] Petitioners compiled the Sept. 17th Supplemental

[9] The names and sources of the information in Exhibit 1 to the Sept. 6th Supplemental Filing are redacted as business proprietary information. *See* Sept. 6th Supplemental Filing.

[10] The attachments include a document listing Import Charges from the Bureau of Census, Sept. 10th Supplemental Filing at Attach. 1, Revised Petition Exhibits, *id.* at Attach. 2, a

Filing by drafting responses intended to supplement deficiencies in the Sept. 10th filing, and it contains supporting documents including a revised affidavit, publicly available information and data on scrap prices, as well as other revised documents, *see generally* Sept. 17th Supplemental Filing.

The record also contains documents not generated by the petitioners. First, Commerce generated the Telephone Memo. to memorialize a telephone conversation during which Commerce sought to "confirm the accuracy and completeness of the information provided in the declarations" of petitioners' market research consultant, Telephone Memo. at 1, *see also id.* at 1–3. Second, Commerce generated the Ex Parte Memo. which memorializes a meeting between petitioners and agency officials during which both parties discussed questions regarding the supplied affidavits and foreign market research contained in supplemental questionnaires issued to the petitioner.

Commerce also placed on the record information obtained from third-party sources that petitioners supplied to Commerce when verifying the petition rate. *See Remand Results* at 15. For example, attached to the Petition is information on lending rates in Mexico derived from the International Monetary Fund's International Financial Statistics, *see* Petition at Ex. 1, foreign exchange rates, *see id.* at Ex. 2, data from the International Labor Organization regarding average wages in Mexico, *see id.* at Ex. 8, public information from the International Energy Agency on energy and gas costs in Mexico, *see id.* Exs. 9–10, as well as income statements from Altos Hornos De Mexico S.A. De C.V., *see id.* at Ex. 12.

Finally, Commerce placed on the record numerous confidential documents used to calculate Deacero's transaction specific margins in the 2013–2014 review. *Second Remand Results* at 7–8 (citing NFI Memo. at Attachs. 2.A–2.L). Commerce explains that these calculations corroborate the rate because there were instances in the 2013–2014 review where transaction specific margins came close to or exceeded the petition rate. *Id.*

Deacero argues that neither the pricing data on the record nor the affidavits are independent sources because they originate from sources associated with petitioners and were submitted to support petitioner's allegations—not to present unbiased facts. *See* Pls.' Br. at 7–9; Resp. Pls. [Deacero] & Deacero USA, Inc. to Cmts. of Def-Intervenor [Nucor] on [*Second Remand Results*] Confidential Version at 4, Jan. 31, 2020, ECF No. 84 ("Pls.' Reply Br."). Further, Deacero distinguishes *KYD*, 607 F.3d at 765, invoked by Commerce, stating that in *KYD* the affidavits came from third-party officials, unlike the

list of ports and harbor maintenance fees, *id.* at Attach. 3, and Iron & Steel Works of the World – 13th Edition. *Id*. at Attach. 4.

affidavits in this instance, which were supplied by entities with ties to the petitioners. *See* Pls.' Reply Br. at 3–4.[11]

It is undeniable that the petitioners had a hand in generating the relevant sources here even where third party information is incorporated. Nonetheless, Commerce attempts to corroborate information to the extent practicable with information independent of the petitioners and seeks to further corroborate the rate using transaction-specific data from the prior review. Deacero does not point to any other means, reasonably at Commerce's disposal, to which Commerce could turn to further corroborate the rate. Deacero would have Commerce choose another rate, Pls.' Br. at 2, 15–17, but the statute does not dictate that Commerce must choose another rate if Commerce determines the rate is reliable and relevant to the respondent using independent sources reasonably at its disposal to the extent practicable and if that determination is reasonable based upon the record.

Under the circumstances, even to the extent that Commerce relies on non-independent sources to corroborate the rate, Commerce explains how its efforts at the petition stage demonstrate that the rate is probative and reliable; that by looking at that information in this review as well as transaction specific data from the 2013–2014 review, it has corroborated the rate to the extent practicable. Commerce tested the allegations raised in the petition by, for example, requiring "petitioner to provide an affidavit from the market researcher who obtained the Mexican price quote," as well as to clarify affidavits "submitted in connection with the U.S. price quote" used to calculate the petition rate. *Second Remand Results* at 6–7 (citing Sept. 6th Supplemental Filing at Ex. 1; Sept. 10th Supplemental Filing at 2.) In response, petitioners furnished affidavits from individuals who personally attest to supplying the data petitioners relied on, as well as having the requisite knowledge to provide that data. *See* Sept. 6th Supplemental Filing at Ex. 1; Sept. 17th Supplemental Filing at Attach. 1.[12] Moreover, Commerce "conducted a telephone interview with the Mexican market researcher [and] obtained information on the individual's credentials, background, experience in market research, and information collecting methods, as well as a description of

[11] The affidavits come from [[ ]] and market researchers hired by the petitioners.

[12] These individuals include [[ ]] a U.S. producer of carbon steel wire rod who received verbal information directly from [[ ]] as well as a market researcher, whose name and credentials are redacted, who attests to having obtained information about prices for sales of carbon steel wire rod in Mexico. *See* Sept. 17th Supplemental Filing at Attach.1; Sept. 6th Supplemental Filing at Ex. 1; *see also* Second Remand Results at 6–7.

the home market prices the individual obtained." *Id.* at 7 (citing Telephone Memo. at 1–2). These documents have all been placed on the record, *see Second Remand Results* at 1–2, and demonstrate, to the extent practicable, that the petition rate was tested by Commerce and is probative despite the fact that they originated from parties associated with the petitioner. *See Second Remand Results* at 14–17.

