U.S. Customs and Border Protection

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS
(No. 12 2022)

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 December 2022. A total of 113 recordation applications were approved, consisting of 5 copyrights and 108 trademarks.

Corrections or updates may be sent to: Intellectual Property Enforcement 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: Zachary Ewing, Paralegal Specialist, Intellectual Property Enforcement Branch, Regulations and Rulings, Office of Trade at (202) 325–0295.

ALAINA VAN HORN
Chief,
Intellectual Property Enforcement Branch
Regulations and Rulings, Office of Trade

CBP IPR RECORDATION — JANUARY 2023

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
COP 22–00061	11/30/2022	11/30/2042	Pokemon Violet.	GAME FREAK inc.,	No
COP 22–00062	11/30/2022	11/30/2042	Pokemon Scarlet.	GAME FREAK inc.,	No
COP 22–00063	12/3/2022	12/3/2042	Copes Paw Bag.	Bruce Copes. Address: 3032 Pinewood Ave Unit 1, Baltimore, MD, United States.	No
COP 22–00064	12/7/2022	12/7/2042	CaiaSoft (version 1.0)	CAIA HOLDINGS LLC, Transfer: By written agreement. Address: 3 Susannah's X-ing, Dover, NH, 03820, United States.	No
COP 22–00065	12/19/2022	12/19/2042	INTERNATIONAL RIGHTS OF TRAVEL PASSPORT TREATY OF THE WORLD TRAVEL BOOKLET.	Jerry Bell Bey. Address: PO BOX 22124, TAMPA, FL, 33622, United States.	No
TMK 03–00168	12/7/2022	2/24/2033	SWISS ARMY	SWISS ARMY BRAND LTD.	No
TMK 03–00187	12/12/2022	12/14/2032	DUPLO	LEGO JURIS A/S	No
TMK 03–00334	12/21/2022	12/24/2032	SPONGEBOB SQUAREPANTS	VIACOM INTERNATIONAL INC.	No
TMK 03–00563	12/22/2022	1/21/2033	SUDAFED	JOHNSON AND JOHNSON	No
TMK 05–00275	12/13/2022	2/12/2033	CONFIGURATION OF A TABLE WITH A WOODEN BASE & GLASS	THE ISAMU NOGUCHI FOUNDATION & GARDEN MUSEUM	No
TMK 06–00287	12/6/2022	1/15/2033	TROJAN	CHURCH & DWIGHT CO., INC.	No
TMK 06–00767	12/6/2022	8/21/2032	Flying Buffalo Design	BUFFALO BILLS, LLC	No
TMK 09–00461	12/14/2022	10/7/2032	W (STYLIZED)	Wrought Washer Mfg., Inc.	No
TMK 10–00909	12/5/2022	12/24/2032	BUICK	GENERAL MOTORS LLC	No
TMK 10–00931	12/6/2022	1/27/2033	BUICK	GENERAL MOTORS LLC	No
TMK 10–00966	12/9/2022	9/18/2032	STI (STYLIZED)	Fuji Jukogyo Kabushiki Kaisha ta Fuji Heavy Industries Ltd.	No
TMK 10–01027	12/5/2022	12/24/2032	DESIGN OF BUICK EMBLEM	GENERAL MOTORS LLC	No
TMK 11–00309	8/22/2022	8/25/2032	MAVERICK	Lorillard Licensing Company, LLC	No
TMK 11–01398	12/6/2022	1/15/2033	DESIGN OF Pontiac Emblem	GENERAL MOTORS LLC	No
TMK 12–01227	12/9/2022	1/2/2033	PICROSS 3D & DESIGN	Nintendo of America Inc.	No
TMK 12–01280	12/2/2022	12/4/2032	ANGRY BIRDS	Rovio Entertainment, Ltd.	No

CBP IPR RECORDATION — JANUARY 2023

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 12–01429	12/22/2022	1/6/2033	TOYOTA	TOYOTA JIDOSHA KABUSHIKI KAISHA, trading as TOYOTA MOTOR CORPORATION	No
TMK 13–00118	1/31/2013	3/4/2023	UL	UL LLC	No
TMK 13–00182	12/29/2022	9/25/2032	CARAVELLE	Bulova Corporation	No
TMK 13–00440	12/9/2022	1/26/2033	NINTENDO	Nintendo of America Inc.	No
TMK 13–00476	12/20/2022	6/5/2025	UC-II	"Lonza Greenwood LLC tproehl@gbc.law"	No
TMK 13–00636	12/29/2022	1/2/2033	SPECTER	Raytheon Canada Limited	No
TMK 13–00742	12/19/2022	12/24/2032	DESIGN OF LEAPING DEER INSIDE OF A CLOSED BORDER	Deere & Company	No
TMK 13–01259	12/8/2022	3/17/2032	FLOWMASTER	B&M RACING & PERFORMANCE PRODUCTS INC.	No
TMK 14–00050	12/1/2022	12/15/2032	NBA Logo & DESIGN	NBA Properties, Inc.	No
TMK 14–00839	12/5/2022	1/13/2033	DESIGN of Cadillac Crest & Wreath	GENERAL MOTORS LLC	No
TMK 14–00856	12/5/2022	12/8/2032	Buick Emblem	GENERAL MOTORS LLC	No
TMK 14–00902	12/5/2022	1/8/2033	DESIGN of Corvette C3 Emblem	GENERAL MOTORS LLC	No
TMK 15–00230	12/22/2022	10/3/2032	MUCINEX	Reckitt Benckiser LLC	No
TMK 16–00201	2/26/2016	3/9/2024	ARAVON	Rockport IP Holdings, LLC	No
TMK 16–01494	12/1/2022	12/4/2032	SPECIALIST	WD-40 Manufacturing Company	No
TMK 17–00048	11/30/2022	12/11/2032	WD-40 SPECIALIST	WD-40 Manufacturing Company	No
TMK 17–00131	12/1/2022	8/12/2032	TRIANGLE IN CIRCLE DESIGN	New Colt Holding Corp.	No
TMK 18–00408	12/14/2022	8/30/2032	SWAROVSKI	SWAROVSKI AKTIENGESELLSCHAFT	No
TMK 18–00737	12/13/2022	12/14/2032	BIG WHEEL	Osborne Industries, Inc.	No
TMK 18–01142	12/22/2022	10/31/2032	PP & Design	Philipp Plein	No
TMK 21–00143	12/20/2022	9/25/2032	DUREX	LRC PRODUCTS	No
TMK 22–00973	11/14/2022	11/21/2031	LV & DESIGN	LOUIS VUITTON FRANCE	No
TMK 22–01094	12/1/2022	7/5/2032	WORD PARTY	The Jim Henson Company, Inc.	No
TMK 22–01095	12/2/2022	2/25/2025	TEKO	TEKO PP LIMITED SCOTLAND	No

CBP IPR RECORDATION — JANUARY 2023

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 22–01096	12/2/2022	1/13/2029	SANFORD GUIDE	Antimicrobial Therapy, Inc.	No
TMK 22–01097	12/5/2022	3/27/2032	GMAN SPORT (STYLIZED)	GMAN USA LLC	No
TMK 22–01098	12/6/2022	11/17/2032	CHEMSTRIP	ROCHE DIAGNOSTICS CORPORATION	No
TMK 22–01099	12/7/2022	11/2/2032	GARDENA & DESIGN	Husqvarna AB SWEDEN	No
TMK 22–01100	12/6/2022	8/4/2031	CONTAINER CITY	MJM Logistics and Container City	No
TMK 22–01101	12/7/2022	10/30/2032	WATERPIK	WATER PIK, INC.	No
TMK 22–01102	12/8/2022	11/23/2032	ULTRA BLUE	Bastian Solutions, LLC	No
TMK 22–01103	12/9/2022	7/30/2029	REPRESENT	Represent Clothing Limited UNITED KINGDOM	No
TMK 22–01104	12/9/2022	7/8/2028	SOFIA	RICHLINE GROUP, INC.	No
TMK 22–01105	12/9/2022	2/8/2033	EARTHWORKS AUDIO	EARTHWORKS, INC.	No
TMK 22–01106	12/9/2022	5/22/2032	PRESTIGE WINDOWS & DOORS	R.J.S. Consultants Inc	No
TMK 22–01107	12/12/2022	10/5/2032	ROUGE ARTIST	MAKE UP FOR EVER	No
TMK 22–01108	9/16/2022	6/10/2032	NHL & Shield Design	NATIONAL HOCKEY LEAGUE NOT FOR PROFIT ASSOCIATION	No
TMK 22–01109	12/12/2022	5/28/2025	TREX	REX COMPANY, INC.	No
TMK 22–01110	12/13/2022	10/2/2029	HOWL	HANDLE ONLY WITH LOVE, LLC	No
TMK 22–01111	12/13/2022	3/1/2033	DESIGN OF SHOE	Nike, Inc.	No
TMK 22–01112	12/13/2022	2/28/2033	Configuration of Air Huarache shoe	Nike, Inc.	No
TMK 22–01113	12/13/2022	2/28/2033	CONFIGURATION OF AIRMAX 97	Nike, Inc.	No
TMK 22–01114	12/13/2022	6/26/2024	DESIGN OF SKYLINE	THE PROFESSIONAL BASKETBALL CLUB, LLC	No
TMK 22–01115	12/14/2022	11/21/2031	CONVERSE & DESIGN	Converse, Inc.	No
TMK 22–01116	5/6/2023	8/6/2033	TEF-GEL	ULTRA SAFETY SYSTEMS, INC.	No
TMK 22–01117	12/14/2022	9/30/2029	ADRENALINE RUSH	IP HOLDINGS FL LLC.	No
TMK 22–01118	12/14/2022	8/25/2030	HEC WORLDWIDE	IP HOLDINGS FL LLC.	No
TMK 22–01119	12/14/2022	4/19/2026	VERTICAL RUSH	IP HOLDINGS FL LLC.	No
TMK 22–01120	12/14/2022	1/30/2029	CAPSUGEN	Pollogen Ltd. - ISRAEL	No

CBP IPR RECORDATION — JANUARY 2023

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 22–01121	12/14/2022	2/24/2031	TIKI PLUNGE	IP HOLDINGS FL LLC.	No
TMK 22–01122	12/14/2022	8/11/2031	SAFIRE	Osborne Industries, Inc.	No
TMK 22–01123	12/14/2022	10/6/2031	SAFIRE	Osborne Industries, Inc.	No
TMK 22–01124	12/14/2022	11/24/2031	PATRIOT	IP HOLDINGS FL LLC.	No
TMK 22–01125	12/14/2022	11/24/2031	HURRICANE	IP HOLDINGS FL LLC.	No
TMK 22–01126	12/14/2022	12/7/2031	SURGE	IP HOLDINGS FL LLC.	No
TMK 22–01127	12/14/2022	3/21/2032	JUNGLE TREK	IP HOLDINGS FL LLC.	No
TMK 22–01128	12/15/2022	3/21/2032	S SEAMLESS SLIDE LANES (STYLIZED)	IP HOLDINGS FL LLC.	No
TMK 22–01129	12/15/2022	3/21/2032	BRIDGE-WELD TECHNOLOGY	IP HOLDINGS FL LLC.	No
TMK 22–01130	12/15/2022	2/1/2033	BLAUPUNKT	GIP Development -LUXEMBOURG	No
TMK 22–01131	12/16/2022	12/28/2031	FLOW PRO	Osborne Industries, Inc.	No
TMK 22–01132	12/16/2022	3/14/2032	DESIGN OF MARINE CREST	U.S. Marine Corps Room	No
TMK 22–01133	12/16/2022	4/19/2031	UNITED STATES MARINE CORPS & DESIGN	U.S. Marine Corps Room	No
TMK 22–01134	12/16/2022	4/19/2031	SEMPER FI	U.S. Marine Corps	No
TMK 22–01135	12/16/2022	5/16/2031	SEMPER FI UNITED STATES MARINES & DESIGN	U.S. Marine Corps agency of the United States government	No
TMK 22–01136	12/16/2022	4/19/2031	U.S. Marine Corps Emblem Design	U.S. Marine Corps agency of the United States government	No
TMK 22–01137	12/20/2022	11/8/2026	PRADA	PRADA S.A. LUXEMBOURG	No
TMK 22–01138	12/20/2022	12/15/2032	MIYAKO	ASSR	No
TMK 22–01139	12/16/2022	11/16/2032	OSL	OPEN STYLE LAB, INC.	No
TMK 22–01140	12/20/2022	9/7/2032	GRAFLEX	Rebel Source LLC	No
TMK 22–01141	12/21/2022	7/25/2027	HARIBO (STYLIZED)	HARIBO GERMANY	No
TMK 22–01142	12/21/2022	8/17/2026	PRADA MILANO DAL 1913 & DESIGN	PRADA S.A. LUXEMBOURG	No
TMK 22–01143	12/20/2022	9/30/2025	VOYZ	ASSR, LLC	No
TMK 22–01144	12/20/2022	12/24/2023	FEUR	ASSR, LLC	No

CBP IPR RECORDATION — JANUARY 2023

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 22–01145	12/22/2022	3/13/2033	SUPREME & DESIGN	Chapter 4 Corp. DBA SUPREME CORPORATION	No
TMK 22–01146	12/21/2022	3/4/2033	PRADA - MILANO & DESIGN	PRADA S.A. LUXEMBOURG	No
TMK 22–01147	12/21/2022	3/27/2032	DESIGN OF HARIBO BEAR	Rigo Trading LUXEMBOURG	No
TMK 22–01148	12/21/2022	3/28/2030	PRADA & DESIGN	PRADA S.A.	No
TMK 22–01149	12/21/2022	10/14/2028	GOLD-BEARS	RIGO TRADING S.A. CORPORATION LUXEMBOURG	No
TMK 22–01150	12/21/2022	10/2/2025	HARIBO GOLD-BEARS & Design	Haribo GmbH & Co. KG	No
TMK 22–01151	12/21/2022	10/20/2032	HARIBO	Haribo GmbH & Co. KG	No
TMK 22–01152	12/27/2022	12/25/2032	KITH	KITH RETAIL, LLC	No
TMK 22–01153	12/27/2022	1/30/2028	ASICS STRIPE DESIGN	ASICS Corporation	No
TMK 22–01154	12/27/2022	3/23/2024	ONITSUKA TIGER	ASICS Corporation	No
TMK 22–01155	12/23/2022	1/24/2026	A Design	ASICS Corporation	No
TMK 22–01156	12/27/2022	8/22/2023	ASICS	ASICS CORPORATION	No
TMK 22–01157	12/27/2022	10/6/2023	ASICS	ASICS Corporation	No
TMK 22–01158	12/29/2022	2/22/2033	EMILY IN PARIS	VIACOM INTERNATIONAL INC.	No
TMK 22–01159	12/29/2022	6/27/2032	H HAYWARD & DESIGN	Hayward Industries, Inc.	No
TMK 22–01160	12/29/2022	8/17/2026	FLIPSIDE	National Presto Industries, Inc.	No
TMK 22–01161	12/29/2022	5/13/2028	MM & DESIGN	Innovative Products, Inc.	No
TMK 22–01162	12/29/2022	5/13/2028	MAGNETIC MIC	Innovative Products, Inc.	No
TMK 22–01163	12/29/2022	4/18/2032	BAIER	Baier Marine Company, Inc.	No

U.S. Court of International Trade

Slip Op. 23–1

SEA SHEPHERD NEW ZEALAND AND SEA SHEPHERD CONSERVATION SOCIETY Plaintiffs, v. UNITED STATES, GINA M. RAIMONDO, in her official capacity as Secretary of Commerce, UNITED STATES DEPARTMENT OF COMMERCE, a United States government agency, JANET COIT, in her official capacity as Assistant Administrator of the National Marine Fisheries Service, NATIONAL MARINE FISHERIES SERVICE, a United States government agency, JANET YELLEN, in her official capacity as Secretary of the Treasury, UNITED STATES DEPARTMENT OF THE TREASURY, a United States government agency, ALEJANDRO MAYORKAS, in his official capacity as Secretary of Homeland Security, and UNITED STATES DEPARTMENT OF HOMELAND SECURITY, a United States government agency[1], Defendants, and NEW ZEALAND GOVERNMENT, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 20–00112

[Defendant-Intervenor's Motion to Modify Preliminary Injunction is denied.]

Dated: January 9, 2023

Lia Comerford, Earthrise Law Center at Lewis & Clark Law, of Portland, OR, argued for Plaintiffs Sea Shepherd New Zealand and Sea Shepherd Conservation Society. With her on the briefs was *Kevin Cassidy*.

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendants United States, Gina M. Raimondo, United States Department of Commerce, National Marine Fisheries Service, Janet Yellen, United States Department of the Treasury, Alejandro Mayorkas, and United States Department of Homeland Security. With him on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel was *Jason S. Forman*, Office of the General Counsel, National Oceanic and Atmospheric Administration, of Silver Spring, MD.

Warren E. Connelly, Trade Pacific PLLC, of Washington, D.C., argued for Defendant-Intervenor New Zealand Government. With him on the briefs were *Robert G. Gosselink* and *Kenneth N. Hammer*.