Further Commerce uses sources reasonably at its disposal during this review to further demonstrate the reliability of the rate, namely the transaction specific margins from the 2013–2014 review. *Second Remand Results* at 7–8 (citing NFI Memo. at Attachs. 2.A–2.L). The fact that the petition rate falls within the range of margins calculated supports Commerce's determination that the rate has probative value. Deacero argues the rate in this sampling is aberrational, yet Deacero offers no support for this characterization. *Second Remand Results* at 18.[13] Deacero does not explain why Commerce's conclusions in light of this record evidence are unreasonable nor does it offer any record evidence to contradict its probative value.

In this case, Commerce's resort to a petition rate is reasonable. Deacero contends that the pre-initiation documents Commerce placed on the record were considered for purposes of assessing the petitioners' allegations at initiation, not for corroborating the petition rate for use as an AFA rate. *See* Pls.' Br. at 8. However, Commerce explains that "the same independently-sourced data and the results of analysis now underpin [its] corroboration of the reliability and probative value of the petition data for use as the AFA rate." *Second Remand Results* at 16; *see also id.* at 7–8 (explaining how Deacero's transaction specific margins further demonstrate the petition rate's probative value). Simply because Commerce relies on these documents to assess allegations raised in the petition does not preclude reliance on the same documents for purposes of corroboration, provided that the agency explains how the documents demonstrate that the rate is

[13] Plaintiffs argue that "the weighted-averaged margin applied to Deacero during the 2013–2014 review was merely 1.13% and the fact that the [[ ]] transactions highlighted by Commerce comprise merely [[ ]] of Deacero's U.S. sales during that review, [indicating] that the [[ ]] transactions are aberrational." Pls.' Br. at 11 (citing to Deacero's Remand Rebuttal Factual Info. Submission at Ex. 1, PRR 3, bar code 3793256–01 (Feb. 13, 2019)). Plaintiffs argue that past decisions uphold in some instances, and reject in others, the practice of corroborating AFA rates using transaction specific margins. *See* Pls.' Reply Br. at 4–5 (*comparing Papierfabrick August Koehler S.E. v. United States*, 38 CIT __, 7 F. Supp. 3d 1304, 1316 (2014), *aff'd*, 843 F.3d 1373 ("*Papierfabrick*") *with Dongguan Sunrise Furniture Co. v. United States*, 37 CIT __, 931 F. Supp. 2d 1346, 1356 (2013)). However, as Plaintiffs acknowledge, these cases were decided prior to passage of the TPEA, and 19 U.S.C. § 1677e no longer requires Commerce to link the selected AFA rate to the respondent's commercial reality. *Id.* at 5; *see also* 19 U.S.C. § 1677e(d)(2)(B). Further, even under the commercial reality framework, in *Papierfabrick*, the court upheld Commerce's decision to corroborate a petition rate based on only one transaction specific margin that was above that rate. *See Papierfabrick*, 38 CIT at __, 7 F. Supp. 3d. at 1317–18.

reliable and relevant. Moreover, Commerce in this case has done all that it could do to assess the probity of the rate. Having supplemented the record with information petitioners supplied to Commerce when verifying the petition rate, Commerce announced that it would be "allowing interested parties to place rebuttal factual information on the record." NFI Memo. at 1; *see also Second Remand Results* at 5. The interested parties have not placed on the record any evidence challenging the probative value of the documents Commerce has placed on the record. Finally, Deacero protests Commerce's reliance on the petition rate as an alleged deviation from its ordinary practice of relying on the highest margin calculated for any respondent during the original investigation or any subsequent review. *See* Pls.' Br. at 13–15 (citing *PSC VSMPO-AVISMA Corp. v. United States*, 35 CIT 283, 290–91, 755 F. Supp. 2d 1330, 1338–40 (2011)). Deacero claims, without authority, that the TPEA codified this practice by establishing a presumption of validity for AFA rates based on margins from previous reviews, and that removing the corroboration requirement for such margins demonstrates Congressional support for Commerce's practice. *Id.* at 14. Deacero's logic cannot withstand scrutiny. Simply because Congress established a presumptive validity for AFA rates based on margins from previous reviews does not preclude the use of other corroborated rates. Had Congress intended to limit Commerce's consideration to margins from previous reviews it could have done so. Commerce's determination in its *Second Remand Results* is reasonable on this record and comports with the court's order.

CONCLUSION

For the foregoing reasons, the *Second Remand Results* comply with the court's order in *Deacero II*, are in accordance with law and supported by substantial evidence, and are therefore sustained. Judgment will enter accordingly.

Dated: April 13, 2020
New York, New York

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

Slip Op. 20–55

JACOBI CARBONS AB and JACOBI CARBONS, INC., Plaintiffs, and, NINGXIA HUAHUI ACTIVATED CARBON CO., LTD., et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and, CALGON CARBON CORPORATION and CABOT NORIT AMERICAS, INC., Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Consol. Court No. 16–00185

[The U.S. Department of Commerce's fourth remand results are sustained.]

Dated: April 23, 2020

Daniel L. Porter, James P. Durling, and *Tung A. Nguyen*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, DC, for Plaintiffs Jacobi Carbons AB and Jacobi Carbons, Inc.

Lizbeth R. Levison, Brittney R. Powell, and *Ronald M. Wisla*, Fox Rothschild LLP, of Washington, DC, for Plaintiff-Intervenor Ningxia Huahui Activated Carbon Co., Ltd.

Francis J. Sailer, Andrew T. Schutz, Brandon M. Petelin, and *Dharmendra N. Choudhary*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, NY, for Plaintiff-Intervenors Beijing Pacific Activated Carbon Products Company, Ltd., Ningxia Guanghua Cherishmet Activated Carbon Company, Ltd., and Datong Municipal Yunguang Activated Carbon Company, Ltd.

William E. Perry and *Adams Chi-Peng Lee*, Harris Bricken McVay Sliwoski, LLP, of Seattle, WA, for Plaintiff-Intervenors M.L. Ball Co., Ltd. and Jilin Bright Future Chemicals Company, Ltd.

Gregory S. Menegaz, Alexandra H. Salzman, J. Kevin Horgan, and *John J. Kenkel*, DeKieffer & Horgan PLLC, of Washington, DC, for Plaintiff-Intervenors Carbon Activated Corporation, Ningxia Mineral and Chemical Ltd., Shanxi DMD Corporation, Shanxi Industry Technology Trading Co., Ltd., Shanxi Sincere Industrial Co., Ltd., Tianjin Channel Filters Co. Ltd., and Tianjin Maijin Industries Co., Ltd.

Mollie L. Finnan, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. Of counsel was *Emma T. Hunter*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Melissa M. Brewer, R. Alan Luberda, and *John M. Herrmann*, Kelley Drye & Warren LLP, of Washington, DC, for Defendant-Intervenors Calgon Carbon Corporation and Cabot Norit Americas, Inc.

OPINION

Barnett, Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") fourth redetermination upon remand in this case. *See* Final Results of Redetermination Pursuant to Court Remand ("4th Remand Results"), ECF No. 155–1. Plaintiffs Jacobi Carbons AB and Jacobi Carbons, Inc. (together, "Jacobi") and Plaintiff-Intervenors[1] challenged several aspects of Commerce's final results in the eighth administrative review of the antidumping duty order on certain activated carbon from the People's Republic of China ("the PRC"). *See Certain Activated Carbon From*

[1] Plaintiff-Intervenors include Carbon Activated Corporation, Ningxia Mineral and Chemical Limited, Shanxi DMD Corporation, Shanxi Industry Technology Trading Co., Ltd., Shanxi Sincere Industrial Co., Ltd., Tianjin Channel Filters Co., Ltd., and Tianjin Maijin Industries Co., Ltd. (collectively, "CAC"); Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd., Beijing Pacific Activated Carbon Products Co., Ltd., and Datong Municipal Yunguang Activated Carbon Co., Ltd (collectively, "Cherishmet"); Ningxia Huahui Activated Carbon Co., Ltd. ("NXHH"); and M.L. Ball Co., Ltd., and Jilin Bright Future Chemicals Company, Ltd. (together, "M.L. Ball"). The court consolidated cases filed by CAC, Cherishmet, and M.L. Ball under lead Court No. 16–00185, filed by Jacobi. *See* Order (Nov. 3, 2016), ECF No. 42. Those parties, along with NXHH, had also intervened in this action. *See* Order (Oct. 7, 2016), ECF No. 17; Order (Oct. 12, 2016), ECF No. 22; Order (Oct. 20, 2016), ECF No. 36; Order (Oct. 20, 2016), ECF No. 40.

the People's Republic of China, 81 Fed. Reg. 62,088 (Dep't Commerce Sept. 8, 2016) (final results of antidumping duty admin. review; 2014–2015), ECF No. 44–4,[2] and accompanying Issues and Decision Mem., A-570–904 (Aug. 31, 2016), ECF No. 44–5. The court has issued three opinions resolving substantive issues raised in this case; familiarity with those opinions is presumed. *See Jacobi Carbons AB v. United States* ("*Jacobi I*"), 42 CIT ___, 313 F. Supp. 3d 1344 (2018); *Jacobi Carbons AB v. United States* ("*Jacobi II*"), 43 CIT ___, 365 F. Supp. 3d 1344 (2019); *Jacobi Carbons AB v. United States* ("*Jacobi III*"), 43 CIT ___, 422 F. Supp. 3d 1318 (2019).

Early in this litigation, the court granted Defendant's request for remand to allow the agency to clarify or reconsider its findings regarding economic comparability and Thailand's status as a significant producer of comparable merchandise based on its export quantity. *See* Order (June 20, 2017), ECF No. 77. *Jacobi I* sustained the subsequent remand results with respect to Commerce's economic comparability determination. 313 F. Supp. 3d at 1356. However, the court remanded the agency's determination that Thailand is a significant producer of comparable merchandise, *id.* at 1358–59; selection of certain surrogate values, *id.* at 1360–72; and adjustment to U.S. price to account for irrecoverable value added tax ("VAT"), *id*. at 1373.

In *Jacobi II*, the court sustained Commerce's VAT adjustment to U.S. price. 365 F. Supp. 3d at 1360–63. The court remanded Commerce's selection of Thailand as the primary surrogate country as unsupported by substantial evidence with respect to Commerce's determination that Thailand was a significant producer of comparable merchandise. *Id. at* 1351–53. The court instructed Commerce to select a country that meets the statutory criteria for a surrogate country (i.e., that is economically comparable to the subject nonmarket economy country and a significant producer of comparable merchandise pursuant to 19 U.S.C. § 1677b(c)(4)), and, for those for inputs that Commerce valued using Thai data, to revisit its selection of surrogate values. *Id*. at 1353.

On remand pursuant to *Jacobi II*, Commerce selected Malaysia as the primary surrogate country. *Jacobi III*, 422 F Supp. 3d at 1321.[3] However, Commerce determined that Malaysian data for carbonized material were based on an insignificant import quantity, and thus,

[2] Commerce filed a public administrative record in connection with the 4th Remand Results. *See* ECF No. 156–2.

[3] Commerce selected Malaysia as the primary surrogate country under respectful protest. *Jacobi III*, 422 F. Supp. 3d at 1321. By making the determination under protest, Commerce preserves its right to appeal. *See Meridian Prods. v. United States*, 890 F.3d 1272, 1276 n.3 (Fed. Cir. 2018) (citing *Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003)).

valued that input using data from the Philippine industry publication *Cocommunity*.[4] *Id*. at 1323. The court remanded Commerce's selection of surrogate data for carbonized material because the agency's reasoning was not discernable. *Id*. at 1324, 1328.

In the redetermination at issue here, Commerce continued to find the Malaysian data unreliable. 4th Remand Results at 3. Commerce explained that the Malaysian data contain imports from Myanmar. *Id.* at 4. The Myanmar imports represent a small import quantity with "substantially different . . . per-unit values" compared to "larger-quantity imports . . . from other countries that exported to [Malaysia]." *Id.* at 5 (citation omitted). But Commerce could not exclude the Myanmar imports without creating a "null set" of data for carbonized material. *Id*. Further, while the Malaysian import quantity (11 metric tons) could represent a "single shipment of one full transport container," *id.* at 6, the production of subject merchandise requires more than a single shipment of carbonized material, *id.* at 6–7. Thus, Commerce found that the Malaysian data did not represent a "commercial quantity of carbonized material." *Id.* at 7.