OPINION AND ORDER

Katzmann, Judge:

The court returns to the critically endangered Māui dolphin, endemic to New Zealand, and to the line of litigation based on the fundamental claim that as a result of incidental capture — also

[1] Per CIT Rule 25(d), named officials have been substituted to reflect the current officeholders.

referred to as "bycatch" — in gillnet and trawl fisheries within their range, the Māui dolphin population is declining such that an import ban is required by the Marine Mammal Protection Act ("MMPA").[2] *See Sea Shepherd N.Z. v. United States*, 44 CIT __, __, 469 F. Supp. 3d 1330 (2020) ("*Sea Shepherd I*"); *Sea Shepherd II*, 2022 WL 17250150. The instant question arises from the preliminary injunction this court issued on November 28, 2022, ordering the *immediate* ban on imports into the United States of fish and fish products deriving from nine fish species caught in New Zealand's West Coast North Island inshore trawl and set net fisheries, unless affirmatively identified as having been caught with a gear type other than gillnets or trawls. *See generally* Ct.'s Slip Op. No. 22–130, Nov. 28, 2022, ECF No. 108 and Ct.'s Further Order on Pls.' Mot. for Prelim. Inj., Nov. 28, 2022, ECF No. 109 ("Ct.'s Further PI Order"). The Government of New Zealand, as Defendant-Intervenor, here asks the court to modify[3] the preliminary injunction to afford New Zealand a grace period to implement a "traceability system"[4]. See Def.-Inter.'s Mot.; see also Def-Inter.'s Suppl. Br. For the foregoing reasons, the Government of New Zealand's Motion to Modify is denied.

The court presumes familiarity with the facts and legal frameworks of the underlying litigation, *see Sea Shepherd I*, 469 F. Supp. 3d 1330; *Sea Shepherd II*, 2022 WL 17250150, and now recounts only that which is relevant to the court's review of the instant Motion. On November 28, 2022, after reviewing the traditional four factors that govern a court's grant of injunctive relief,[5] this court enjoined imports of (1) snapper; (2) tarakihi; (3) spotted dogfish; (4) trevally; (5) warehou; (6) hoki; (7) barracouta; (8) mullet; and (9) gurnard deriving from

[2] As the court recently explained, the MMPA "aims to protect marine mammals by setting forth standards applicable to both domestic commercial fisheries and to foreign fisheries, like those in New Zealand, that wish to export their products to the United States." *Shepherd N.Z. v. United States*, 46 CIT __, __, 2022 WL 17250150, at *1 (Nov. 28, 2022) ("*Sea Shepherd II*").

[3] The Government of New Zealand initially styled its pleading as a motion for a "temporary stay of the effective date of the court's preliminary injunction." *See* Mot. of N.Z. Gov't for Temp. Stay of Effective Date of Ct.'s Prelim. Inj., Dec. 6, 2022, ECF No. 115 ("Def.-Inter.'s Mot."). However, at oral argument on December 14, 2022, New Zealand agreed with the court that its Motion was more accurately styled as one to modify the preliminary injunction. *See* N.Z. Gov't Post Arg. Subm. at 1, Dec. 19, 2022, ECF No. 125 ("Def.-Inter.'s Suppl. Br."). Accordingly, the court refers herein to New Zealand's pleading, ECF No. 115, as "Motion to Modify."

[4] The Government of New Zealand uses the phrase "traceability system" to refer to procedures to certify that exports of New Zealand fish and fish products to the United States are not of the kind enjoined by the court's preliminary injunction. *See* Def.-Inter.'s Mot. at 1.

[5] Namely, the court considered (1) whether the moving party was likely to prevail on the merits of the claims; (2) whether the moving party was likely to suffer irreparable harm in the absence of a preliminary injunction; (3) the balance of equities; and (4) whether a preliminary injunction was in the public interest. *See Shepherd II*, 2022 WL 17250150, at *15 (citing *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1345 (Fed. Cir. 2018)).

New Zealand's West Coast North Island multi-species set-net and trawl fisheries, unless affirmatively identified as having been caught with a gear type other than gillnets or trawls. *See* Ct.'s Further PI Order at 2. The court declared this preliminary injunction to be effective immediately, *id.* at 3, and ordered that, absent any intervening events, it would remain in place until the final resolution of Plaintiffs Sea Shepherd New Zealand Ltd. and Sea Shepherd Conservation Society's (collectively "Plaintiffs") challenge to the United States Government's ("Defendants"): (1) rejection of a petition for emergency rulemaking to ban imports of fish and fish products from New Zealand caught using fishing technology that causes death or serious injury of Māui dolphins in excess of U.S. standards under the MMPA; and (2) certification of two New Zealand fisheries as "comparable" with U.S. standards, *see Sea Shepherd II*, 2022 WL 17250150, at *33.

The United States has since implemented the import ban in compliance with the court's Order. *See, e.g.*, U.S. Gov't's Unopp. Mot. for Ext. of Time to Answer Pls.' Suppl. Compl. at 2, Dec. 6, 2022, ECF No. 113 (citing *CSMS Bulletin 54241684*, U.S. Customs & Border Prot., content[.]govdelivery[.]com/accounts/USDHSCBP/bulletins/33ba994 (last visited Jan 9., 2023)).[6] Neither the Government of New Zealand nor the United States seek reconsideration of the merits of this court's opinion, nor have they filed an interlocutory appeal seeking review of the merits of the court's preliminary injunction. *See* Def.-Inter.'s Mot. at 1; *see also* U.S. Gov't's Post Arg. Subm. at 3, Dec. 19, 2022, ECF No. 124 ("Defs.' Suppl. Br."). Rather, before the court, the Government of New Zealand asserts only that because it does not yet have a "traceability system" in place, it is not at present possible to identify imports of the above enumerated fish species that either have been caught: (1) by fisheries other than the two named in the court's preliminary injunction — i.e., New Zealand's West Coast North Island multi-species set-net and trawl fisheries; or (2) with gear other than set-nets and/or trawls, thereby leading to overinclusive enforcement of the court's injunction, *see* Def.-Inter.'s Mot. at 1; accordingly, the Government of New Zealand asks the court to delay the effective date of the preliminary injunction until January 31, 2023 to afford New Zealand an opportunity to devise and implement a traceability system, *id.* at 3, 11–12. Plaintiffs oppose New Zealand's Motion to Modify, *see* Pls.' Resp. in Opp. to Mot. of N.Z. Gov't for Temp. Stay of

[6] Please note, in order to disable links to outside websites, the court has removed the "http" designations and bracketed the periods within hyperlinks. For archived copies of any webpages cited in this opinion, please consult the docket.

Effective Date of Ct.'s Prelim. Inj., Dec. 12, 2022, ECF No. 120; *see also* Pls.' Post Arg Subm., Dec. 19, 2022, ECF No. 126 ("Pls.' Suppl. Br."), while Defendants do not, *see* U.S. Gov't's Resp. to Mot. of N.Z. Gov't for Temp. Stay of Prelim. Inj., Dec. 7, 2022, ECF No. 118; *see also* Defs.' Suppl. Br.

"Generally, of course, courts have inherent power and . . . discretion to modify injunctions." *AIMCOR Ala. Silicon, Inc. v. United States*, 23 CIT 932, 938, 83 F. Supp. 2d 1293, 1299 (1999) (citing *Sys. Fed'n No. 91 v. Wright*, 364 U.S. 642, 647 (1961)). However, "the party seeking to modify a preliminary injunction bears the burden of establishing a change in circumstances that would make continuation of the original preliminary injunction inequitable." *Ad Hoc Shrimp Trade Action Comm. v. United States*, 32 CIT 666, 670, 562 F. Supp. 2d 1383, 1388 (2008) (citing *SNR Roulements v. United States*, 31 CIT 1762, 1764, 521 F. Supp. 2d 1395, 1398 (2007)). Such a "change in circumstances" may be established "by showing either a significant change in factual conditions or law." 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2961 (3d ed. 2022).

The Government of New Zealand maintains that the present need to implement a traceability system *itself* constitutes a change of circumstances meriting modification of the preliminary injunction. *See* Def-Inter.'s Suppl. Br. at 2. But, as the Government of New Zealand acknowledges, the present need for a traceability system is simply a direct — and anticipated — consequence of the court's awarded injunctive relief. *See, e.g.*, Def.-Inter.'s Mot. at 3 n.3 (explaining that the MMPA does "not require, as a condition for a comparability finding, a seafood traceability system," but that "[t]he situation is different now because of the obligation of GNZ officials and importers to comply with the Certification of Admissibility requirements *after issuance of the import ban* to prevent certain seafood from being erroneously excluded from entry" (emphasis added) (citations omitted)); Def.-Inter.'s Suppl. Br. at 2 ("The GNZ had no obligations to establish this traceability system before this Court issued the PI."). The court agrees with Plaintiffs that "the preliminary injunction itself or [the] circumstances flowing directly from [its] issuance" cannot constitute "changed circumstances." Pls.' Suppl. Br. at 2. To hold otherwise would nullify the "changed circumstances" factor, as such conditions would exist in every case.

Because the Government of New Zealand has not made the requisite showing of "changed circumstances," *see Ad Hoc Shrimp*, 32 CIT at 670, 562 F. Supp. 2d at 1388, the court can — and does — deny the Motion to Modify without reaching Defendant-Intervenor's additional arguments. Accordingly, the preliminary injunction remains in effect

as implemented in the court's Further Order on Plaintiffs' Motion for Preliminary Injunction, ECF No. 109.[7]

SO ORDERED.

Dated: January 9, 2023
New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

[7] Having denied Defendant-Intervenor's Motion to Modify on the above grounds, the court declares moot the Government of New Zealand's further Motion to Supplement the Record in Support of Request for Temporary Stay of the Effective Date of the Court's Preliminary Injunction, Dec. 13, 2022, ECF No. 121.

Slip Op. 23–2

WUXI TIANRAN PHOTOVOLTAIC CO., LTD., Plaintiff, and JA SOLAR TECH. YANGZHOU CO., LTD., SHANGHAI JA SOLAR TECH. CO., LTD., AND JINGAO SOLAR CO., LTD., CONSOLIDATED Plaintiffs, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge
Consol. Ct. No. 21–00538

JUDGMENT

Following remand, the United States Department of Commerce ("Commerce") submitted the Final Results of Redetermination Pursuant to Court Remand, ECF No. 38 (Oct. 6, 2022) ("*Remand Results*"). Plaintiff Wuxi Tianran Photovoltaic Co., Ltd., submitted comments on the Remand Results arguing that Commerce's general practice of requiring "complete participation in verification" for all of a respondent's customers is unreasonable. Comments on Remand Redetermination of Plaintiff, ECF No. 41 at 2–3 (Nov. 7, 2022) ("*Tianran Comments*"). Nevertheless, in this unique circumstance, Plaintiff concedes that the *Remand Results* comply with the court's remand order and does not further challenge Commerce's determination. *Tianran Comments* at 2–3 ("Tianran concedes that Commerce's Remand Results generally complies with the [c]ourt's Remand Order . . . . Tianran does not further challenge Commerce's determination in the Remand Results"). Consolidated Plaintiffs do not raise any independent comments. *See* Objections to Remand Results of Consolidated Plaintiffs and Plaintiff-Intervenors, ECF. No. 42 (Nov. 7, 2022). Accordingly, it is

ORDERED, **ADJUDGED**, and **DECREED** that the *Remand Results* by Commerce are **SUSTAINED**.

Dated: January 10, 2023
New York, New York

/*s*/ *Jane A. Restani*
JANE A. RESTANI, JUDGE

Slip Op. 23–3

HYUNDAI ELECTRIC & ENERGY SYSTEMS CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and HITACHI ENERGY USA INC. and PROLEC-GE WAUKESHA, INC., Defendant-Intervenors.

Before: Mark A. Barnett, Chief Judge
Court No. 20–00108

[Sustaining the U.S. Department of Commerce's second remand results in the sixth administrative review of the antidumping duty order on large power transformers from the Republic of Korea.]

Dated: January 11, 2023

Ron Kendler, White & Case LLP, of Washington, DC, argued for Plaintiff. With him on the brief were *David E. Bond* and *William J. Moran*.

Kelly Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *Ian A. McInerney*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Melissa M. Brewer, Kelley Drye & Warren LLP, of Washington, DC, argued for Defendant-Intervenors. With her on the brief were R. Alan Luberda and David C. Smith.

OPINION

Barnett, Chief Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") second redetermination upon remand. *See* Final Results of Redetermination Pursuant to Ct. Remand ("Second Remand Results"), ECF No. 106–1; *see generally Hyundai Elec. & Energy Sys. Co. v. United States ("HEES II")*, 46 CIT __, 578 F. Supp. 3d 1245 (2022); Confid. Final Results of Redetermination Pursuant to Ct. Remand ("First Remand Results"), ECF No. 55–1. Commerce prepared the Second Remand Results in connection with the sixth administrative review of the antidumping duty order on large power transformers ("LPT(s)") from the Republic of Korea ("Korea") for the period of review August 1, 2017, to July 31, 2018 ("the POR"). *Large Power Transformers From the Republic of Korea*, 85 Fed. Reg. 21,827 (Dep't Commerce Apr. 20, 2020) (final results of antidumping admin. review; 2017–2018) ("*Final Results*"), ECF No. 24–4, and accompanying Issues and Decision Mem., A-580–867 (Apr.

14, 2020) ("I&D Mem."), ECF No. 24–5.[1] The court's opinion in *HEES II* presents background information on this case, familiarity with which is presumed.

Plaintiff Hyundai Electric & Energy Systems Co., Ltd. ("HEES") commenced this case challenging several aspects of the *Final Results*. *See* Confid. Compl., ECF No. 13; Summons, ECF No. 1. HEES moved to supplement the administrative record with two additional documents relating to Commerce's finding that a particular LPT was produced in Korea, rather than the United States, which the court granted. *See Hyundai Elec. & Energy Sys. Co. v. United States*, 44 CIT __, 477 F. Supp. 3d 1324 (2020). Defendant United States ("the Government" or "Defendant") then requested a remand of the *Final Results* to address these two additional documents, which the court also granted. *See Hyundai Elec. & Energy Sys. Co. v. United States*, Slip Op. 20–160, 2020 WL 6559158 (CIT Nov. 9, 2020).

On June 30, 2021, Commerce filed its First Remand Results. HEES moved for judgment on the agency record, challenging Commerce's determinations that HEES (1) failed to submit service-related revenue documentation, (2) incorrectly reported certain contested part(s) as non-scope merchandise, and (3) failed to report a U.S. sale of an LPT. *See* Confid. Am. Mem. of P. & A. in Supp. of Pl.'s Rule 56.2 Mot. for J. Upon the Agency R. at 1–4, ECF No. 88. HEES contended that these determinations were not supported by substantial evidence and that substantial evidence did not support the agency's application of adverse facts available ("AFA") and total AFA.[2] *See id*.

On May 10, 2022, the court remanded the First Remand Results. *HEES II*, 578 F. Supp. 3d at 1263. Relevant to this discussion, the court ordered Commerce to reconsider or further explain its determinations to "use facts available with respect to HEES's reporting of the contested part(s)" and "rely on total adverse facts available to determine HEES's [dumping] margin." *Id*. In the Second Remand Results, Commerce found that there was not "a sufficient basis on the record to determine that [HEES] misclassified [the contested parts]" and, thus, HEES's reporting of these parts was not so incomplete "such

[1] The administrative record for the Second Remand Results is divided into a Confidential Remand Record ("CRR"), ECF No. 107–2, and a Public Remand Record ("PRR"), ECF No. 107–3. The parties submitted joint appendices containing record documents cited in their briefs. *See* Confid. J.A., ECF No. 115; Public J.A., ECF No. 116. The court references the confidential record documents, unless otherwise specified.

[2] While the phrase "total AFA" is not referenced in either the statute or the agency's regulations, it can be understood, within the context of this case, to refer to Commerce's application of the "facts otherwise available" and "adverse inference" provisions of 19 U.S.C. § 1677e after finding that it could not accurately calculate a dumping margin with the information submitted by respondents in this review and could not fill in the gaps in information without undue difficulty. *See Mukand Ltd. v. United States*, 767 F.3d 1300, 1308 (Fed. Cir. 2014).

that it contribute[d] to Commerce's determination to apply total AFA to [HEES]." Second Remand Results at 8. However, Commerce continued to apply total AFA based on HEES's failure to correctly report service-related revenue and its failure of the completeness test at verification. *Id.* at 9–13.

HEES filed comments opposing the Second Remand Results. *See* Confid. Pl.'s Cmts. in Opp'n to the Final Results of Redetermination Pursuant to Ct. Remand ("Pl.'s Opp'n Cmts."), ECF No. 109. Defendant and Defendant-Intervenors, Hitachi Energy USA Inc. and Prolec-GE Waukesha, Inc. (together, "Defendant-Intervenors"), filed comments urging the court to sustain the Second Remand Results. *See* Confid. Def.'s Resp. to Cmts. on Remand Redetermination ("Def.'s Resp. Cmts."), ECF No. 111; Def.-Ints.' Cmts. in Supp. of [Second Remand Results] ("Def.-Ints.' Cmts. in Supp."), ECF No. 113.[3] The court heard oral argument on December 7, 2022. Docket Entry, ECF No. 119.

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),[4] 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).

DISCUSSION

When "necessary information is not available on the record," or an interested party "withholds information" requested by Commerce, "fails to provide" requested information by the submission deadlines, "significantly impedes a proceeding," or provides information that cannot be verified pursuant to 19 U.S.C. § 1677m(i), Commerce "shall . . . use the facts otherwise available." *Id*. § 1677e(a). Once Commerce determines that the use of facts otherwise available is warranted, if Commerce also "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," Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise

[3] HEES also submitted comments in support of the Second Remand Results with respect to Commerce's determination that HEES's reporting of certain contested parts and components did not warrant the application of AFA. *See* Pl.'s Responsive Cmts. in Supp. of the [Second Remand Results] ("Pl.'s Cmts. in Supp."), ECF No. 114.

[4] 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 otherwise stated.

available." *Id*. § 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); *see also Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1275–76 (Fed. Cir. 2012).

Commerce uses total adverse facts available to determine dumping margins when "none of the reported data is reliable or usable." *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011) (citation omitted); *see also Nat'l Nail Corp. v. United States*, 43 CIT __, __, 390 F. Supp. 3d 1356, 1374 (2019) (explaining that "Commerce uses 'total adverse facts available'" when it applies "adverse facts available not only to the facts pertaining to specific sales or information . . . not present on the record, but to the facts respecting all of respondents' production and sales information that the [agency] concludes is needed for an investigation or review") (citation omitted). "[U]se of partial facts available is not appropriate when the missing information is core to the antidumping analysis and leaves little room for the substitution of partial facts without undue difficulty." *Mukand,* 767 F.3d at 1308.

I. Substantial Evidence Supports Commerce's Determination that HEES's Reporting of Parts and Components Does Not Warrant Application of AFA

In *HEES II*, the court found that Commerce failed to establish that HEES incorrectly reported certain contested parts and remanded to Commerce to "reconsider or further explain whether HEES failed to properly report the contested part(s)." 578 F. Supp. 3d at 1259. In its remand determination, Commerce concluded that it did "not have a sufficient basis on the record to determine that [HEES] misclassified [the] parts in question" and, thus, that the reporting of these parts was not a basis for applying total AFA to HEES. Second Remand Results at 8. No parties contest Commerce's determination on this issue. *See* Def.'s Resp. Cmts. at 4; Pl.'s Cmts. in Supp. at 1–2; Def.-Ints.' Cmts. in Supp. at 2. Commerce explained the basis for its determination on this issue and that determination complies with the court's remand order. Accordingly, the court will sustain Commerce's determination on this issue.

II. Commerce's Use of Total AFA

A. Background

In *HEES II*, the court sustained Commerce's use of AFA with respect to HEES's failure to report service-related revenue, 578 F. Supp. 3d at 1256, and with respect to HEES's completeness failure at verification, *id*. at 1263. However, the court remanded the *Final Results* for Commerce to reconsider or further explain its determination to use facts available with respect to HEES's reporting of certain contested parts. *Id.* at 1259. Because the remanded issue was one of three bases, in combination, for Commerce's decision to use total AFA, the court deferred ruling on whether substantial evidence supported Commerce's use of total AFA. *Id*.

On remand, Commerce found that there was not a sufficient record basis to determine that HEES misclassified the contested parts. Second Remand Results at 8. However, Commerce found that HEES's deficient reporting of service-related revenue and failure of the completeness test at verification, together, warranted the continued application of total AFA. *Id*. at 9. Commerce found that it was unable to calculate an accurate dumping margin without a complete U.S. sales database and service-related revenue documentation. *Id*.

Commerce explained that, based on the record, it was unable to determine whether the unreported service-related revenue was included in, or excluded from, the reported gross unit prices. *Id*. at 10. Commerce was thus "unable to identify corresponding service-related expenses to implement [the agency's] normal capping policy," calculate "an accurate export price," or "calculate an accurate dumping margin." *Id*. at 10; *see also id*. at 17–18.

HEES's failure to properly report service-related revenue arose based on the company's decision to prepare its questionnaire responses and sales databases in the same manner as prior administrative reviews, notwithstanding its repeated acknowledgement that its relationship with Hyundai Corporation USA ("Hyundai USA") had materially changed. *HEES II*, 578 F. Supp. 3d at 1251–52. Specifically, HEES reported that it was no longer affiliated with Hyundai USA because of ownership changes in the company that left HEES with less than five percent ownership of Hyundai USA. *Id*. at 1252. Despite no longer being affiliated, HEES represented that it would continue to treat Hyundai USA as an affiliate for reporting purposes because there were other bases upon which the agency might find affiliation. *Id*. at 1251–52; *see also* 19 U.S.C. § 1677(33) (defining "affiliated persons"). Because HEES reported its U.S. sales database as if it remained affiliated with Hyundai USA, it did not provide

Commerce with certain service-related revenue documentation, particularly between HEES and Hyundai USA, which Commerce discovered at verification.[5] *HEES II*, 578 F. Supp. 3d at 1253. In *HEES II*, the court found that substantial evidence supported Commerce's use of AFA with respect to service-related revenue because HEES withheld this documentation that related to every U.S. sale, *id*. at 1253, despite acknowledging that the two companies were no longer affiliated and, to that end, HEES failed to cooperate to the best of its ability in responding to Commerce's requests for information. *Id*. at 1256.

On remand, Commerce also explained that HEES's failure to report the U.S. sale of an LPT that Commerce determined was made in Korea impeded the agency's ability to accurately calculate a dumping margin. Second Remand Results at 11–13. Specifically, Commerce found that the omission of this sale "could lead to a significantly inaccurate calculation of the weighted-average dumping margin for [HEES]." *Id*. at 12; *see also id*. at 18–20.

B. Parties' Contentions

HEES contends that Commerce's application of total AFA is not supported by substantial evidence and is contrary to law. Pl.'s Opp'n Cmts. at 3. HEES contends that the omission of service-related revenue documentation is limited to a discrete category of information and "is [not] so pervasive as to justify disregarding" other data and documents that were correctly reported and verified. *Id*. at 5. HEES also contends that Commerce has not adequately explained why total AFA is justified with respect to this omission because, in a past review of this antidumping order, Commerce applied only partial AFA with respect to missing service-related revenue information. *Id*. at 4. Finally, HEES contends that the omission of a single LPT sale does not undermine the entirety of its U.S. sales reporting or suggest a pattern of unresponsiveness. *Id*. at 6–12.

Defendant and Defendant-Intervenors contend that Commerce's determination to apply total AFA is supported by substantial evidence and in accordance with law. Def.'s Resp. Cmts. at 5; Def.-Int's Cmts. at 2.

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[5] HEES reported its U.S. sales on a constructed export price basis, and not an export price basis, and thus did not include service-related revenue documentation between it and Hyundai USA, claiming that this documentation was "intercompany, internal communications." *See HEES II*, 578 F. Supp. 3d at 1252–53 (quoting I&D Mem. At 13).

C. Substantial Evidence Supports Commerce's Use of Total AFA

When relying on total adverse facts available, Commerce must "examine the record and articulate a satisfactory explanation for its action." *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013). "[U]se of partial [adverse] facts available is not appropriate when the missing information is core to the antidumping analysis and leaves little room for the substitution of partial facts without undue difficulty." *Mukand*, 767 F.3d at 1308.

Here, Commerce based its determination to use total AFA on *both* HEES's failure to report service-related revenue for its U.S. sales transactions *and* its failure of the completeness test at verification. Second Remand Results at 13, 21. HEES attempts to disaggregate these issues by arguing that, in analogous past cases, Commerce determined to use partial AFA where a party failed to provide certain service-related revenue documentation *or* failed to report a single sale. *See* Pl.'s Opp'n Cmts. at 4, 7–8. The court, however, having sustained Commerce's determination to apply AFA with respect to each of these issues, must determine whether the use of total AFA based on these reporting failures in combination is supported by substantial evidence. The court concludes that substantial evidence supports Commerce's determination.

Looking first at HEES's failure to report service-related revenue and withhold relevant documentation, Commerce explained that the absence of this information made it impossible to apply its "capping methodology" for U.S. sales transactions.[6] Second Remand Results at 10. Commerce explained that it could not "reasonably calculate an accurate dumping margin" because it could not properly "cap" service-related revenue due to the "incomplete and unreliable information" provided by HEES and the absence of record information showing whether the service-related revenue was excluded from or included in the reported gross U.S. price. *Id.* at 11. Thus, the agency determined that total AFA was warranted. *Id*.

HEES first argues that Commerce has not justified its use of total AFA here because Commerce previously applied partial AFA in the second administrative review of the antidumping order on LPTs for

[6] Pursuant to 19 U.S.C. § 1677a(c)(2), Commerce is required to reduce the price used to establish the export price or constructed export price by "the amount, if any, included in such price, attributable to any additional costs, charges, or expenses . . . which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States." Commerce offsets any such service-related expenses with related service-related revenues, capping those revenues at the level of the associated expenses. *See ABB, Inc. v. United States*, 41 CIT __, __, 273 F. Supp. 3d 1200, 1208 (2017). The court has upheld Commerce's practicing of "capping" service-related revenue by the associated service-related expenses. *See id.*

failure to accurately report service-related revenue. *See* Pl.'s Opp'n Cmts. at 4–5; *see also ABB Inc. v. United States*, 44 CIT __, __, 437 F. Supp. 3d 1289, 1300–1301 (2020) (sustaining Commerce's application of partial AFA where respondents did not accurately report service-related revenue).[7] Contrary to HEES's argument, Commerce has adequately explained why it is treating HEES's failure to provide service-related revenue differently than it did in the second administrative review.

In the second administrative review, Commerce received service-related revenue and expense information and the agency used this information to cap service-related revenues by service-related expenses. *See ABB Inc.*, 437 F. Supp. at 1300 & n.17. In this review, HEES chose to report its sales on a constructed export price basis despite repeatedly acknowledging that HEES and Hyundai USA were no longer affiliated. *See HEES II*, 578 F. Supp. 3d at 1251–53. As a result, HEES did not provide *any* usable service-related revenue information and failed to explain whether such revenue was already excluded from the U.S. price, thereby "imped[ing] Commerce's ability to calculate an accurate U.S. price for every sale reported in the U.S. sales database." Second Remand Results at 18. Furthermore, in the second administrative review, Commerce only used AFA with respect to HEES's service-related revenue information. *See ABB Inc*., 437 F. Supp. 3d at 1294–95. Here, however, Commerce also found that the use of AFA was warranted with respect to HEES's failure to report all U.S. sales. *See* Second Remand Results at 17, 19–21.

HEES also argues that the service-related revenue information it failed to provide was "limited to a discrete category of information." Pl.'s Opp'n Cmts. at 6 (emphasis omitted); *see also id.* at 5–6. However, as Commerce explained, reporting of service-related revenue was core to its analysis. *See* Second Remand Results at 10–11, 17–18. Complete and accurate U.S. sales prices are a fundamental aspect of a dumping calculation. *See Mukand*, 767 F.3d at 1307 (sustaining Commerce's use of total AFA for failure to accurately report cost information and tacitly agreeing with agency's statement that reporting of sales and cost data was "one of the most basic and significant requirements in performing [a] dumping analysis and margin calcu-

[7] Commerce's use of partial AFA for failure to accurately report service-related revenue in the second administrative review was subsequently vacated by the U.S. Court of Appeals for the Federal Circuit. *Hitachi Energy USA Inc. v. United States*, 34 F.4th 1375, 1386 (Fed. Cir. 2022), *as modified by Hitachi Energy USA Inc. v. United States*, 2022 WL 17175134 (Fed. Cir. Nov. 23, 2022) (limiting the court's ruling to the circumstances of that case). However, this ruling related to Commerce's failure to provide parties with an opportunity to correct reporting deficiencies pursuant to 19 U.S.C. § 1677m(d), and not the distinction between use of partial and total AFA. *See id*. at 1385–86.

lation"). Here, service-related revenue information was vital to Commerce's ability to cap service-related revenue, calculate accurate export prices, and ultimately calculate an accurate dumping margin. *See* Second Remand Results at 10–11, 17–18. Thus, HEES's failure to report service-related revenue was not limited to a discrete category of information but was instead "vitally interconnected with other elements of the dumping determination." *See Mukand, Ltd. v. United States*, 37 CIT 443, 453 (2013).

HEES also contends that the omission of a single sale from the U.S. sales database is insufficient to justify the use of total AFA. *See* Pl.'s Opp'n Cmts. at 6–12. HEES contends that Commerce's application of total AFA based on a single omission is inconsistent with both Commerce's practice and the court's precedent, *id*. at 7–8, and record evidence does not support Commerce's claim that the omission of one sale will cause a significant inaccuracy in the calculation of the dumping margin, *see id*. at 8.[8] These arguments are unconvincing.

HEES again fails to appreciate that Commerce did not base its determination to use total AFA on only the omission of one sale—HEES's failure to provide service-related revenue documentation between it and Hyundai USA also contributed to Commerce's finding that total AFA was justified.[9] Second Remand Results at 13, 21. Likewise, HEES fails to appreciate the factual difference between instances in which a single omitted sale makes up a small percentage of overall sales, and instances, such as here, in which the omitted sale makes up a more significant percentage of sales, both in total volume and total value. *See id.* at 12 ("Given the value of this omitted U.S. sale compared to the total value of the reported U.S. sales transactions and given the difference of gross unit price among U.S. sales transactions, we find that omission of this U.S. sale . . . could lead to

[8] HEES contends that Commerce's claimed inability to establish the completeness of the U.S. sales database is not supported by substantial evidence because Commerce fully reconciled HEES's U.S. sales database. Pl.'s Opp'n Cmts. at 10–12. This argument is nothing more than an attempt to relitigate an issue which the court decided in *HEES II*. In evaluating whether substantial evidence supported Commerce's decision that the unreported U.S. sale was manufactured in Korea, the court noted that Commerce's reconciliation of HEES's U.S. sales database was a point in favor of HEES's contention that the LPT in question was produced in the United States. *HEES II*, 578 F. Supp. 3d at 1262. However, the court ultimately determined that substantial evidence supported Commerce's determination that the LPT was not produced in the United States, but, instead, in Korea. *Id*. Once Commerce's finding that the LPT in question was produced in Korea is accepted, the fact that this sale avoided detection undermined Commerce's faith in the value of its completeness test for HEES's U.S. sales. *See* Second Remand Results at 19.

[9] While HEES does also argue that the combination of its reporting failures does not justify use of total AFA, *see* Pl.'s Opp'n Cmts. at 12, this argument is just a restatement of its arguments that each issue by itself does not merit use of total AFA.

a significantly inaccurate calculation of the weighted-average dumping margin for [HEES].").[10]

As Commerce explained, the relationship between the price of a single U.S. LPT sale to the prices of other U.S. LPT sales made during the POR "does not indicate the impact that the [single] sale [would] have on the margin calculation" because "[t]he timing and matching of the sale, sales adjustments, and Commerce's capping methodology, as well as the gross unit price together," could lead to a disproportionate impact on the dumping margin. *Id.* at 19. In other words, Commerce found no reason to assume that the omitted sale was dumped at the same level as another similarly priced U.S. sale because the dumping margin depends not simply on the price of the U.S. sale, but the differential between that price and its normal value—and the relevant normal value may differ based upon the timing of the U.S. sale and the physical characteristics of that sale. *See Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369–70 (Fed. Cir. 1998) ("An explicit explanation is not necessary, however, where the agency's decisional path is reasonably discernible.").

The prior decisions upon which HEES relies to support its contention that a single omitted sale does not justify total AFA are inapposite. Plaintiff cites *Fujian Machinery and Equipment Import & Export Corp. v. United States*, 27 CIT 1059, 276 F. Supp. 2d 1371 (2003), for the proposition that "total AFA based on the respondent's failure to report a single sale was a form of 'impermissible bootstrapping' and that this single error did not justify the conclusion that the entirety of the respondent's data were unreliable." Pl.'s Opp'n Cmts. at 7. Plaintiff fails to understand, however, that the antidumping duty

[10] The court is not persuaded by HEES's contention that Commerce merely speculated that the missing sale would dramatically affect the calculation of the final dumping margin. *See* Pl.'s Opp'n Cmts. at 8. Commerce stated that because the number of U.S. sales made during the POR was low, "the failure to report even a single sale *may* dramatically affect the final margin calculation." Second Remand Results at 18 (emphasis added); *see also id*. at 12 ("[O]mission of this U.S. sale . . . *could* lead to a significantly inaccurate calculation of the weighted-average dumping margin for [HEES]") (emphasis added). While HEES emphasizes Commerce's choice of the words "may" and "could" to support its position that Commerce merely speculated about the effect of the omitted sale, *see* Pl.'s Opp'n Cmts. at 8, there is no dispute that the omitted sale would have at least some impact on the final dumping margin, *see* Pl.'s Opp'n Cmts. at 8–9 (arguing only that the omitted sale would not significantly alter the dumping margin); Second Remand Results at 13. That omitted sale "call[ed] into question" more than just the accuracy of HEES's sale ledger, because HEES was unable to produce documentation that it told Commerce existed for all U.S. sales. Second Remand Results at 20. Although Commerce's choice of words is phrased as conjecture about the impact of the omitted sale on the dumping margin, it is reasonable to conclude that even one omitted sale might substantially affect the final dumping margin when there are only a small number of sales made during the POR. Moreover, it is not reasonable to require Commerce to quantify the impact of the omitted sale when quantifying it would require Commerce to gather, review, confirm, and verify information that HEES failed to provide in the first instance.

order at issue there, involving heavy forged hand tools, covered four classes of merchandise and the court expressly affirmed Commerce's application of total AFA with respect to the class of merchandise in which the unreported sale occurred. *Fujian*, 27 CIT at 1060, 276 F. Supp. 2d at 1373. The court then addressed whether Commerce could extrapolate from the recognized failure with respect to one class to the other three classes of merchandise, and found that Commerce could not so do, without more. *Id*. at 1061, 276 F. Supp. 2d at 1374. The court expressly noted that "numerous 'oversights' would likely suggest a 'pattern of unresponsiveness' justifying not only the application of facts available . . ., but of AFA," *id*. at 1061 n.2, 276 F. Supp. 2d at 1374 n.2, and ultimately sustained Commerce's use of total AFA for all four classes of merchandise based on additional reporting and verification failures*, see id.* at 1062–65, 276 F. Supp. 2d at 1375–77.