Commerce continued to rely on the *Cocommunity* data to value carbonized material. *Id*. at 8. Commerce explained that these data are "representative of a broad market average, publicly available and contemporaneous with the period of review (POR), tax and duty exclusive and specific to carbonized material used in the production of the subject merchandise." *Id.* at 6.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to subsection 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012), 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) (citation and internal quotation marks omitted).

DISCUSSION

Jacobi submitted comments during the remand proceeding supporting Commerce's draft results, which Commerce confirmed in the 4th Remand Results. 4th Remand Results at 8. Defendant-Intervenors

[4] In the third remand results, Commerce determined that the Philippines is "at a comparable level of economic development as [the PRC] and [a] significant producer of comparable merchandise." *Jacobi III*, 422 F. Supp. 3d at 1321. Commerce did not reconsider this finding in the 4th Remand Results.

also do not object to the 4th Remand Results. Ltr. from Melissa M. Brewer, Kelley Drye & Warren LLP, to the Court (Apr. 6, 2020), ECF No. 157. No other comments were received. Thus, Commerce's determination is uncontested.

Commerce's valuation of carbonized material complies with the court's order in *Jacobi III* by providing reasoning supported by substantial evidence for declining to rely on the Malaysian data and, instead, selecting the *Cocommunity* data. 4th Remand Results at 3.

CONCLUSION

There being no challenges to the 4th Remand Results, and those results being otherwise lawful and supported by substantial evidence, the court will sustain Commerce's 4th Remand Results. Judgment will enter accordingly.

Dated: April 23, 2020
New York, New York

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

Slip Op. 20–56

UNITED STATES, Plaintiff, v. CHU-CHIANG "KEVIN" HO, et al., Defendants.

Before: Timothy M. Reif, Judge
Court No. 19–00102

[Granting plaintiff's Motion for Extension of Time for Service and denying defendant's Motion to Quash Service of Process and to Dismiss Pursuant to USCIT Rules 12(b)(2) and 12(b)(5).]

Dated: April 27, 2020

William George Kanellis, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, D.C. for plaintiff. With him on the brief was *Joseph H. Hunt*, Assistant Attorney General, *Robert E. Kirschman, Jr.*, Director and *Patricia M. McCarthy*, Assistant Director.

Elon A. Pollack and *Kayla R. Owens*, Stein Shostak Shostak Pollack & O'Hara, LLP of Los Angeles, CA for defendant.

OPINION

Reif, Judge:

In this action, the United States Government ("Government" or "plaintiff") requests that the United States Court of International Trade ("USCIT" or "CIT") extend the service period to effect service of the complaint and summons upon defendant Chu Chiang "Kevin" Ho from September 19, 2019, to October 16, 2019 — the date that he was physically served with the complaint and summons. Plaintiff's Motion

for Extension of Time for Service, ECF No. 6 ("Pl. Mot. Ext."). In response to plaintiff's Motion for Extension of Time for Service, defendant moves to quash service of process and to dismiss plaintiff's complaint against him in his individual capacity. Defendant's Motion to Quash Service of Process and to Dismiss Pursuant to USCIT Rules 12(b)(2) and 12(b)(5), ECF No. 7 ("Def. Mot. Q. Dis."). The CIT has jurisdiction to entertain this action pursuant to 28 U.S.C. § 1582.

For the reasons stated below, the court denies defendant's Motion to Quash Service of Process and to Dismiss this Action and grants plaintiff's Motion for Extension of Time for Service.

BACKGROUND

On June 21, 2019, the Government filed a complaint naming Chu-Chiang "Kevin" Ho, Wintis Corporation, Ship Communications, Inc., Aelis Nova, and Maderdove, LLC as defendants, jointly and severally liable for alleged violations of 19 U.S.C. § 1592. Pl. Mot. Ext. at 2. The Government was on notice that, pursuant to USCIT Rule 4(l), the Government had 90 days from the filing of the complaint — that is, until September 19, 2019 — to effect service on Mr. Ho. The stakes were high; the Government had no margin for error or delay because the Government had run down the clock on the statute of limitations. The Government would be time-barred from refiling if failure to effect service within the 90-day period resulted in the dismissal of this action.

Nine days later, on June 30, 2019, the Government attempted to effect service on Mr. Ho through a professional process server. Timothy Ault, one of the Government's retained process servers, declared that he had visited Mr. Ho's residence on June 30, 2019, and effected service upon him under California law. *See United States v. Ho*, CIT No. 19–00038 ("*HO I*"), ECF No. 14, Ex. 1 at ¶ 7. However, this declaration would later prove to be incorrect because Mr. Ho was, in fact, out of the country on that day. Pl. Mot. Ext. at 2 ("U.S. Customs and Border Protection (CBP) retrieve[d] records relating to Mr. Ho's international travel . . . indicat[ing] that [he] was . . . out of the country]"). Thus, service as prescribed by Rule 4 was not effected in accordance with California law.

The Government did not learn about its faulty service until August 26, 2019, when Mr. Ho filed an Opposition to the Government's Sur-Reply in the companion case, *HO I*. In his Opposition filing, Mr. Ho provided declarations and evidence that he and his family were out of the country on June 30, and that no one was at their residence on that date. *See HO* I, ECF No. 16, Ex. 1. After learning of the possibility that Mr. Ho was, in fact, out of the country on June 30,

2019,[1] the Government waited one month, until September 26, seven days after the 90-day period expired under USCIT Rule 4(l), to attempt to serve Mr. Ho again. Def. Mot. Q. Dis. at 7. Travel records indicate that Mr. Ho was present in the United States during the last 15 days of the 90-day period, *see* Pl. Mot. Ext. at 4; Def. Mot. Q. Dis. at 7, but the Government made no attempt to serve Mr. Ho during this time. *HO* 1, ECF No. 6, Ex. 2.