The agency determinations cited by HEES also do not support its argument that Commerce's practice is to apply partial facts available when there is a single missing sale. *See* Pl.'s Opp'n Cmts. at 7 (citing Issues and Decision Mem. for Certain New Pneumatic Off-the-Road Tires From China ("China ORT Mem."), A-570–912, (Apr. 8, 2015), https://access.trade.gov/Resources/frn/summary/prc/2015–08673–1.pdf (last visited Jan. 11, 2023;[11] Issues and Decision Mem. for Tissue Paper From China ("China TP Mem."), A-570–894, (Oct. 9, 2007), https://access.trade.gov/Resources/frn/summary/prc/E7–20349–1.pdf (last visited Jan. 11, 2023)).[12] While Commerce did not directly address these determinations, Commerce effectively distinguished these cases when, as discussed above, the agency responded to HEES's core argument that failure to report a single U.S. sale does not undermine its reporting. Commerce explained that, here, there were so few U.S. sales made during the POR that even a single unreported sale could affect the calculation of the dumping margin such that total AFA was merited. *See* Second Remand Results at 18. While the exact quantity of missing sales is not discussed in

[11] In the China ORT Memorandum, Commerce applied partial AFA when a respondent failed to report all sales for an entire control number. China ORT Mem. at 32–35. However, in that proceeding, upon discovery of the omission of sales at verification, the respondent provided the information requested by Commerce *and* Commerce verified that information. China ORT Mem. at 34 (noting that although the agency did not accept the invoices provided at verification as part of the record, it reviewed the information on the invoices to ensure the veracity of the information on a summary sheet of sales that was part of the record). Here, as noted above, HEES was unable to provide the documentation it claimed existed for all U.S. sales. Second Remand Results at 20.

[12] In that proceeding Commerce applied partial AFA with respect to a missing sale and a "discount on U.S. sales found at verification." China TP Mem. at 33.

either of the cited determinations, HEES has not shown that Commerce was bound to use partial AFA in this case simply because it did so in the cited determinations.

CONCLUSION

Based on the foregoing, the court will sustain Commerce's *Final Results* as amended by the Second Remand Results. Judgment will enter accordingly.

Dated: January 11, 2023
New York, New York

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

Slip Op. 23–4

SMA SURFACES, INC. (F/K/A POLARSTONE US), Plaintiff, v. UNITED STATES, Defendant, and CAMBRIA COMPANY, LLC, Defendant-Intervenor.

Before: Gary S. Katzmann, Judge
Court No. 21–00399

[Plaintiff's Motion for Judgment on the Agency Record is granted in part and denied in part. The U.S. Department of Commerce's Final Scope Ruling is remanded consistent with this opinion.]

Dated: January 12, 2023

Michael S. Holton, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, D.C., argued for Plaintiff SMA Surfaces, Inc. (f/k/a Polarstone US). With him on the briefs were *Jordan C. Kahn*, *Kavita Mohan*, and *Erik D. Smithweiss* of Los Angeles, CA.

Joshua E. Kurland, Senior Trial Counsel, U.S. Department of Justice, Washington, D.C., argued for Defendant United States. With him on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Tara K. Hogan*, Assistant Director. Of Counsel *Jared Cynamon*, Attorney, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement & Compliance.

Luke A. Meisner, Schagrin Associates, of Washington, D.C., argued for Defendant-Intervenor Cambria Company LLC. With him on the brief was *Roger B. Schagrin*.

OPINION AND ORDER

Katzmann, Judge:

This case calls on the court to go beyond scratching the glass surface when reviewing an agency's interpretation of scope text and photographic record evidence. Plaintiff SMA Surfaces, Inc. ("SMA Surfaces" or "Plaintiff"), an importer of crushed glass surface products from the People's Republic of China ("China"), brings the instant action to contest a scope ruling by the U.S. Department of Commerce ("Commerce" or "the Government"). SMA Surfaces had requested a scope inquiry clarifying that three of its glass surface products were not subject to the antidumping and countervailing duty orders on certain quartz surface products from China, which Commerce had instituted pursuant to the statutes designed for fair trade and prevention of injury to domestic industry. *See Certain Quartz Surface Products from the People's Republic of China: Antidumping and Countervailing Duty Orders*, 84 Fed. Reg. 33,053 (Dep't Com. July 11, 2019) ("*QSP Orders*"). After reviewing SMA Surfaces's request, Commerce determined that the scope language of the *QSP Orders* covered the three glass surface products. *See* Mem. from J. Pollack to J. Maeder, re: Final Scope Ruling on the Antidumping and Countervailing Duty Orders on Quartz Surface Products from the People's Re-

public of China: SMA Surfaces at 5–6 (Dep't Com. July 15, 2021), P.R. 15 ("Final Scope Ruling"). SMA Surfaces petitions the court for review, contending that the Final Scope Ruling was "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

The court concludes that Commerce's determination to include the glass surface products was in accordance with law but only partly justified by substantial evidence. While Commerce's interpretation of the *QSP Orders* was consistent with plain text, substantial evidence justified the inclusion of only two of the three glass surface products, branded "Grey Concrete Leather" and "Andes," but not the third "Twilight" product. Finally, Commerce's consideration of evidence under 19 C.F.R. § 351.225(k)(1) was also in accordance with law, thereby preserving Commerce's determinations as to the Grey Concrete Leather and Andes products. Plaintiff's Motion for Judgment on the Agency Record is granted in part and denied in part, and the court remands to Commerce for further explanation or reconsideration consistent with this opinion.

BACKGROUND

"When participants in a domestic industry believe that competing foreign goods are being sold in the United States at less than their fair value," *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1297–98 (Fed. Cir. 2013), or that competing foreign goods are subject to a foreign country's countervailable subsidy with respect to their manufacture, production, or export, *see* 19 U.S.C. § 1671(a)(1), then they may petition Commerce to impose antidumping or countervailing duties on importers. *See* 19 U.S.C. §§ 1671a(b), 1673a(b). If Commerce determines that "the subject merchandise is being, or is likely to be, sold in the United States at less than its fair value," 19 U.S.C. § 1673d(a), or that "a countervailable subsidy is being provided with respect to the subject merchandise," 19 U.S.C. § 1671d(a), and the United States International Trade Commission ("ITC") determines that a domestic industry is materially injured or threatened with material injury as a result, Commerce issues an antidumping and/or countervailing duty order. 19 U.S.C. §§ 1671d(b), 1673d(b). But "[q]uestions sometimes arise as to whether a particular product is covered by the scope of an antidumping or countervailing duty order." 19 C.F.R. § 351.225(a) (2022). Importers may ask for scope rulings, which are determinations made by Commerce that clarify the scope of the order, once issued, as it relates to their particular product. *See id.* § 351.225.

On April 17, 2018, Defendant-Intervenor Cambria Company LLC ("Cambria"), a domestic producer of quartz surface products, submitted antidumping and countervailing duty petitions to Commerce concerning imports of certain quartz surface products from China. *See Certain Quartz Surface Products from the People's Republic of China: Initiation of Less-Than-Fair-Value Investigation*, 83 Fed. Reg. 22,613, 22,614 (Dep't Com. May 16, 2018); *Certain Quartz Surface Products from the People's Republic of China: Initiation of Countervailing Duty Investigation*, 83 Fed. Reg. 22,618, 22,622 (Dep't Com. May 16, 2018) (together, the "Investigations"). Quartz surface products "consist of slabs and other surfaces created from a mixture of materials that includes predominately silica (e.g., quartz, quartz powder, cristobalite) as well as a resin binder (e.g., an unsaturated polyester)," and include "surfaces such as countertops, backsplashes, vanity tops, bar tops, work tops, tabletops, flooring, wall facing, shower surrounds, fire place surrounds, mantels, and tiles." *Investigations*, 83 Fed. Reg. at 22,618, 22,622. The initial scope of the investigation "[s]pecifically excluded . . . crushed glass surface products," defining crushed glass surface products to mean "surface products in which the crushed glass content is greater than any other single material, by actual weight." *Id.*

On March 1, 2019, Cambria asked Commerce to clarify this exclusion in the Investigations' scope text. *See* Letter from Cambria Co. LLC to Dep't Com., re: Certain Quartz Surface Products from the People's Republic of China: Request for Scope Clarification (Mar. 1, 2019) ("Scope Clarification Req."). The Scope Clarification Request noted that, in the wake of Commerce's preliminary affirmative determinations in the antidumping and countervailing investigations of quartz surface products from China, Chinese producers and exporters had begun to ship "quartz surface products made from ground glass powder that [were] virtually indistinguishable in appearance from other quartz surface products." *Id.* at 7. By contrast, the exclusion of crushed glass surface products in the initial Investigations was "intended to capture" a particular kind of "crushed glass surface product[] made by" domestic producers such as "IceStone, Vetrazzo, Curava, and Florentine Marble." *Id.* at 5. Those surface products contain pieces of crushed glass from recycled materials such as bottles and jars as an "eco-friendly solution" and have a distinct appearance that "emphasize[s] . . . [the] recycled content." *Id.* at 5–6. Because the scope language in the Investigations "was never intended" to cover crushed glass products that were effectively indistinguishable from other quartz surface products, Cambria proposed an amendment to the scope text that enumerated four requirements

to meet the crushed glass exclusion. *Id.* at 7, 11. On May 14, 2019, Commerce modified the scope of the Investigations, reasoning that:

> [I]nformation [on the record] overtly suggests the possibility of future evasion of the orders if we do not modify the scope in these investigations. . . .
>
> Commerce should modify the scope of the Petitions to best reflect an effective scope of the potential orders which would provide the injured domestic parties with the remedy it is seeking — a remedy which counters injurious dumping and subsidization. Indeed, were Commerce not to address it here, we would fail to best address the dumping and subsidies found to exist in these investigations.

Mem. from M. Skinner to G. Taverman, re: Certain Quartz Surface Products from the People's Republic of China: Scope Modification Determination at 4 (Dep't Com. May 14, 2019) ("Scope Modification Mem."). Importers subsequently challenged Commerce's scope modification as unlawful and unjustified by substantial evidence. *See MS Int'l, Inc. v. United States*, 32 F.4th 1145 (Fed. Cir. 2022). The Federal Circuit reasoned, in relevant part, that because "Commerce found the *Preliminary Scope* to be defective [where] Chinese producers and exporters could evade antidumping and countervailing duty orders by selling 'quartz glass,'" Commerce acted within its discretion when it "modified the scope to cure the defect" and gave "appropriate deference to the petitioner's intent." *Id.* at 1150–52.

On July 11, 2019, Commerce issued final antidumping and countervailing duty orders on certain quartz surface products from China. *See QSP Orders*, 84 Fed. Reg. 33,053. The scope of the *QSP Orders* once again "specifically exclude[s] crushed glass surface products." *Id.* at 33,055–56. The exemption for crushed glass surface products in the final *QSP Orders* ("crushed glass exclusion") requires the satisfaction of four criteria, defined as follows:

> Specifically excluded from the scope of the orders are crushed glass surface products. Crushed glass surface products must meet each of the following criteria to qualify for this exclusion: (1) The crushed glass content is greater than any other single material, by actual weight; (2) there are pieces of crushed glass visible across the surface of the product; (3) at least some of the individual pieces of crushed glass that are visible across the surface are larger than one centimeter wide as measured at their widest cross-section (glass pieces); and (4) the distance

> between any single glass piece and the closest separate glass piece does not exceed three inches.

Id.

SMA Surfaces, an importer of quartz and glass surface products from China, filed a scope ruling request with Commerce on April 28, 2021. Letter from SMA Surfaces, Inc. to Dep't Com., re: Antidumping Duty Order on Certain Quartz Surface Products from the People's Republic of China: Scope Ruling Request (Apr. 28, 2021), P.R. 1–2 ("Scope Ruling Req."). SMA Surfaces asked that Commerce find that three of its glass surface products — branded "Grey Concrete Leather," "Andes," and "Twilight" (together, the "three glass surface products") — were outside the scope of the *QSP Orders* because they satisfied the crushed glass exclusion. *Id.* SMA Surfaces submitted photos in an effort to demonstrate compliance with the four criteria. *Id.* at 4. SMA Surfaces represented that these photos depicted glass pieces of various sizes — ranging from 0.2–0.3 millimeters to larger than one centimeter — all within three inches of one another. *Id.* The photos were sufficient to satisfy the fourth criterion, SMA Surfaces argued, because nothing in the fourth criterion limited the definition of "any single glass piece" to only one-centimeter-wide glass pieces. *Id.* In the alternative, even if Commerce were to limit the fourth criterion to one-centimeter-wide glass pieces, SMA Surfaces maintained that the photos demonstrated that the three glass surface products still satisfied the exclusion criteria. *Id.* In opposing comments submitted to Commerce on May 14, 2021, Petitioner Cambria argued that SMA Surfaces's products were subject to the *QSP Orders* because they did not meet the second, third, and fourth elements of the crushed glass exemption. *See* Letter from Cambria Co. LLC to Dep't Com., re: Response to Scope Ruling Request by SMA Surfaces, Inc. at 7–14 (May 14, 2021), P.R. 3.[1] Of relevance in this appeal, Cambria argued against SMA Surfaces's interpretation of the fourth criteria. *See id.* at 11–14. Per Cambria, "glass pieces" is a defined term referring to visible pieces of crushed glass larger than one centimeter that is then used in criterion four's distance requirement. *See id.* at 12.

On July 16, 2021, Commerce concluded that the three glass surface products were within the scope of the *QSP Orders*. Final Scope Ruling at 5–6. Commerce explained that the three glass surface products met the first through third criteria of the crushed glass exclusion, *id.* at 5, but did not meet the fourth:

[1] Cambria's comments to Commerce also alleged that it was unclear whether SMA Surfaces's products satisfied the first criterion of the exclusion. *See id.* at 14.

> The fourth criterion then specifies that it is these one-centimeter glass pieces that must be at most three inches apart. Here, SMA Surfaces has provided record evidence demonstrating that its glass surface products are predominantly glass. The photographs SMA Surfaces submitted indicate that there are small pieces of glass scattered across the surface of its products and that the products contain some one centimeter "glass pieces," as defined by the crushed glass scope exclusion language.
>
> As explained above, the scope specifies that the distance between any single "glass piece" and the closest separate "glass piece" may not exceed three inches. However, an examination of the pictures of the three glass surface products shows that they do not meet the crushed glass scope exclusion, because not all one centimeter "glass pieces" are within three inches of another one centimeter "glass piece" across the surface of the product.

Id.

SMA Surfaces timely filed the instant action against Defendant United States ("the Government") on September 9, 2021 to challenge the Final Scope Ruling. *See* Compl. at 1, Sept. 9, 2021, ECF No. 10. Cambria filed an unopposed motion to intervene as Defendant-Intervenor on October 8, 2021, *see* Def.-Inter.'s Mot. to Intervene, Oct. 8, 2021, ECF No. 12, which the court granted later that day, *see* Ct. Order Granting Def.-Inter.'s Mot. to Intervene, Oct. 8, 2021, ECF No. 18. SMA Surfaces filed its Motion for Judgment on the Agency Record on February 16, 2022 pursuant to USCIT Rule 56.2. *See* Pl.'s Mot. for J. on Agency R., Feb. 16, 2022, ECF No. 22 ("Pl.'s Br."). The Government and Cambria filed response briefs on May 25, 2022, *see* Def.'s Resp. to Pl.'s Mot. for J. on Agency R., May 25, 2022, ECF No. 27 ("Def.'s Br."); Def.-Inter.'s Resp. Br. in Opp'n to Mot. for J. on Agency R., May 25, 2022, ECF No. 26 ("Def.-Inter.'s Br."), to which SMA Surfaces replied on July 8, 2022, *see* Pl.'s Reply Br., July 8, 2022, ECF No. 28 ("Pl.'s Reply"). Cambria moved for oral argument, *see* Mot. for Oral Arg., July 29, 2022, ECF No. 31, which the court granted and scheduled for November 1, 2022, *see* Order on Mot. for Oral Arg., Sept. 13, 2022, ECF No. 32. The court issued questions in advance of argument, *see* Ct.'s Qs. for Oral Arg., Oct. 11, 2022, to which the parties filed responses, *see* Pl.'s Resp. to Ct.'s Oral Arg. Qs. ("Pl.'s OAQ Resp."), Oct. 25, 2022, ECF No. 35; Def.'s Resp. to Ct.'s Oral Arg. Qs., Oct. 25, 2022, ECF No. 36 ("Def.'s OAQ Resp."); Def.-Inter.'s Resp. to Ct.'s Oral Arg. Qs., Oct. 25, 2022, ECF No. 37 ("Def.-Inter.'s OAQ Resp."). The court invited parties to file submissions after oral argument on November 1, 2022, *see* Oral Arg., Nov. 1, 2022, ECF No. 39,

and on November 9, 2022, all parties made such submissions, *see* Pl.'s Post-Arg. Subm., Nov. 9, 2022, ECF No. 40; Def.'s Post-Arg. Subm., Nov. 9, 2022, ECF No. 41; Def.-Inter.'s Post-Arg. Subm., Nov. 9, 2022, ECF No. 42.

DISCUSSION

The court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1581(c), which empowers the Court of International Trade to review decisions by Commerce concerning "whether a particular type of merchandise is within the class or kind of merchandise described in an . . . antidumping or countervailing duty order." 19 U.S.C. § 1516a(a)(2)(B)(vi). When reviewing final scope rulings by Commerce, "[t]he court shall hold unlawful any determination . . . found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id.* § 1516a(b)(1)(B)(i).

Plaintiff mounts three challenges to the Final Scope Ruling. First, SMA Surfaces argues that Commerce's construction of the crushed glass exclusion's fourth criterion was not in accordance with law: specifically, Commerce's interpretation of the term "glass piece" in the fourth criterion as a defined term that included the third criterion's dimensional requirements was inconsistent with the plain text of the *QSP Orders*. Second, assuming, *arguendo*, that Commerce's interpretation was permissible, SMA Surfaces contends that substantial evidence on the record showing satisfaction of the fourth criterion did not justify Commerce's determination that the scope of the *QSP Orders* included the three glass surface products. Third, Plaintiff argues that Commerce, in considering the 19 C.F.R. § 351.225(k)(1) factors, failed to address detracting evidence and improperly relied on a prior scope determination. The court considers each in turn.

I. Commerce's Interpretation of "Glass Piece" Is in Accordance with Law

The first question is whether Commerce's interpretation of the term "glass piece" in the scope text was in accordance with law. Recall that the third and fourth criteria — the only portions of the *QSP Orders* here at issue — require:

> (3) at least some of the individual pieces of crushed glass that are visible across the surface are larger than one centimeter wide as measured at their widest cross-section (glass pieces); and (4) the distance between any single glass piece and the closest separate glass piece does not exceed three inches.

QSP Orders, 84 Fed. Reg. at 33,056. SMA Surfaces argued before Commerce that "a plain reading of the scope compels the conclusion

that the plain language of 'any single glass piece' in the scope cannot be limited to mean a glass piece larger than one centimeter. There is nothing in the fourth factor that defines 'glass piece' or limits this term to glass pieces larger than one centimeter," in contrast with the third criterion, which uses the word "*some* . . . pieces of crushed glass" instead of "*any* single glass piece." Pl.'s Br. at 8 (emphasis added); *see also* Final Scope Ruling at 4. Having noted these arguments, Commerce reasoned in the Final Scope Ruling:

> We find that the language in the scope of the *Orders* is dispositive with regard to these products. . . . The third criterion of the crushed glass scope exclusion defines a "glass piece" as pieces of glass "larger than one centimeter wide as measured at their widest cross-section (glass pieces)." The fourth criterion then specifies that it is these one-centimeter glass pieces that must be at most three inches apart. . . .
>
> [T]he scope specifies that the distance between any single "glass piece" and the closest separate "glass piece" may not exceed three inches.

Final Scope Ruling at 5–6. SMA Surfaces now seeks review of Commerce's interpretation. The court declines to adopt Plaintiff's construction of the third and fourth criteria and concludes that Commerce's interpretation was consistent with the plain text of the *QSP Orders* and is, therefore, in accordance with law.

Because "[n]o specific statutory provision govern[s] the interpretation of the scope of antidumping or countervailing orders," Federal Circuit case law and 19 C.F.R. § 351.225(k) together supply a three-step inquiry.[2] *Meridian Prods., LLC v. United States*, 851 F.3d 1375, 1381 (Fed. Cir. 2017) (internal quotation marks omitted) (alterations in original) (quoting *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 776 F.3d 1351 (Fed. Cir. 2015)). "First, Commerce must look to the text of an order's scope; second, Commerce will consult descriptions of the merchandise in other sources [pursuant to 19 C.F.R. § 351.225(k)(1)]; and third, if still necessary, Commerce may

[2] Commerce issued the Final Scope Ruling on July 15, 2021, pursuant to 19 C.F.R. § 351.225(d), (k)(1). *See* Final Scope Ruling at 1. In September 2021, Commerce promulgated a final rule that amended the text of 19 C.F.R. § 351.225(k)(1) to reflect the three-step inquiry that had been fashioned by the Federal Circuit's combining of case law and the prior code provisions. *See Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws*, 86 Fed. Reg. 52,300, 52,322–23 (Dep't Com. Sept. 20, 2021). Because the revisions to § 315.225 applied "to scope inquiries for which a scope ruling application is filed . . . on or after November 4, 2021," *id.* at 52,300, the court applies the prior version of 19 C.F.R. § 351.255(k) in combination with Federal Circuit case law, *see* Pl.'s Br. at 12 n.27; Def.'s Br. at 9 n.2; Def.-Inter.'s Br. at 11 n.2.

consider additional factors comparing the merchandise in question to merchandise subject to the order [pursuant to 19 C.F.R. § 351.225(k)(2)]." *Id.* The first "question of whether the unambiguous terms of a scope control the inquiry, or whether some ambiguity exists, is a question of law" that the court reviews *de novo*.[3] *Id.* at 1382 (citing *Allegheny Bradford Corp. v. United States*, 28 CIT 830, 842, 342 F. Supp. 2d 1172, 1183 (2004)). "If the scope [language] is unambiguous, it governs." *Id.* at 1381 & n.7 (footnote omitted) ("The relevant scope terms are 'unambiguous' if they have 'a single or clearly defined or stated meaning.'" (quoting *Unambiguous*, *Webster's Third New International Dictionary of the English Language Unabridged* (1986))).

Text and context both affirm Commerce's interpretation of "glass piece" as a defined term in the *QSP Orders*. To begin, placement of shorthand text in parentheses after a long description commonly indicates a defined term.[4] When reviewing the scope of an antidumping or countervailing duty order, this court has previously understood subsequent references to a term within parentheses to relate back to the initial definition. *See Eckstrom Indus., Inc. v. United States*, 22 CIT 1034, 1045, 27 F. Supp. 2d 217, 226 (1998) ("Commerce placed

[3] Where appropriate, the court must grant "Commerce 'substantial deference' with regard to its interpretation of its own antidumping duty and countervailing duty orders." *Id.* at 1381–82 (quoting *King Supply Co. v. United States*, 674 F.3d 1373, 1348 (Fed. Cir. 2012)). But Commerce may not "interpret orders contrary to their terms." *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002) (internal quotation marks omitted) (quoting *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1371 (Fed. Cir. 1998)). The court therefore does not owe deference to Commerce for its determination of whether the text of the scope order is unambiguous, which is a question within the competence of courts and reviewed *de novo*. *See, e.g.*, *Arcelormittal Stainless Belg. N.V. v. United States*, 694 F.3d 82, 89–90 (Fed. Cir. 2012) (holding that "Commerce was not justified in finding the order ambiguous" where "Commerce's broad reading of the . . . order is in conflict with the plain language of the order itself"); *cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (When interpreting agency rules, "the possibility of deference can arise only if a regulation is genuinely ambiguous. . . . even after a court has resorted to all the standard tools of interpretation.").

The court further notes that the deference Commerce gave to Cambria in *MS International*, which required Commerce to set an investigation scope consistent with the petitioner's intent, *see* 32 F.4th at 1151, and is sourced in Commerce's statutory obligation to consider an interested party's petition, *see Ad Hoc Shrimp Trade Action Comm. v. United States*, 33 CIT 915, 924, 637 F. Supp. 2d 1166, 1174–75 (2009) (citing 19 U.S.C. §§ 1673, 1673a(b)), is unrelated to the deference implicated in this case. Here, it is the court that may give deference to Commerce, if appropriate, in its interpretation of the scope text when deciding the final scope ruling. This latter deference is ultimately sourced in Congress's delegation of authority to Commerce as "the agency charged with administering the antidumping [and countervailing] duty program." *Ericsson GE Mobile Commc'ns, Inc. v. United States*, 60 F.3d 778, 783 (Fed. Cir. 1995), *as corrected on reh'g* (Sept. 1, 1995).

[4] This commonplace practice of defining shorthand is also present in the parties' briefing. *See, e.g.*, Pl.'s Br. at 1 (defining "ADD," "CVD," and "QSP Orders," among other terms, using parentheses); Def.'s Br. at 1 (similar); Def.-Inter.'s Br. at 1 (similar). Furthermore, SMA Surfaces does not dispute the use of other defined terms in the *QSP Orders*. *See, e.g.*, *QSP Orders*, 84 Fed. Reg. at 33,053 (defining "quartz surface products").

'pipe fittings' within a parenthetical. Thereafter, Commerce referred simply to 'pipe fittings' when defining the scope. Because 'pipe fittings' as defined by Commerce refers only to welded stainless steel pipe fittings, all of Commerce's subsequent descriptions of pipe fittings can refer only to welded pipe fittings . . . ." (citations omitted)). Commerce applied that same understanding here. The *QSP Orders* place "glass pieces" in parentheses *after* the description of "individual pieces of crushed glass that are visible across the surface [and] larger than one centimeter wide as measured at their widest cross-section." *QSP Orders*, 84 Fed. Reg. at 33,056. The text then twice reprises "glass pieces" in the immediately following criterion, which thereby refers back to the third criterion's dimensional limitations. *See id.*

The accumulative and successively narrowing design of the crushed glass exclusion makes Commerce's reading all but certain. When "interpreting a regulatory provision, we examine the text of the regulation *as a whole*, reconciling the section in question with sections related to it." *Lengerich v. Dep't of Interior*, 454 F.3d 1367, 1370 (Fed. Cir. 2006) (emphasis added). The first criterion, as a kind of threshold requirement, mandates a sufficient percentage weight of crushed glass. The second through fourth criteria enumerate accumulative, successively narrowing requirements: Criterion two requires *visible* crushed glass; criterion three requires *one-centimeter wide*, visible crushed glass; and criterion four requires *adequately distanced*, one-centimeter-wide, visible crushed glass. Instead of repeating criterion three's detailed requirements, criterion four uses shorthand to accomplish this successively narrowing scheme. The references to "glass piece[s]" in the fourth criterion, therefore, refer to pieces of crushed glass that meet the third criterion's dimensional limitations.

SMA Surfaces's arguments that "glass piece" is not a defined term are unavailing. Plaintiff argues that the definition of "glass pieces" in the third criterion, which uses the term "at least *some* of the individual pieces," is in tension with the use of "*any* single glass piece" in the fourth criterion because the ordinary meaning of "'any' cannot mean 'some.'" Pl.'s Br. at 8–9 (emphasis added). Specifically, "any" is "used to indicate one selected *without restriction*," Pl.'s Resp. at 6 (emphasis in original) (internal quotation marks omitted) (quoting *Any*, Merriam-Webster, https://www.merriam-webster.com/dictionary/any (last visited Jan. 11, 2023)), and therefore "'any single glass piece' means any visible glass piece as would be necessary to observe distances between them necessitated by the fourth criterion — and not only those that are larger than one-centimeter, as referenced in the third criterion," *id.* at 5–6. But this approach cherry-picks two words and strips them of context. "[T]he term 'any' 'has a

diversity of meaning and may be employed to indicate "all" or "every" as well as "some" or "one" and its meaning in a given statute depends upon the context and the subject matter of the statute.'" *Eteros Techs. USA, Inc. v. United States*, 46 CIT __, __, 592 F. Supp. 3d 1313, 1324 (2022) (quoting *Any*, *Black's Law Dictionary* (6th ed. 1996)). Interpreting "glass piece" as a defined term resolves the very tension Plaintiff identifies. Criterion three states that *some* pieces of crushed glass, out of all the pieces of crushed glass visible across the product's surface, must meet dimensional requirements; criterion four requires *any* of those pieces that do meet the dimensional requirements to also meet the distance requirements. In short, the Government is correct that "the two criteria are harmonious: the third criterion defines the term, and the fourth criterion explicitly reprises it." Def.'s Br. at 13.

Plaintiff's focus on the editing history surrounding punctuation similarly fails to overcome the plain text reading. SMA Surfaces insists that "there are no quotation marks around the parenthetical term, capitalization of the words in the term, or other indicia that it is to function as a defined term, such as being prefaced with 'hereinafter.'" Pl.'s OAQ Resp. at 4. Additionally, the style of the parenthetical in Cambria's proposal, which styled the parenthetical as ("Glass Pieces") and all subsequent references as Glass Piece, differs from the final version that was published in the *Federal Register*, which styled the parenthetical as (glass pieces) and all subsequent references as glass piece. *Compare* Scope Modification Mem. at 12, *with* Scope Clarification Req. at 9. In noting this distinction, SMA Surfaces argues that Commerce's subsequent modification of Cambria's proposed language supersedes Cambria's initial intention to define the term. *See* Pl.'s OAQ Resp. at 4–5. But all legal documents authored by Commerce before the court — whether published in the *Federal Register* or filed via ACCESS — have used parentheticals with non-capitalized terms and no quotation marks in order to define shorthand, suggesting a consistent style. *See, e.g.*, *QSP Orders*, 84 Fed. Reg. at 33,053 (defining "quartz surface products" in a parenthetical without capitalization or quotation marks); *Scope Modification Determination* at 1 (same); Final Scope Ruling at 1 (defining "glass surface products" in a parenthetical without capitalization or quotation marks). Furthermore, "a purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting [the text's] true meaning. . . . [Textual] construction 'is a holistic endeavor,' and, at a minimum, must account for [the] full text, language as well as punctuation, structure, and subject matter." *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454

(1993) (quoting *United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)). That Commerce changed the quotation marks and capitalized letters from Cambria's proposal — a change that was almost certainly stylistic rather than substantive[5] — cannot supply an inference so broad that undoes the crushed glass exclusion's structure of accumulative, successively narrowing criteria.

The broader issue with SMA Surfaces's argument is that it fails to offer a plausible explanation for what the "glass pieces" parenthetical at the end of the sentence could signify, if not a defined term for the products described in the preceding sentence. The court cannot accept an interpretation that renders the "(glass pieces)" parenthetical meaningless and "mere surplusage." *Polites v. United States*, 35 CIT 312, 317, 755 F. Supp. 2d 1352, 1357 (2011) (internal quotation marks omitted) (quoting *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1073 (Fed. Cir. 2001)); *cf. Sharp v. United States*, 530 F.3d 1234, 1238 (Fed. Cir. 2009) (rejecting an interpretation of statutory text because it "would violate the canon that we must 'give effect, if possible, to every clause and word of a statute'" (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001))). In response, Plaintiff proposes that "'glass pieces' in parentheses could also simply refer to 'individual pieces of crushed glass that are visible across the surface' without the dimensional limitations." Pl.'s Reply at 9; *see also id.* at 10 ("[T]here is no indication . . . in the plain language . . . that the term 'glass pieces' is limited only to glass pieces as being larger than one-centimeter in width."). But the parenthetical's placement is indication enough: "(glass pieces)" comes after the entire criterion, which includes the dimensional limitations, instead of in the middle of the sentence. *See Safeguard Base Ops., LLC v. United States*, 989 F.3d 1326, 1342 (Fed. Cir. 2021) ("[C]ourts must consider not only the bare meaning of each word but also the *placement* and purpose of the language . . . ." (emphasis added) (internal quotation marks omitted) (quoting *Barela v. Shinseki*, 584 F.3d 1379, 1383 (Fed. Cir. 2009))). Lacking any reasonable alternative, the court must interpret the text in a manner that gives effect to every word.[6]

[5] Commerce also represented to the court at oral argument that its internal style guide omits quotation marks and capitalized letters from parentheticals that define shorthand like "glass pieces." *See* Oral Arg. But because the style guide is neither publicly available nor in the record, the court does not rely on it in holding for Commerce.

[6] And even if the definition of "glass pieces" differed in ordinary meaning from "any single glass piece," the court must still adhere to the defined term in interpreting the *QSP Orders*. *Cf. Van Buren v. United States*, 141 S. Ct. 1648, 1657 (2021) ("When 'a statute includes an explicit definition' of a term, 'we must follow that definition, even if it varies from a term's ordinary meaning.'" (quoting *Tanzin v. Tanvir*, 141 S. Ct. 486, 490 (2020))).

Unsupported by the plain text,[7] SMA Surfaces's stilted reading of the fourth criterion cannot stand. The third criterion of the crushed glass exclusion unambiguously defines "glass piece" to be a piece of crushed glass that is "visible across the surface [and] larger than one centimeter wide as measured at their widest cross-section." *QSP Orders*, 84 Fed. Reg. at 33,056. Interpreting "glass piece" to be a defined term "reconciles the text of the entire regulation, not simply isolated sentences" or phrases. *Lengerich*, 454 F.3d at 1370 (internal quotation marks omitted) (quoting *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1577 (Fed. Cir. 1995)). Because all subsequent references to "glass piece" incorporate the third criterion's dimensional requirements, the court holds that Commerce's construction of the scope language in the fourth criterion is consistent with the plain meaning and, therefore, in accordance with law.

II. Substantial Evidence Supported Commerce's Inclusion of the Grey Concrete Leather and Andes Products, but Not the Twilight Product

Having established that criteria three and four are unambiguous, the court turns to the next question "of whether a product meets the unambiguous scope terms presents a question of fact reviewed for substantial evidence." *Meridian Prods.*, 851 F.3d at 1382 (citing *Novosteel SA v. United States*, 284 F.3d 1261, 1269 (Fed. Cir. 2002)). "Substantial evidence 'means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *CS Wind Viet. Co. v. United States*, 832 F.3d 1367, 1373 (Fed. Cir. 2016) (quot-

[7] The text makes the meaning of "glass piece" in the fourth criterion clear. To the extent Commerce considered 19 C.F.R. § 351.225(k)(1) sources that evinced the anti-evasion intent motivating the scope language, the court concludes that those sources further support the Government and Cambria's position. *See* Final Scope Ruling at 6 ("In addition to the plain language of the scope of the *Orders*, we examined the other information enumerated under 19 C.F.R. § 351.225(k)(1) . . . , and find that none of these sources undermine our analysis.").

Commerce initially adopted Cambria's proposed crushed glass exclusion language in order to exempt crushed glass surface products from the scope of the *QSP Orders*. *See supra* p. 4. Commerce later narrowly tailored the initial language to the current four criteria in order to target a specific kind of crushed glass product while "address[ing] the potential for evasion" in the initial scope language. *See* Scope Modification Mem. at 4, 12 (explaining that the initial "exclusion language added to the scope was intended to address these kinds of crushed glass products").

If the fourth criterion were to include any visible pieces of crushed glass, applying a three-inch distance requirement to 0.2–0.3 millimeter pieces of glass would allow surface products with predominantly finer-sized pieces of glass to qualify for the crushed glass exclusion. As the Government and Cambria stress, that reading would undo Commerce's narrow tailoring in the Scope Modification Memorandum, where Commerce made clear its intentions to avoid evasion by "quartz glass" producers and to specifically exempt crushed glass surface products with recycled, ecofriendly aesthetics. SMA Surfaces's reading of the fourth criterion amounts to an attempt to diminish the *QSP Orders* by broadening the crushed glass exclusion.

ing *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477 (1951)). "Commerce must explain the basis for its decisions; while its explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court." *NMB Sing. Ltd. v. United States*, 557 F.3d 1316, 1319–20 (Fed. Cir. 2009) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co. ,* 463 U.S. 29, 43 (1983)). Commerce's determination "must take into account whatever in the record fairly detracts from its weight," *CS Wind Viet. Co.*, 340 U.S. at 477 (citation and internal quotation marks omitted), and conclusory statements do "not meet . . . 'the obligation to address important factors raised by comments from petitioners and respondents,'" *NMB Sing. Ltd.*, 557 F.3d at 1319.