The Government restarted its attempts to serve Mr. Ho on September 26, 2019, then suspended these efforts three days later after learning that Mr. Ho had left the country on September 24, 2019. Pl. Mot. Ext. at 3–4; *see also* ECF No. 6, Ex. 1 at 2. The Government resumed its service attempts on October 12, 2019, the day after the Government learned (from CBP) that Mr. Ho had returned to the United States on October 6, 2019. Pl. Mot. Ext. at 4. The Government continued its attempts until Mr. Ho was personally served with the complaint and summons at his home on October 16, 2019. *Id.* The next day, the Government filed its Motion for Extension of Time for Service, nearly a month after the 90-day period had expired.

In its motion, the Government seeks a 27-day enlargement of the 90-day period for service of process, to extend the Government's deadline for effecting service on defendant from September 19, to October 16, 2019. *See* Pl. Mot. Ext. at 1. In response, defendant requests that the court quash service of process and dismiss this action for lack of personal jurisdiction over defendant. The Government argues that because good cause exists to extend the service period, the court is required to provide the extension. Alternatively, the Government argues that even in the absence of good cause, the court should, in its discretion, order that service has been effected due to Mr. Ho's constructive notice of the complaint. *Id.*

In response to plaintiff's Motion for Extension of Time for Service, defendant moves to quash service of process and to dismiss plaintiff's complaint against him in his individual capacity. Defendant's Motion to Quash Service of Process and to Dismiss Pursuant to USCIT Rules 12(b)(2) and 12(b)(5) ("Def. Mot. Q. Dis."), ECF No. 7 at 1. Defendant argues that, contrary to the Government's assertions, good cause does not exist to extend time for the Government to serve Mr. Ho. *Id.* at 7. Defendant also argues that the factors that a court considers for

[1] The Government does not specify when it was finally able to corroborate Mr. Ho's absence from the country on June 30, 2019. Nor does the Government specify when it learned of his subsequent absences from the country. The Government states only that, "Government counsel did not have real-time records of Mr. Ho's travel, and only learned of his subsequent absence from the United States after the fact." Pl. Op. Mot. Dismiss at 4, n.3.

extended service in the absence of good cause further support dismissal. Defendant's Reply to Plaintiff's Opposition ("Def. Rep."), ECF No. 10 at 6.

LEGAL FRAMEWORK

I. USCIT Service of Process Rules

USCIT Rule 4(l) governs the time limits for service of process in this action. The rule provides, in relevant part, that:

> If a defendant is not served within 90 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

See also Fed. R. Civ. P. 4(m).[2] Thus, the CIT *must* grant more time to complete service if the plaintiff demonstrates good cause for failing to serve defendant within the 90-day period. *See* USCIT Rule 4(l). In addition, the CIT *may* grant an extension even absent good cause, as a matter of the court's discretion. *See id.*; *United States v. Rodrigue*, 33 CIT 1453, 1471, 645 F. Supp. 2d 1310, 1329 (2009) (*citing Henderson v. United States*, 517 U.S. 654, 662–63 (1996), and the corollary Federal Rule of Civil Procedure 4(m), Advisory Committee Note, 1993 Amendments).

II. Extension of Time for "Good Cause"

The Government bears the burden of establishing "good cause" for its failure to effect service within the 90-day period. *See* Wright & Miller, Federal Practice and Procedure Section 1137. That burden is heavy. *See, e.g., Beauvoir v. U.S. Secret Service*, 234 F.R.D. 55, 56 (E.D.N.Y 2006) (stating that "[a] party seeking a good cause extension bears a heavy burden of proof") (quotation omitted). This Court has interpreted "good cause" in Rule 4(l) to mean "reasonable efforts," or "those efforts reasonably calculated to effect service within" the prescribed number of days. *United States v. General Int'l Mktg Grp.*, 14 CIT, 545, 549, 742 F. Supp. 1173, 1176 (1990) ("a fair standard of good cause is one which requires people to show behavior consistent with the recognition that a 120-day deadline exists."); *United States v. World Commodities Equip. Corp.*, 32 CIT 294 (2008). These applications of Rule 4(l) comport with other formulations of the standard for

[2] The text of USCIT Rule 4(l) is identical to that of Rule 4(m) of the Federal Rules of Civil Procedure, except for conforming changes required by differences in the numbering of the two sets of rules.

good cause across other federal courts, which generally agree on the requirement that the serving party show "real diligence."[3]

Further, this Court and other federal courts have held that when the statute of limitations is nearing expiration, "'good cause' requires that a plaintiff exert such efforts at service as are consistent with a recognition that [90] days may otherwise mark the death of the action." *Rodrigue*, 645 F. Supp. 2d at 1323–24 (citations omitted); *see also Tuke v. United States*, 76 F.3d 155, 156 (7th Cir. 1996). In situations like these, the plaintiff "must show *meticulous efforts* to comply with the rule" to receive the benefit of the "good cause" exception. *Rodrigue*, 645 F. Supp. 2d at 1324 (emphasis in original) (citations omitted).[4] Ultimately, the plaintiff should "[t]reat the [90] days with the respect reserved for a time bomb." *Id.* (citations omitted).

III. Extension of Time Absent Good Cause, As a Matter of Discretion

Under Rule 4(l), a court may also, in its discretion, grant an extension of time to effect service even in the absence of good cause. A majority of circuits have "found that the plain language of Rule 4(m)[5] broadens a district court's discretion by allowing it to extend the time for service even when plaintiff fails to show good cause." *Thompson v. Brown*, 91 F.3d 20, 21 (5th Cir. 1996). As long as "a district court properly sets out the relevant law and makes no factual findings that are clearly erroneous," the court's decision to grant or refuse an extension of time will be overturned on appeal only if its decision is "arbitrary or unreasonable." *See Gile v. United Airlines, Inc.*, 95 F.3d 492, 495 (7th Cir. 1996); *Lorentzen v. Anderson Pest Control*, 64 F.3d 327, 330 (7th Cir. 1995).