Commerce's reasoning in the Final Scope Ruling states in relevant part:

> We find that the language in the scope of the Orders is dispositive with regard to [the three glass surface products]. . . . The third criterion of the crushed glass scope exclusion defines a "glass piece" as pieces of glass "larger than one centimeter wide as measured at their widest cross-section (glass pieces)." The fourth criterion then specifies that it is these one-centimeter glass pieces that must be at most three inches apart. . . .
>
> As explained above, the scope specifies that the distance between any single "glass piece" and the closest separate "glass piece" may not exceed three inches. However, an examination of the pictures of the three glass surface products shows that they do not meet the crushed glass scope exclusion, because not all one centimeter "glass pieces" are within three inches of another one centimeter "glass piece" across the surface of the product.

Final Scope Ruling at 5–6.

This explanation tests the outer bounds of "reasonably discernible." Commerce's only factual finding could be interpreted as nothing more than a mere conclusory recitation of criterion four. *Compare* Final Scope Ruling at 6 ("[N]ot all one centimeter 'glass pieces' are within three inches of another one centimeter 'glass piece' across the surface of the product."), *with QSP Orders*, 84 Fed. Reg. at 33,056 ("[T]he distance between any single glass piece and the closest separate glass piece does not exceed three inches."); *see also Nucor Corp. v. United States*, 44 CIT __, __, 461 F. Supp. 3d 1374, 1379 (2020) ("Commerce's discussion should not 'lack[] record citations supporting the agency's findings [and] . . . consist[] of conclusory statements . . . without any examples or citations to support those statements.'" (alterations in

original) (quoting *Hyundai Heavy Indus., Co. v. United States*, 42 CIT __, __, 332 F. Supp. 3d 1331, 1349 (2018))). What saves this factual finding from being a conclusory recitation is the reference to Commerce's "examination of the pictures."

Commerce's examination of the photographs that SMA Surfaces submitted is, therefore, at the heart of the dispute. SMA Surfaces argues that Commerce failed to properly consider the photographic evidence in the record that, in SMA Surfaces's estimation, shows that the three glass surface products qualify for the exclusion even under Commerce's read of the fourth criterion. In response, the Government and Cambria point to Commerce's express acknowledgment that its finding of fact is based on its "examination of the pictures" and citation to Exhibits 14–16 of the record. *See* Final Scope Ruling at 5–6 & nn.23–24. While Commerce is not required to detail every inferential step of its analysis, "the path of Commerce's decision" — the first step of which is Commerce's review of photographic evidence — must still be sufficiently detailed to be "reasonably discernable." *NMB Sing. Ltd.*, 557 F.3d at 1319. Furthermore, "[u]nder the standard of review it must apply, the court cannot sustain an agency determination that relies, in whole or in part, upon an *invalid finding* of material fact." *Guizhou Tyre Co. v. United States*, 46 CIT __, __, 557 F. Supp. 3d 1302, 1317 (2022) (emphasis added) (evidence of a successful board election immediately after an unsuccessful one was insufficient to support Commerce's conclusion that those board members had been effectively "appointed" instead of elected).

This court has long reasoned that photographs in the agency record may constitute substantial evidence justifying Commerce's factual findings. *See, e.g.*, *Aristocraft of Am., LLC v. United States*, 42 CIT __, __, 331 F. Supp. 3d 1372, 1380 (2018), *as amended* (Apr. 17, 2019) (photograph that gave rise to two competing and plausible inferences was substantial evidence for Commerce's determination of one of the two); *Shandong Rongxin Imp. & Exp. Co. v. United States*, 41 CIT __, __, 203 F. Supp. 3d 1327, 1341 (2017) (photographs of pencils manufactured abroad "are substantial evidence only of the fact that Dixon manufactured at least some pencils outside of the United States, at an unclear point in time," and did not preclude Commerce's finding that the manufacturer also produced pencils in the United States); *Zhaoqing New Zhongya Aluminum Co. v. United States*, 37 CIT 1003, 1008–09, 929 F. Supp. 2d 1324, 1329 (2013) (a photograph taken in 2010 of a developed property was not substantial evidence justifying Commerce's conclusion that the lot was similarly developed in 2006); *King Supply Co. v. United States*, 35 CIT 21, 30, 2011 WL 52496, at

*7 (Jan. 6, 2011), *rev'd on other grounds*, 674 F.3d 1343 (Fed. Cir. 2012) ("several photographs of pipe fittings produced by [the plaintiff] and used in structural applications" was substantial evidence justifying Commerce's finding that the plaintiff's "pipe fittings are used in structural applications"); *Wash. Int'l Ins. Co. v. United States*, 33 CIT 1023, 1030, 1034, 2009 WL 2460824, at *5, *8 (July 29, 2009) (photographs taken by the FDA constitute substantial evidence to support inferences relied upon by Commerce, even though "a number of Commerce's inferences from the record are tenuous"); *see also United Steel & Fasteners, Inc. v. United States*, 947 F.3d 794, 799–800 (Fed. Cir. 2020) ("pictures provided by US & F [that] clearly show the helical aspect of AREMA washers," when "taken together" with other evidence, constitute "substantial evidence . . . that US & F's washers are 'helical'"). The court now turns to undertaking a similar review of the photographs submitted by SMA Surfaces.[8]

A. Substantial Evidence Supports Commerce's Inclusion of the Grey Concrete Leather and Andes products in the QSP Orders.

SMA Surfaces submitted photographs of the Grey Concrete Leather and Andes products as Exhibits 14 and 15 to its Scope Ruling Request, J.A. at 161–66, and stated that the photographs "demonstrate[]" that "all . . . 'large glass chip pieces' are not separated by more than 3 inches from the next 'large glass chip piece.'" Scope Ruling Req. at 13. Despite Plaintiff's intentions in submitting the photographs, the court holds that Exhibits 14 and 15 constituted substantial evidence for Commerce's inclusion of the Grey Concrete Leather and Andes products within the scope of the *QSP Orders*.

"[A] reasonable mind might accept" Exhibits 14 and 15 "as adequate to support a conclusion" that — in the absence of a ruler measuring the requisite distance — certain of the circled glass pieces were more than three inches away from the nearest circled glass piece. *CS Wind Viet. Co.*, 832 F.3d at 1373 (internal quotation marks omitted) (quoting *Universal Camera*, 340 U.S. at 477); *see also* J.A. at 162 (a reasonable mind may find the bottom right circled glass piece to be more than three inches away from the nearest glass piece); J.A. at 164 (same with regards to the upper left circled glass piece). SMA Surfaces, of course, submitted the photographs with the conviction that they proved the contrary. *See* Pl.'s Br. at 5. Given that the pictures do not include sufficient ruler measurements to clarify the distance between all the glass pieces, more than one competing in-

[8] The pages of the Joint Appendix (Public Record), July 22, 2022, ECF No. 30, that contain the photographs referenced in the following paragraphs are also appended to this slip opinion.

ference regarding distance "seem[s] plausible. [But] [w]hat the court cannot do is direct Commerce to favor Plaintiff['s] preferred evidentiary inference over another reasonable inference." *Aristocraft of Am.*, 331 F. Supp. 3d at 1380 (citing *Mitsubishi Heavy Indus. Ltd. v. United States*, 275 F.3d 1056, 1062 (Fed. Cir. 2001)). Furthermore, "that Commerce's method of calculating a particular piece of . . . data may not yield a precise calculation does not render its determination unsupported by substantial evidence." *Jinxiang Hejia Co. v. United States*, 35 CIT 1190, 1198, 2011 WL 3915675, at *7 (Sept. 7, 2011).

SMA Surfaces's argument that it did "not circle *all* the one-centimeter glass pieces depicted in the photograph, just a representative few to help the Department identify the chips," Pl.'s Reply at 13 (emphasis in original), also fails. Indeed, SMA Surfaces caveated in the record that "some of the large glass chips are circled for ease of identification," Scope Ruling Req. at 11, and raises in its Reply that it "did not circle all of the visible one-centimeter pieces, many of which were obscured by the ruler," Pl.'s Reply at 13. But once again, SMA Surfaces asks the court to draw inferences in its favor, and once again, the court must decline. As this court previously explained in *Aristocraft of America*, which involved an analogous dispute over competing reasonable inferences drawn from photographic evidence in the agency record:

> This issue ultimately boils down to a problem of proof for Plaintiffs. Plaintiffs could have done much more to remove doubts about the photographs (and undermine any competing inferences). Better quality photos and better authentication would have helped, as would have affidavits . . . explaining what the photographs depicted. . . . Without the additional evidentiary proffer, Plaintiffs simply ask too much of the court to wade into fact finding on a sparse record.

Aristocraft of Am., 331 F. Supp. 3d at 1380. Ultimately, "[t]he burden of creating an adequate record lies with [interested parties] and not with Commerce." *Id.* (second alteration in original) (internal quotation marks omitted) (quoting *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011)).

SMA Surfaces also insists that Commerce should have issued supplemental questionnaires prior to the Final Scope Ruling if it doubted the photographic evidence to be true or sufficient. *See* Pl.'s Br. at 2, 7–8, 11. But there is no authority for Plaintiff's proposition. Commerce may, in certain circumstances, "determine[] that a response to a request for information" is deficient and "shall, to the extent practicable, provide that person with an opportunity to remedy

or explain the deficiency." 19 U.S.C. § 1677m(d). Yet § 1677m(d) is ultimately inapposite because SMA Surfaces's exhibits were not "a response to a request for information" by Commerce but an appendix to its own Scope Ruling Request.[9] Without any other statute or regulation obligating Commerce to ask for additional evidence before a final determination, the burden of developing an adequate record falls on SMA Surfaces, not Commerce. *See Aristocraft of Am.*, 331 F. Supp. 3d at 1380. Commerce's lack of supplemental questionnaires did not violate administrative process, and Commerce's Final Scope Ruling, as it regards the Grey Concrete Leather and Andes products, was supported by substantial evidence.[10]

B. Substantial Evidence Does Not Support Commerce's Inclusion of the Twilight Product in the QSP Orders.

SMA Surfaces submitted photographs of the Twilight product as Exhibits 16 to its Scope Ruling Request, J.A. at 167–74, and stated that "Twilight has pieces of glass larger than 1 cm across its surface, and these 1 cm glass pieces are all within 3 inches of another 1 cm or larger glass piece." Scope Ruling Req. at 13. The court concludes that Exhibit 16 did not constitute substantial evidence for Commerce's inclusion of the Twilight product within the scope of the *QSP Orders*.

In contrast to Exhibits 14 and 15, no "reasonable mind might accept" Exhibit 16 "as adequate to support a conclusion" that certain of the circled glass pieces were more than three inches away from the nearest circled glass piece. *CS Wind Viet. Co.*, 832 F.3d at 1373 (internal quotation marks omitted) (quoting *Universal Camera*, 340 U.S. at 477). The first image in Exhibit 16 shows five circled pieces of crushed glass at least one centimeter wide. *See* J.A. at 168. The second, third, and fourth images then prove with a ruler that the following pieces are all at most three inches apart: (1) the upper

[9] Analogizing to § 1677m(d) would be similarly unconvincing. "When a respondent provides seemingly complete . . . information, § 1677m(d) does not require Commerce to issue a supplemental questionnaire seeking assurances that the initial response was complete and accurate." *ABB Inc. v. United States*, 42 CIT __, __, 355 F. Supp. 3d 1206, 1222 (2018). Exhibits 14 through 16 are sparse, yes, but they do not approach the level of incompleteness or inaccuracy in prior cases mandating a supplemental questionnaire. *See, e.g.*, *Hyundai Heavy Indus. Co. v. United States*, 44 CIT __, __, 485 F. Supp. 3d 1380, 1391–92 (2020) (holding that Commerce failed to issue a supplemental questionnaire after becoming aware of reporting deficiencies in a party's response); *see also ABB Inc.*, 355 F. Supp. 3d at 1222 ("Commerce is not obligated to issue a supplemental questionnaire to the effect of, 'Are you sure?'").

[10] The additional detail in the Exhibit 16 photographs for Twilight, *see* J.A. at 167–74, further illustrates the point that SMA Surfaces failed to provide enough information in Exhibits 14 and 15 to compel Commerce to agree with its views.

middle and upper right pieces, *see* J.A. at 169; (2) the upper middle and lower middle pieces, *see* J.A. at 170; (3) the upper left and lower left pieces, *see* J.A. at 171. A reasonable mind, relying on the ruler in the photographs, must conclude that each circled "glass piece" in the first image is within three inches of another "glass piece." Commerce's reason for citing to Exhibit 16 to substantiate the proposition that "not all one centimeter 'glass pieces' are within three inches of another one centimeter 'glass piece across the surface of the product," Final Scope Ruling at 6 & n.24, is not "reasonably discernible" to the reviewing court, *NMB Sing. Ltd.*, 557 F.3d at 1319.

Commerce may have, as the Government and Cambria explain extensively in their briefing, considered Twilight's glass pieces to not be sufficiently "across the surface of the product" because the photographs may be confined to certain areas of the surface in a manner that contravenes the intent of the crushed glass exclusion. *See* Def.-Inter.'s Br. at 15, 19; Def.'s OAQ Resp. at 8–10; Def.-Inter.'s OAQ Resp. at 7–8. They note that Commerce found that "not all one centimeter 'glass pieces' are within three inches of another one centimeter 'glass piece' *across the surface of the product*." Final Scope Ruling at 6 (emphasis added); *see also* Def.-Inter.'s Br. at 19. But once again, the substantial evidence standard, while significantly deferential, requires more than a passing reference without further analysis. "Commerce's reasoning [needs] not be a model of clarity." *Bergerac, N.C. v. United States*, 24 CIT 525, 540, 102 F. Supp. 2d 497, 540 (2000). But "[t]here are no findings and no analysis here to justify the choice made, no indication of the basis on which [Commerce] exercised its expert discretion." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962). And it is well established that "[p]ost-hoc rationalizations of agency actions first advocated by counsel in court may not serve as the basis for sustaining the agency's determination." *U.H.F.C. Co. v. United States*, 916 F.2d 689, 700 (Fed. Cir. 1990). Without any further explanation of what about Exhibit 16 failed to justify Twilight's compliance with the fourth criterion, Commerce's decision is simply not "obvious in light of the determination as a whole." *Id.* Exhibit 16, therefore, does not constitute substantial

evidence, and the court must remand to Commerce for reconsideration.[11]

III. Commerce's Consideration of the 19 C.F.R. § 351.225(k)(1) Factors Was in Accordance with Law

Finally, SMA Surfaces argues that Commerce's consideration of the 19 C.F.R. § 351.225(k)(1) factors was not in accordance with law because it failed to address record evidence from Cambria's Scope Clarification Request, *see* Pl.'s Br. at 11–12, and improperly relied on a prior scope determination, *see id.* at 13. The code states in relevant part:

> [T]he Secretary will take into account the following:
>
> (1) The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission.

19 C.F.R. § 351.225(k)(1) (2021). Commerce, in turn, explained in its Final Scope Ruling:

> We find that the language in the scope of the Orders is dispositive with regard to [the three glass surface] products. . . .
>
> In addition to the plain language of the scope of the *Orders*, we examined the other information enumerated under 19 CFR 351.225(k)(1), including the description of the merchandise contained in the Petitions, the record from the investigations, the final report of the International Trade Commission, as well as prior scope rulings, and find that none of these sources undermine our analysis. Moreover, our determination here that SMA Surfaces' products do not meet the terms of the crushed glass

[11] Recall that because Commerce limited its "examination" to the "pictures of the glass surface products," Final Scope Ruling at 6, the court's substantial evidence inquiry is limited to only photographic evidence. The only other images of the Twilight product are in Exhibit 17 to the Scope Ruling Request — which compares Twilight and IceStone's Snow Flurry product — and the generic photo of the Twilight product in the body of the Scope Ruling Request. But because neither photograph includes a ruler or scale, Commerce could not have used them to reach a determination regarding distance. *See* Scope Ruling Req. at 4; J.A. at 175–76.

SMA Surfaces also argues that Commerce did not evaluate the photograph in Exhibit 17, J.A. at 175–76, which was "an important piece of record evidence" that showed the Twilight product to be "materially indistinguishable" from "Snow Flurry," a surface product by IceStone LLC. Pl.'s Reply at 16. In 2019, Cambria had included images of IceStone surface products in its request to Commerce for a scope modification as examples of products that should be exempt from the *QSP Orders*. Scope Clarification Req. at 4, 6 & Ex. 1. But because Exhibit 16, Commerce's cited basis for including Twilight, did not constitute substantial evidence, the court does not decide the question of whether Commerce erred in not addressing Exhibit 17.

> scope exclusion is consistent with our finding in the Panmin scope ruling, where we also found that, to meet the terms of the crushed glass scope exclusion, there must be visible one centimeter pieces of glass within three inches of another one centimeter piece of glass across the surface of the slab. Specifically, we stated that "an examination of the pictures of the three "ZZ" series glass products shows that they do not meet the crushed glass scope exclusion, because not all one centimeter 'glass pieces' are within three inches of another 'glass piece' across the surface of the product."

Final Scope Ruling at 6.

Commerce's consideration of the § 351.225(k)(1) factors was in accordance with law.[12] Plaintiff first insists that Commerce "ignored key record evidence" in failing to address alleged visual similarities between examples of glass surface products appended to Cambria's Scope Clarification Request and SMA Surfaces's products. *See* Pl.'s Br. at 11. But it is unclear why comparisons of digital images without any scale or ruler would be relevant to determining compliance with the fourth criterion of the crushed glass exclusion, which expressly requires a *quantitative* determination about the distance between glass pieces; Commerce may not use record evidence to "interpret orders contrary to their terms." *Duferco Steel*, 296 F.3d at 1097 (internal quotation marks omitted) (quoting *Wheatland Tube Co.*, 161 F.3d at 1371). Simply because Commerce found no detracting evidence regarding criterion four, Final Scope Ruling at 6, it had no such evidence to address, *CS Wind Viet. Co.*, 832 F.3d at 1373.

SMA Surfaces next takes aim at Commerce's citation to a prior scope determination ruling involving the same crushed glass exclusion to the *QSP Orders*. *See* Final Scope Ruling at 6 (citing *Final Scope Ruling on the Antidumping and Countervailing Duty Orders on Quartz Surface Products from the People's Republic of China: Request by Deyuan Panmin International Limited and Xiamen Deyuan Panmin Trading Co., Ltd.* (Dep't Com. Feb. 20, 2020) ("*Panmin*")). Plaintiff's position "is only that Commerce unlawfully relied on the Panmin ruling that adopted a flawed interpretation of the fourth criterion." Pl.'s OAQ Resp. at 11. The challenge relies on this court's ruling in

[12] Because Commerce had determined that the scope language was dispositive, Cambria raises the threshold issue of whether SMA Surfaces may challenge Commerce's consideration of the § 351.225(k)(1) factors at all. *See* Def.-Inter.'s Br. at 20–21. But because Commerce considered evidence under these factors, *see* Final Scope Ruling at 6, and insofar as its consideration of the factors bears on the reasonableness of Commerce's final determination, it is subject to judicial review. *Cf. SEC v. Chenery Corp.*, 318 U.S. 80, 89 (1943) (reasoning that an agency's "action must be judged by the standards which the [agency] itself invoked").

Star Pipe Products v. United States, which reasoned that a prior scope determination that "appear[ed] to be on point" did not "suggest that the support it lends is unqualified; to the contrary, the support [a prior scope ruling] provides is limited by the errors in that ruling." 44 CIT __, __, 463 F. Supp. 3d 1366, 1377 (2020). Furthermore, because the requester in *Panmin* did not appeal the determination and it was never reviewed or sustained by the Court of International Trade, SMA Surfaces contends that its weight as a "prior scope determination" under § 351.225(k)(1) is not binding and diminished. *See* Pl.'s Reply at 21.

This final argument also does not withstand scrutiny. As an initial matter, the text of the code makes no distinction based on whether a prior scope determination has been appealed to the Court of International Trade; any weighing is left to Commerce's discretion and our deferential standard of review. But more importantly, *Panmin* suffers from no such clear "error[]." *Star Pipe Prods.*, 463 F. Supp. 3d at 1377. Commerce determined in *Panmin* that criterion four applied to pieces of crushed glass wider than one centimeter. Today's ruling holds that interpretation to be consistent with plain meaning. That alone distinguishes this case from *Star Pipe Products*. *See id.* (identifying the "error[]" to be the prior scope determination's "same reliance on the description of 'pipe fittings' in the ITC Report that the court finds to be misplaced"). Commerce's citation to *Panmin* in the Final Scope Ruling, which provided belt-and-suspenders support for its plain text interpretation of criterion four, was therefore in accordance with law.[13] And because Commerce's determination as to the Grey Concrete Leather and Andes products was also justified by substantial evidence, the Final Scope Ruling is sustained insofar as it relates to those two glass surface products. *See* 19 U.S.C. § 1516a(b)(1)(B)(i).

CONCLUSION

Having concluded that criterion four unambiguously refers to pieces of crushed glass wider than one centimeter, the court holds that (1) Commerce's inclusion of Grey Concrete Leather and Andes in the *QSP Orders* was justified by substantial evidence and in accordance with law and, therefore, is sustained; and (2) Commerce's inclusion of Twilight in the *QSP Orders* was not justified by substantial evidence and must be remanded for reconsideration. The court remands to Commerce for further proceedings consistent with this

[13] Commerce also did not suggest that the glass surface products in *Panmin* were factually comparable to those in the instant Final Scope Ruling. *Contra* Pl.'s Reply at 22. Plaintiff's alternative argument, abandoned in later briefing, that Commerce should have "provided . . . record evidence demonstrating that the products at issue in that case were comparable" is unavailing for that reason alone. *Id.*

opinion. Commerce shall file with this court and provide to the parties its remand results within 90 days of the date of this order. Thereafter, the parties shall have 30 days to submit briefs addressing the revised Final Scope Ruling to the court, and the parties shall have 15 days thereafter to file reply briefs with the court.

SO ORDERED.

Dated: January 12, 2023
New York, New York

/*s*/ *Gary S. Katzmann*
JUDGE

APPENDIX

IN THE UNITED STATES COURT OF INTERNATIONAL TRADE
BEFORE: THE HONORABLE GARY S. KATZMANN, JUDGE

SMA SURFACES, INC.,	:	
Plaintiff,	:	
v.	:	Case No. 21-00399
UNITED STATES,	:	**PUBLIC VERSION**
Defendant,	:	
and	:	
CAMBRIA COMPANY LLC,	:	
Defendant-Intervenor.	:	

JOINT APPENDIX

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Jordan C. Kahn
Kavita Mohan
Michael S. Holton

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Counsel for Plaintiff SMA Surfaces, Inc. (f/k/a Polarstone US)

Dated: July 22, 2022

EXHIBIT 14

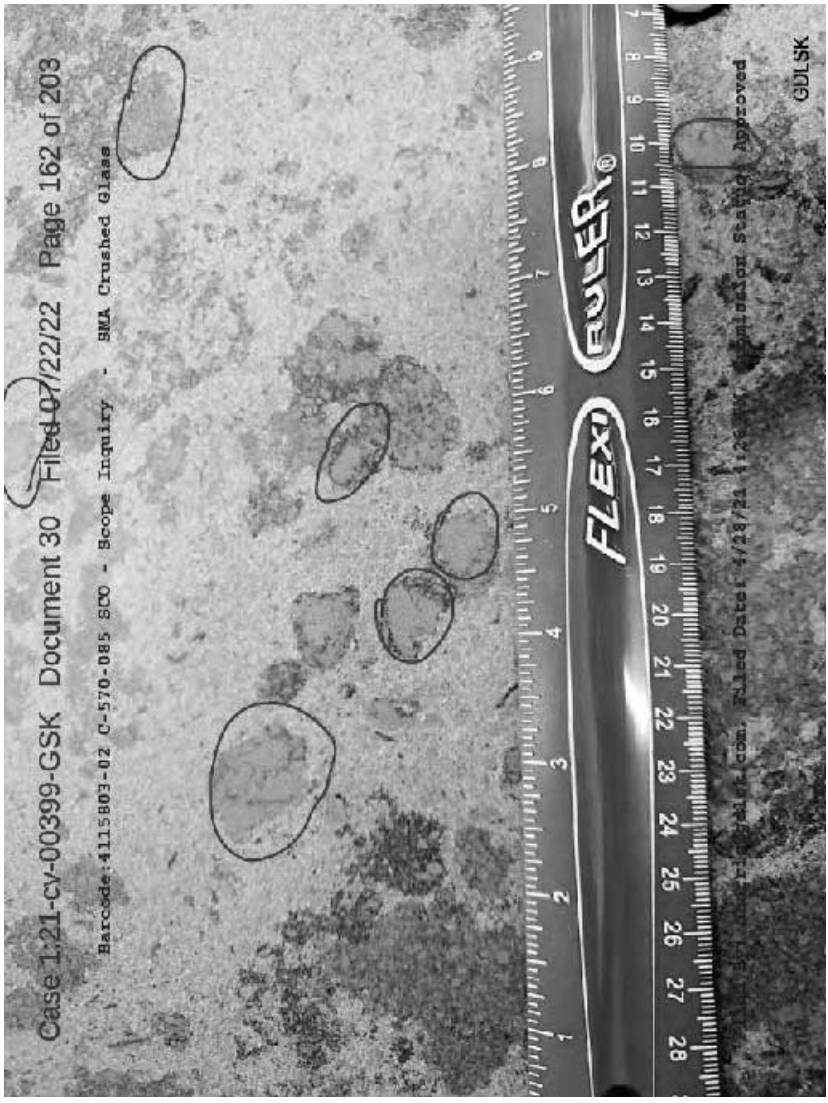
Case 1:21-cv-00399-GSK Document 30 Filed 07/22/22 Page 162 of 203
Barcode:4115803-02 C-570-085 SCO - Scope Inquiry - SMA Crushed Glass
FLEXI RULER®
GDLSK

EXHIBIT 15

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RULER
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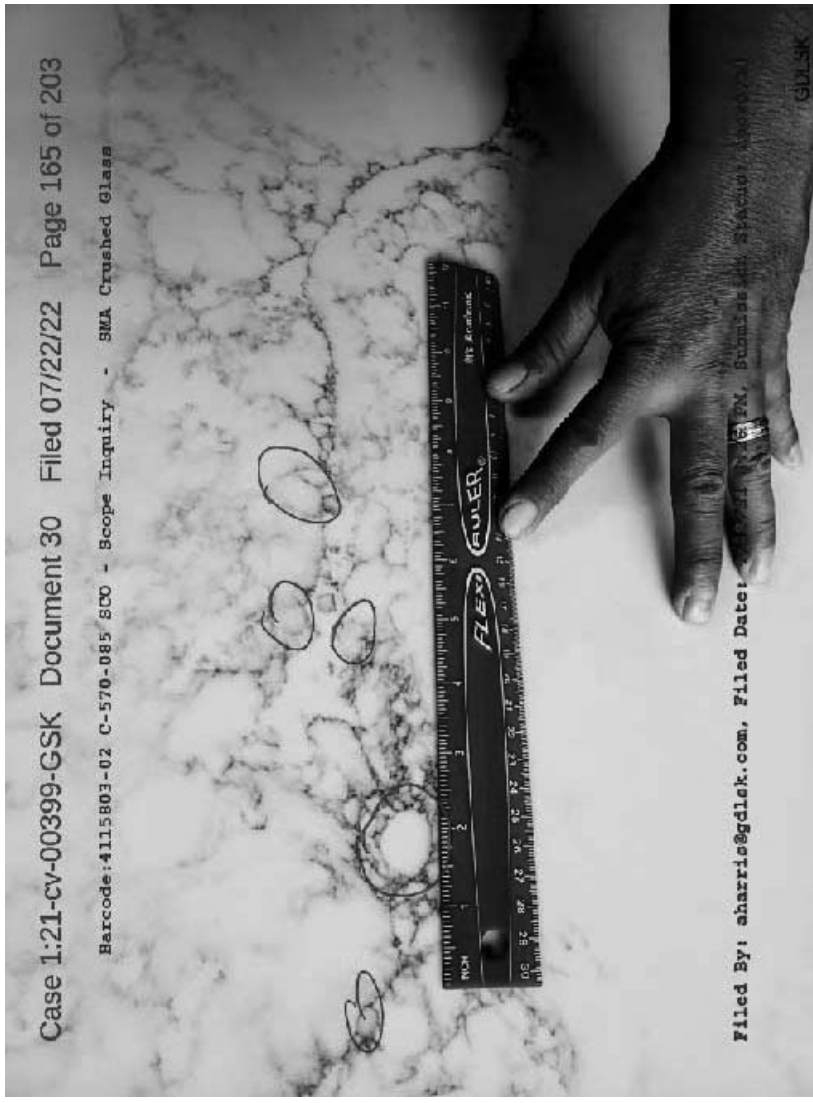
GDLSK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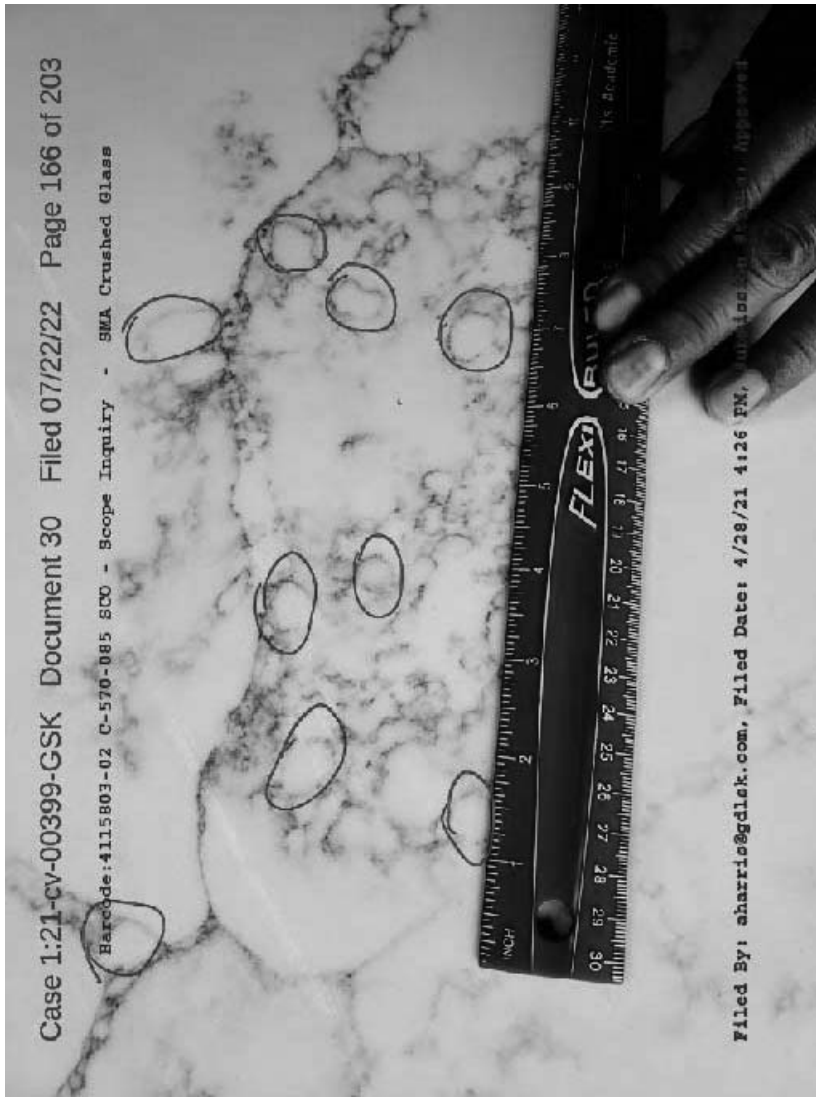
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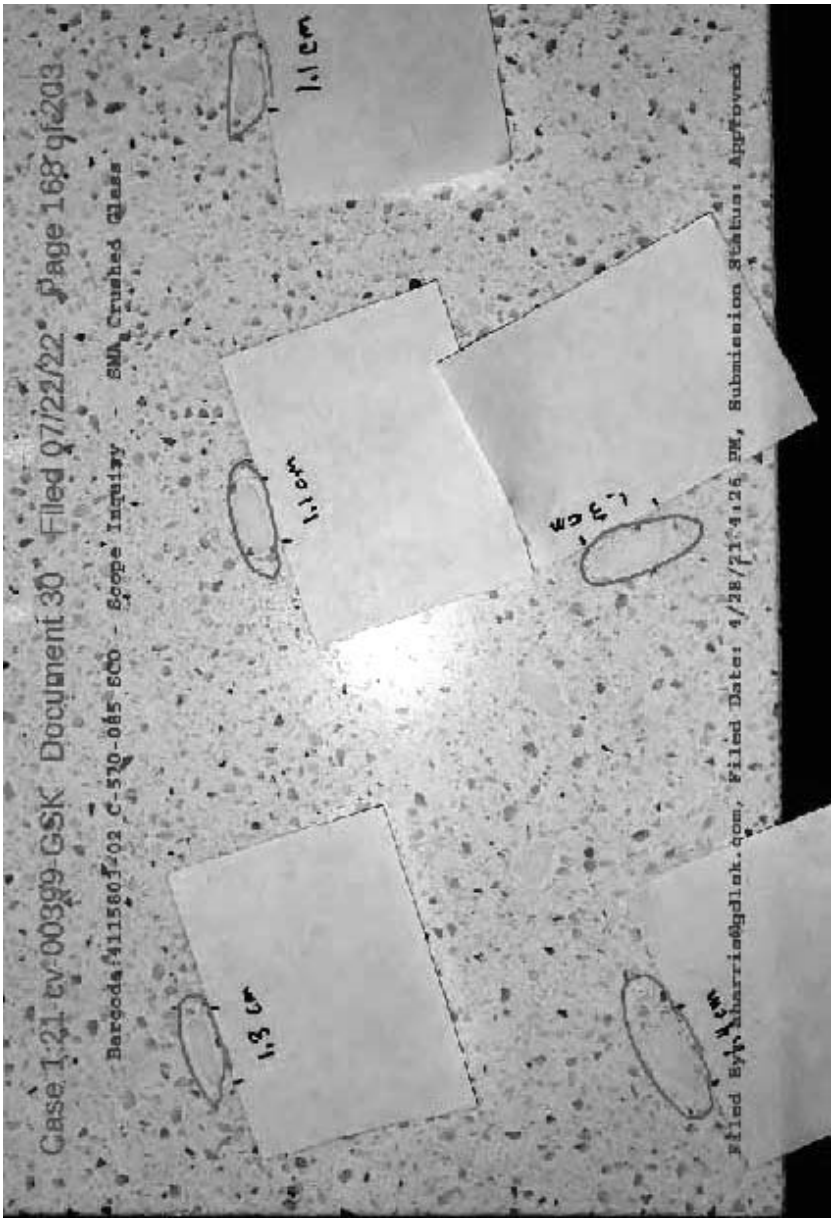
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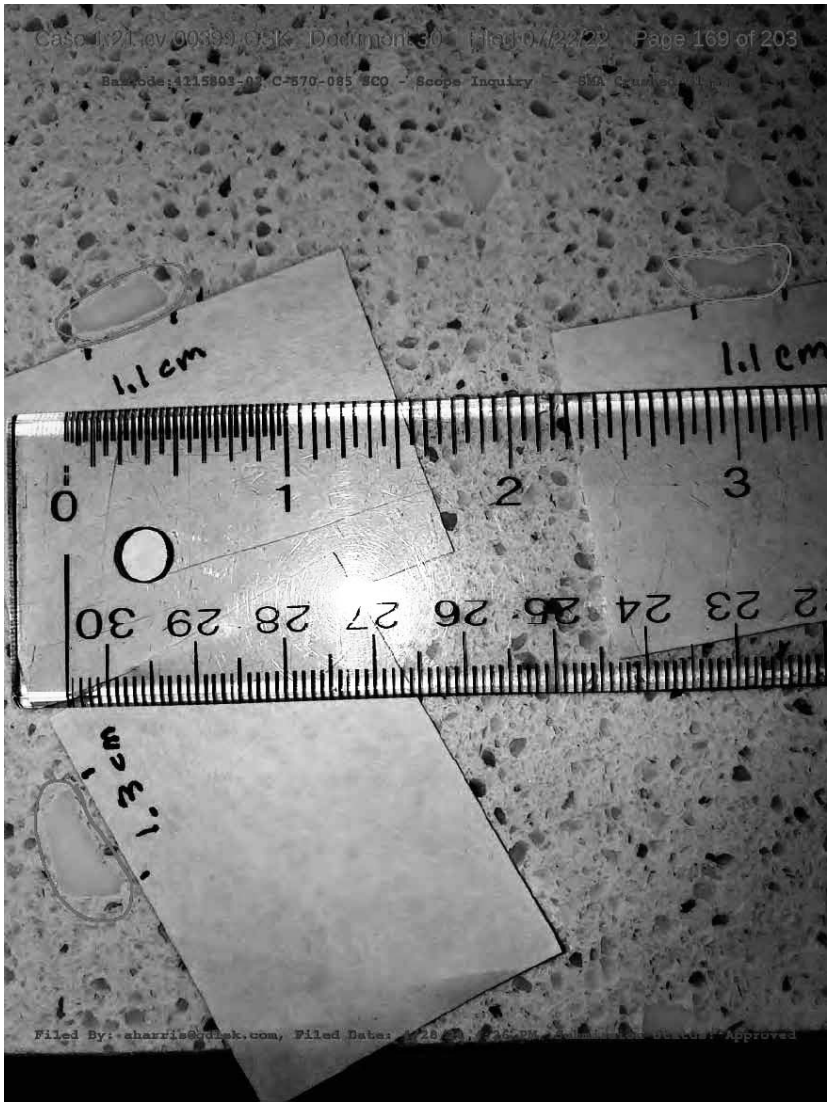
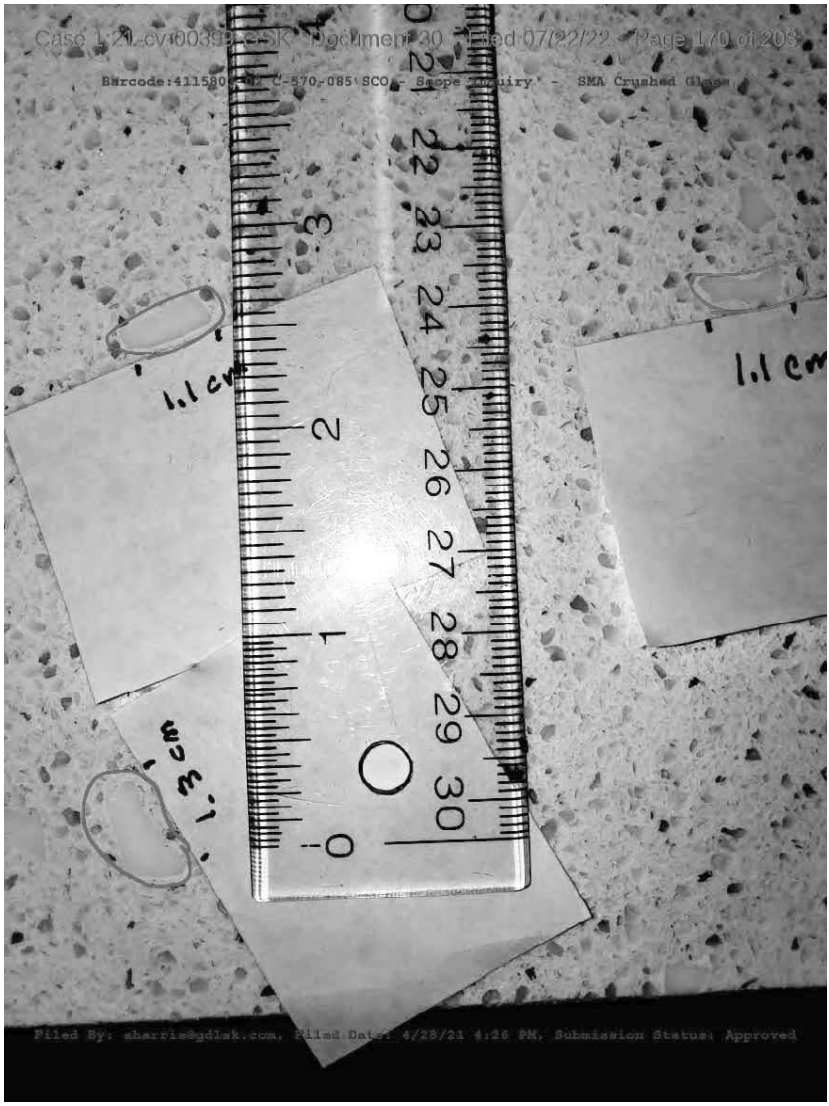
Filed By: Harris@gdlak.com, Filed Date: 4/28/21 4:26 PM, Submission Status: Approved
1.1 cm
1.1 cm
1.3 cm
1.4 cm