In the past, this Court has considered several factors in determining whether to extend the time for service of process even in the

[3] *See, e.g., Habib v. General Motors Corp.*, 15 F.3d 72, 74 (6th Cir. 1994) (noting that "[t]o demonstrate good cause, other courts have held that a plaintiff may . . . show that he/she made a reasonable and diligent effort to effect service"); *Resolution Trust Corp. v. Starkey*, 41 F.3d 1018, 1022 (5th Cir. 1995) (stating that, "in short, one is required to be diligent in serving process, as well as pure of heart, before good cause will be found"); *Shuster v. Conley*, 107 F.R.D. 755, 757 (W.D. Pa. 1985) (stating that "[a] court will not grant an extension [for service of process] where the plaintiff has not demonstrated a reasonable effort to effect service prior to the running of the 120-day period").

[4] *See also Despain v. Salt Lake Area Metro Gang Unit*, 13 F.3d 1436, 1438 (10th Cir. 1994) ("The 'good cause' provision of Rule 4(j) should be read narrowly to protect only those plaintiffs who have been meticulous in their efforts to comply with the Rule"); *Broitman v. Kirkland (In re Kirkland)*, 86 F.3d 172, 176 (10th Cir. 1996) ("The plaintiff who seeks to rely on the good cause provision must show meticulous efforts to comply with the rule").

[5] As discussed above, USCIT Rule 4(m) is the FRCP-corollary of CIT Rule 4(l).

absence of a showing of good cause. *Rodrigue*, 645 F. Supp. 2d at 1329–30. Those factors have included:

> [W]hether the statute of limitations would bar the refiled action; whether the defendant is evading service or concealed a defect in attempted service; whether the defendant had actual notice of the complaint; whether the defendant would be prejudiced by the extension of time; whether service of process was eventually achieved, and, if so, when; and whether the plaintiff sought a timely extension of time.

Id. Accordingly, these factors guide the court's determination here.

DISCUSSION

Toward the beginning of the 2002 movie, *Serving Sara*, Tony (played by Vincent Pastore) calls Sara Moore (Elizabeth Hurley) from a payphone on a Manhattan street to alert her that a rival process server, Joe Tyler (Matthew Perry), is on the way up to her apartment.

Tony, seeking to foil Tyler's service of divorce papers on Sara says to her: "Listen up. If I were you, I'd get the hell out of your apartment right now."

Sara: "Who is this?"

Tony: "Let's just say, 'a friend'. Look, some [guy] is on his way up to serve you papers. He's going to say he's delivering flowers."

Sara: "Papers? What, is this about my parking tickets?"

Tony: "No, no, no, no. It's a lot bigger than that."

Sara: "Look, I really don't have any idea what you're talking about, so...."

Tony: "Hey, lady, when is getting served papers any good, huh? Don't be stupid, hang up and get out."[6]

* * *

Contrary to the comical portrayal in *Serving Sara*, "[p]roper service of process is not some mindless technicality, but — rather — a critical part of a lawsuit." *Rodrigue*, 645 F. Supp. 2d at 1320 (citations omitted). "[U]nless the procedural requirements for effective service of process are satisfied, a court lacks authority to exercise personal jurisdiction over [a] defendant." *Candido v. District of Columbia*, 242 F.R.D. 151, 160 (D.D.C. 2007) (citations omitted). The Government's motion for extension of time and defendant's motions to quash service and to dismiss this action are analyzed below, in turn. As discussed there, the Government has failed to show good cause for its failure to serve defendant within the 90-day period for effecting service of process. However, an extension of time is warranted despite the

[6] SERVING SARA (Reginald Hudlin/Mandalay Pictures 2002).

absence of good cause because a review of the relevant factors counsels in favor of a discretionary extension. The requested extension of time is, therefore, granted, thus effecting service of process and establishing personal jurisdiction over defendant.

I. Extension of Time for "Good Cause"

In this case, the Government was on notice that, pursuant to Rule 4(l), the Government had 90 days from the filing of the complaint — that is, until September 19, 2019 — to effect service on Mr. Ho. The failure to provide specifics for this period is particularly striking given that the Government has provided a detailed timeline about its service efforts in relation to CBP notifications regarding Ho's travels that the Government received in late September and early October.[7] The Government was also on notice that it would be time-barred from refiling if failure to effect service within the 90-day period resulted in the dismissal of this action because it had run down the clock on the statute of limitations.

The Government should have acted *meticulously* and in a manner that reflected "a recognition that [90] days [could] otherwise mark the death of the action;" however, the Government did not. *Rodrigue*, 645 F. Supp. 2d at 1323–24 (citations omitted). Rather, it attempted to serve defendant only *a single time* prior to the 90-day deadline, and the Government did so through a process server whose reliability was contested given developments in the companion case, *HO I*.[8] Even so, this court does not need to decide whether the Government's reliance upon Timothy Ault was reasonable in its attempt to serve Mr. Ho on June 30, 2019. The Government's relative inaction after learning on August 26, 2019, of its potential error (through Mr. Ho's Opposition to the Government's Sur-Reply in the companion case) undermines the Government's argument for "good cause."

The Government failed to make any service attempts in the final three weeks of the 90-day service period after becoming aware of its

[7] For example, the Government recounts that "[a]ttempts to serve Mr. Ho [at the end of September 2019] were suspended when Government counsel learned [from the CBP] that Mr. Ho had left the country again, but resumed on October 12, the day after counsel learned [from the CBP] that Mr. Ho had most recently returned to the United States [on October 6, 2019]." Pl. Mot. Ext. at 4.

[8] For example, on April 8, 2019, because Mr. Ault served defendant with two copies of the complaint at his residence but failed to serve a copy of the summons, service was not effected in accordance with California law. *See HO I*, ECF No. 7 at 3. Later, on June 1, 2019, Mr. Ault again attempted service at Mr. Ho's residence. *See HO I*, ECF No. 8 at 5. His initial affidavit, submitted with defendant's Opposition to the Motion to Dismiss in *HO I*, "made no mention that Mr. Ho refused service or closed the door in Mr. Ault's face." But, now that defendant contends that he was not served on that date (because defendant claims he was not at home at the time of alleged service), Mr. Ault is now "claim[ing] that Mr. Ho evaded service" by closing the door in Mr. Ault's face, a detail that did not appear in his initial affidavit. *See HO I*, ECF No. 16 at 6–7.

potential error. Travel records indicate that Mr. Ho was back in the United States from September 4, 2019, through the end of the 90-day period; thus, the Government had more than two weeks to serve Mr. Ho at his U.S. residence before the 90-day period expired.

The Government's failure to explain the reason that it did not carry out further service attempts until more than a week after the 90-day period expired is telling. In Plaintiff's Opposition to Defendant's Motion to Dismiss, ECF No. 9 ("Pl. Op. Mot. Dismiss"), the Government vaguely states that, "In September 2019, when counsel confirmed that Mr. Ho had been out of the country on June 30, he re-engaged the Government's process service agency to resume attempts at service." Pl. Op. Mot. Dismiss at 17. The Government never specifies on exactly which day in September the Government was able to confirm with CBP that Mr. Ho had been out of the country on June 30, 2019. But if the Government received confirmation of this fact from CBP prior to the expiration of the 90-day period and *still* did not attempt to serve him at his U.S. residence, then the Government did not act *meticulously* and in a manner that reflected "a recognition that [90] days [could] otherwise mark the death of the action." *Rodrigue*, 645 F. Supp. 2d at 1323–24 (citations omitted).

Assuming *arguendo* that not receiving confirmation from CBP until *after* the 90-day period would excuse the Government's failure to restart service attempts until September 26, 2019, the burden would still be on the Government to provide such evidence. The Government has not done so.

But even a late notification from CBP, substantiated by evidence, could not save the Government's attempt to show "good cause." When Mr. Ho's Opposition filing was made in *HO I* in late August, the Government should have become aware that if Mr. Ho's claim of being out of the country on June 30, 2019, were, in fact, true, then service would not actually have been effected pursuant to Rule 4(l) and California law.[9] The Government also was on notice that the expiration of the 90-day period was a little more than three weeks away. This court need not query the Government's reasons for wanting to confirm Mr. Ho's whereabouts on June 30, 2019, *see* Pl. Mot. Ext. at 2, to conclude that sitting on its hands while waiting for confirmation from CBP as the deadline approached (and, soon thereafter, expired) was not meticulous.

In conclusion, the Government has not shown "good cause" for its failure to serve defendant within the 90-day period following the

[9] Mr. Ho provided declarations and evidence that he and his family were out of the country on June 30, 2019, and that no one was at their home on that date. *See HO I*, ECF No. 16, Declarations of Kevin Ho, Tzuling Liu, Rex Chu-Chun Ho, and Ray Marmash.

filing of the Government's complaint. Therefore, the Government is not entitled – on this basis – to an extension of time to effect service of process.

II. Extension of Time Absent Good Cause, As a Matter of Discretion

Although "good cause" does not exist, the balance of factors here militates in favor of the court exercising lenity and granting the Government's motion for an extension. The court reaches its conclusion based on: (1) the severe prejudice to the Government if it were not able to refile the action; (2) defendant's actual notice of the complaint; (3) the fact that service was eventually effected; (4) the lack of significant prejudice to defendant; and, (5) the absence of a protracted delay in motioning for an extension.

With respect to the first factor, in the present case, denying the requested extension of time will severely prejudice the Government because the statute of limitations for refiling the action expired during the 90-day period. The relevant Advisory Committee Note to the Federal Rules of Civil Procedure expressly identifies whether "the applicable statute of limitations would bar the refiled action" as a factor that justifies granting an extension of time even without good cause. Fed.R.Civ.P. 4(m), Advisory Committee Note, 1993 Amendments. Here, if the court denies the Government's motion for an extension of time, the statute of limitations will prevent the Government from refiling, resulting in severe prejudice to the Government's case on technical grounds. As a result, the Government would lose entirely the opportunity to bring its case. The fact that the "technical default [may have been] the result of pure neglect on the plaintiff's part" does not render the prejudice any less significant. *Zapata v. City of New York*, 502 F.3d 192, 198 (2d Cir. 2007).

A second key factor that weighs in favor of granting the requested extension of time is that the defendant had actual notice of the complaint. Prior decisions of this Court and other federal courts hold that service of process provisions should be liberally construed to effectuate service when actual notice has been received by defendant. *United States v. Zatkova*, 791 F. Supp. 2d 1305, 1213 (CIT 2011). *See also United Food & Commercial Workers Union v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir. 1984) ("Rule 4 is a flexible rule that should be liberally construed so long as a party receives sufficient notice of the complaint[.]"). Here, defendant had actual notice of the complaint in *HO II* as early as August 26, 2019, when defendant filed its reply

in *HO I*, notifying the Government of its defective service.[10] *See HO I*, ECF No. 16. In other words, Mr. Ho was "plainly aware that this lawsuit [had] been filed" before the 90-day period expired. Pl. Mot. Ext. at 4.

A third factor that weighs in favor of granting the motion for an extension of time is that service of process was eventually achieved. The Government was able to effect service of process in mid-October, less than one month after the 90-day period expired. This Court has at times refused discretionary extensions even where service was effected less than one month after the service period ended. However, in those cases, defendants typically did not have any notice of the complaint during the service period. *See, e.g., United States v. World Commodities*, 32 CIT at 297. In this case, defendant, by his own admission, had notice of the complaint during the service period. Pl. Mot. Ext. at 4. Further, not only did the Government eventually effect service, but the fact that defendant "was out of the country for 46 of the possible 90 days of service" dramatically reduced the number of possible days the Government had to effect service, further counseling toward a discretionary extension. Pl. Mot. Ext. at 4.

The court's decision to grant a discretionary extension is based primarily on the factors discussed above; however, "whether the defendant is evading service or concealed a defect in attempted service" may also be relevant. *Rodrigue*, 645 F. Supp. 2d at 1329–30. The Government alleges evasion and concealment on the part of defendant as factors weighing in favor of the court granting an extension. In its brief, the Government notes "indicia of evasion" surrounding the service attempts at defendant's residence, Pl. Mot. Ext. at 3, as well as alleges a "history of evasion and prevarication with respect to service in *HO I*" on the part of Ho. *Id.* at 4. However, these claims of evasion — whether credible or not — are immaterial to the service issue presented in this case. The evidence of evasion put forth by the Government refers to alleged conduct in the companion case, *HO I*, or relates to service attempts *after* the 90-day period expired. *See* ECF No. 6, Ex. 1 at 1–2. Neither informs the court's assessment of whether defendant evaded service during the 90-day period in this case, and defendant's travel outside of the United States does not in itself support a finding of evasion.

[10] The Government also claims that defendant had actual notice of the complaint on the basis that the Government's process server left a copy of the complaint and summons on his front doorstep. Pl. Mot. Ext. at 9–10. However, this apparent action alone is insufficient to establish actual notice. The Government provides no evidence that defendant ever *actually received*, let alone opened or read, the complaint and summons left on his front doorstep. *Cf. Rodrigue*, 645 F. Supp. 2d 1310, 1333.

As established throughout the record, defendant frequently travels to China and Taiwan for business, and as stated elsewhere by this Court, "[t]he mere fact that a plaintiff experiences difficulty in effecting service of process does not mean that the defendant is guilty of evasion." *Rodrigue*, 645 F. Supp. 2d at 1332. Absent some *affirmative* evidence of evasion, the court will not presume that defendant engaged in evasion during the 90-day period merely because the Government had difficulty locating him. *Cf. id; see also World Commodities*, 32 CIT at 298 (although there the court examined the assertions of evasion in the context of "good cause" analysis). Still, absence of evasion is by no means dispositive for the analysis. The court finds that the lack of evasion here does not outweigh the aforementioned factors. As the above analysis makes clear, there is ample reason to support granting the extension under the circumstances.

The balancing factors approach adopted by this Court in the past also calls for the court to weigh the potential prejudice toward the Government if the extension were not to be granted against the potential prejudice to defendant were the extension to be granted. This Court has noted that a defendant may be "harmed by a generous extension of the service period beyond the limitations period for the action." *Zapata*, 502 F.3d at 198. In this case, the defendant has not shown "any actual harm to its ability to defend the suit as a consequence of the delay in service." *Coleman v. Milwaukee Bd of School Directors*, 290 F.3d 932, 934 (7th Cir. 2002). The harm to defendant is not substantial; the extension requested by the Government is modest and fewer than 30 days. As a consequence, the court determines that the prejudice against defendant is not significant enough to outweigh the factors that counsel in favor of granting the Government's motion for an extension.

A final factor that the Court considers in determining whether to grant a discretionary extension is whether Plaintiff timely sought an extension of time. *Rodrigue*, 645 F. Supp. 2d at 1329–30. When service is effected "within a matter of days, or even weeks," *Id.* at 1333, then the Court does not consider the delay so substantial as to warrant dismissal of the action. Here, the Government sought an extension of time less than a month after the 90-day period expired. Moreover, since defendant had actual notice of the complaint, the court attaches less weight to this factor: a motion was not necessary to put defendant "on notice." *Cf. Rodrigue*, 645 F. Supp. 2d at 1333 (where the Government did not effect service of process on one defendant until more than five months after the service period and where another defendant had still not been served a full year after the expiration of the service period). Accordingly, absent other compelling

reasons to dismiss the Government's motion for an extension of time, the lack of a timely filing does not shift the balance in favor of dismissal.[11] In sum, the factors identified by this Court in *Rodrigue* support a discretionary extension here. 645 F. Supp. 2d 1310.

The decision to grant this extension is within the court's discretion, and in exercising such discretion, it is prudent to consider the practice of other federal courts. This analysis is consistent with the practice of most other federal courts. *See Coleman*, 290 F.3d 932. As the court noted in *Coleman*, "the fact that the balance of hardships favors the plaintiff does not *require* the . . . judge to excuse the plaintiff's failure to serve the complaint and summons within the [90] days provided by the rule." *Id.* at 934 (emphasis supplied). The *Coleman* court instructs:

> Where . . . the defendant does not show any actual harm to its ability to defend the suit as a consequence of the delay in service, where indeed it is quite likely that the defendant received actual notice of the suit within a short time after the attempted service, and where moreover dismissal without prejudice has the effect of dismissal with prejudice because the statute of limitations has run since the filling of the suit . . . most district judges probably would exercise lenity and allow a late service, deeming the plaintiff's failure to make timely service excusable by virtue of the balance of hardships.

290 F.3d at 934. Most district judges would exercise lenity, *id.*, and the court here takes notice of this practice.

As noted, the court concludes that the balance of factors — prejudice to the Government, prejudice to defendant, actual notice, whether service was eventually achieved, and, whether a timely extension was sought — weighs in favor of granting an extension. The court thus grants this extension, effecting service of process and establishing personal jurisdiction over defendant.

CONCLUSION

For the reasons stated above, defendant's Motion to Quash Service of Process and to Dismiss this Action is denied, and plaintiff's Motion for Extension of Time for Service is granted.

Dated: April 27, 2020
New York, New York

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

[11] Further, the court takes note that the Government's delay here represented a strategic decision to achieve service, *See* Pl. Op. Mot. Dismiss at 10, a decision that, based on the record before the court, was not unwarranted. The Government then promptly filed its motion once service was effected.