Case 1:21-cv-00399-CRK Document 30 Filed 07/22/22 Page 169 of 203
1.1 cm
1.1 cm
0
1
2
3
30 29 28 27 26 25 24 23
1.3 cm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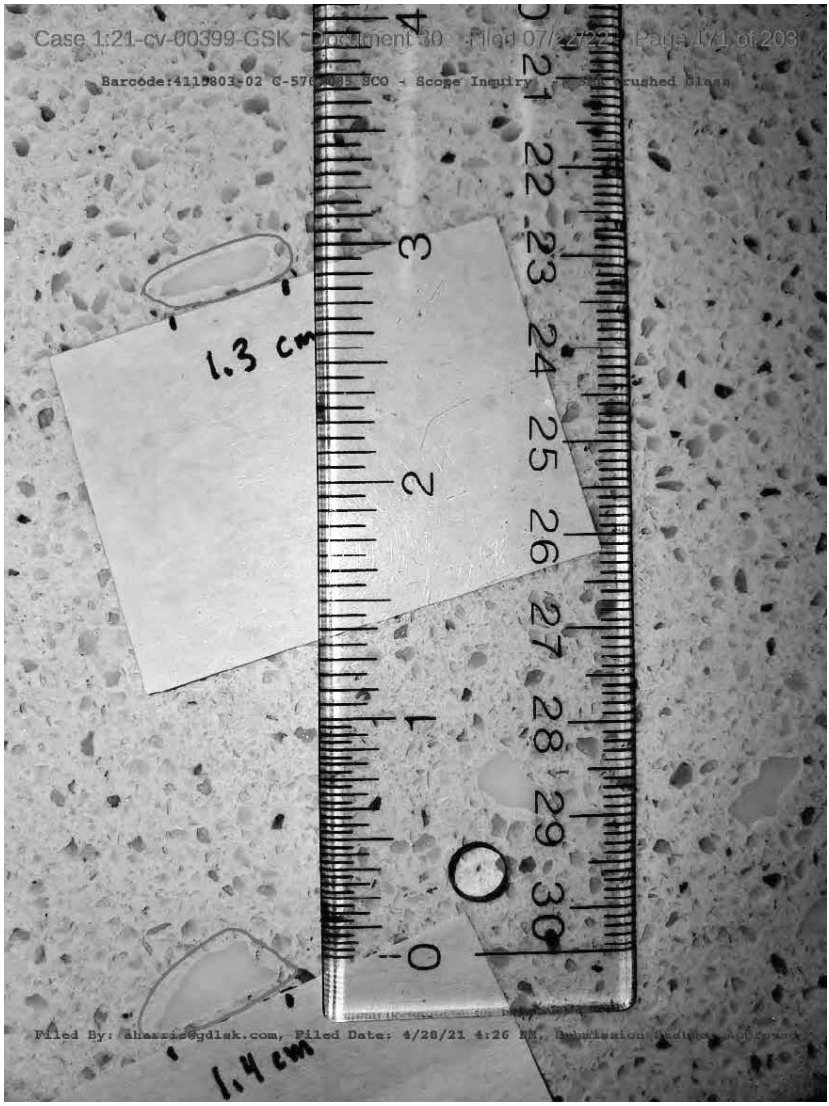
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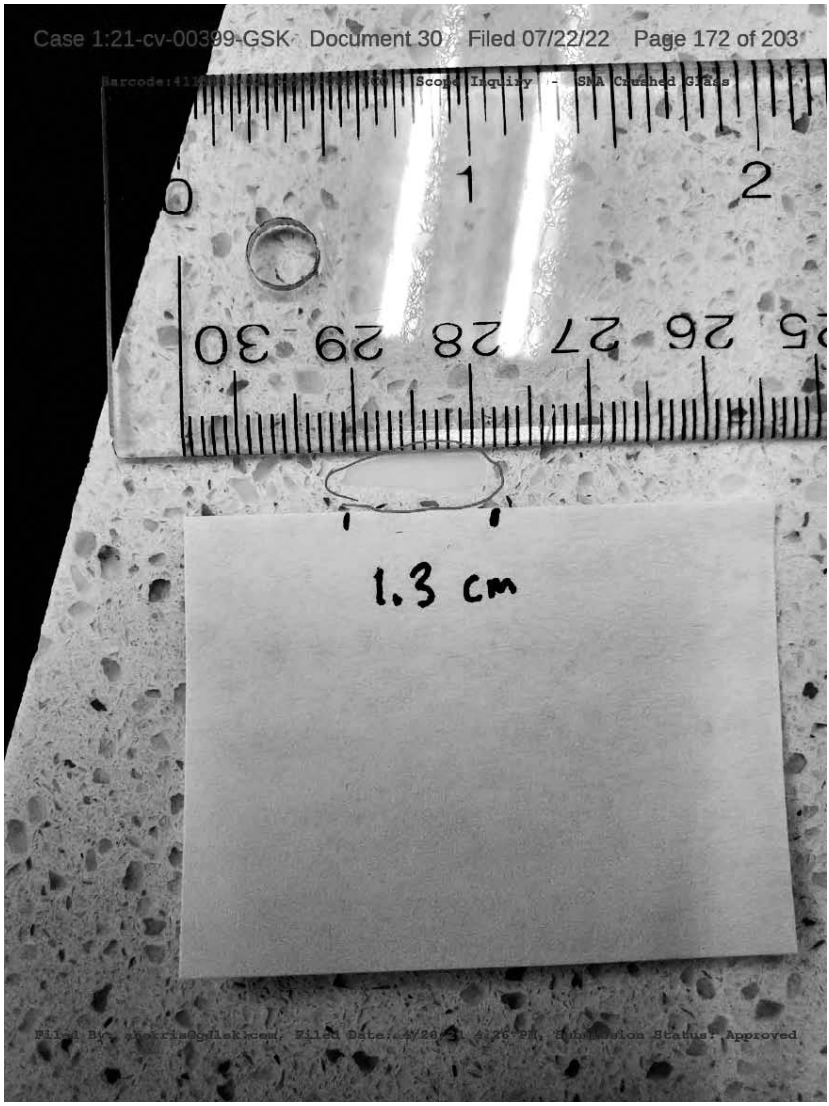
Filed By: aharris@gdlsk.com, Filed Date: 4/28/21 4:26 PM,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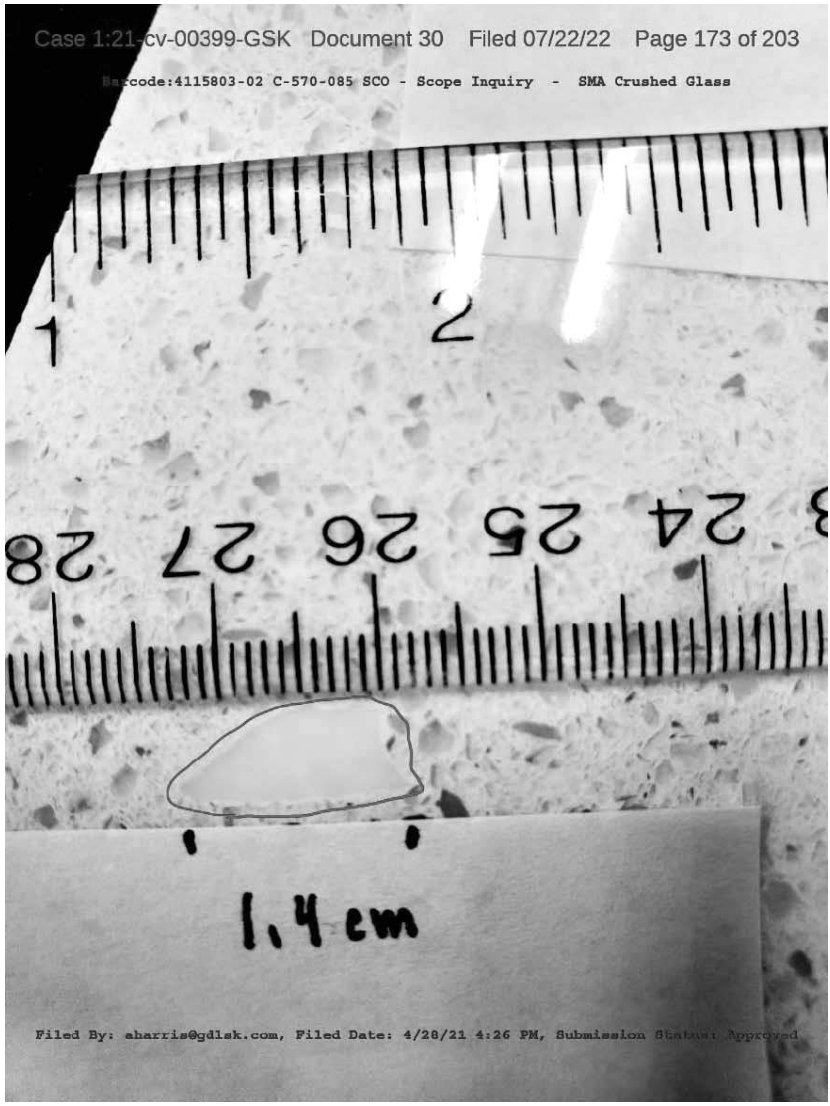
Scope Inquiry - SNA Crushed Glass
1.3 cm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1
2
24 25 26 27 28
1.4 cm
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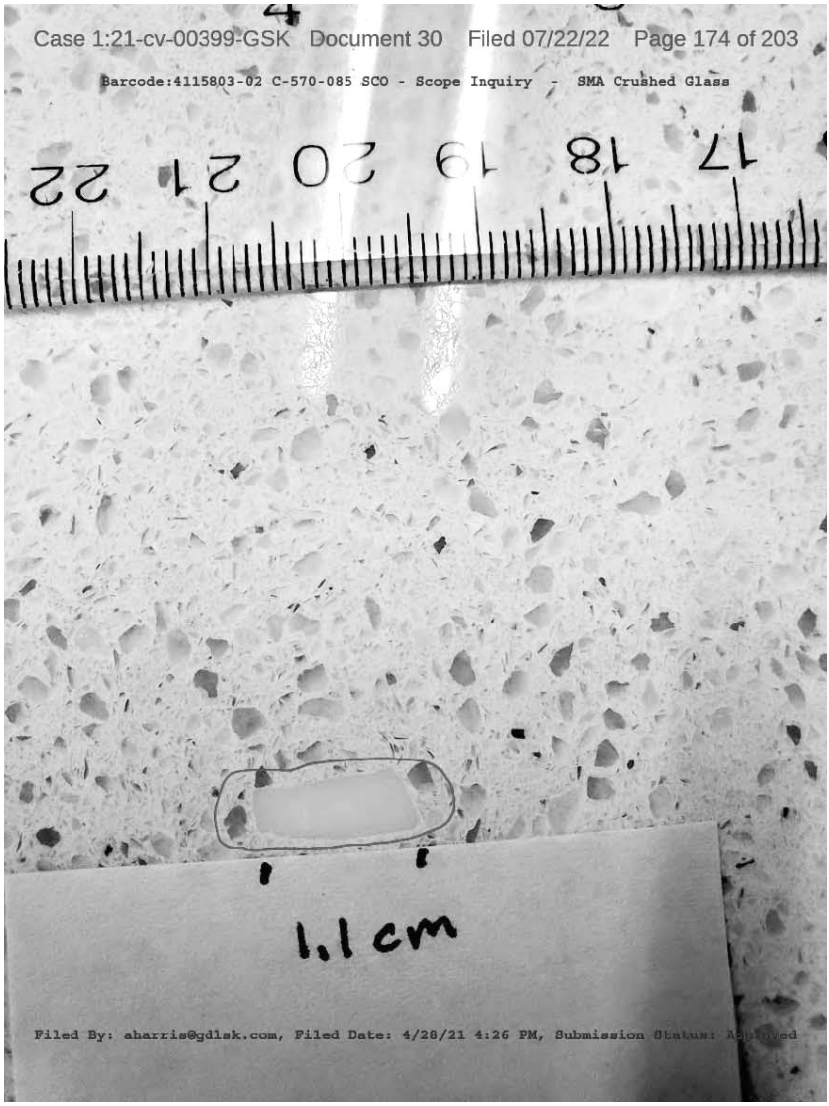
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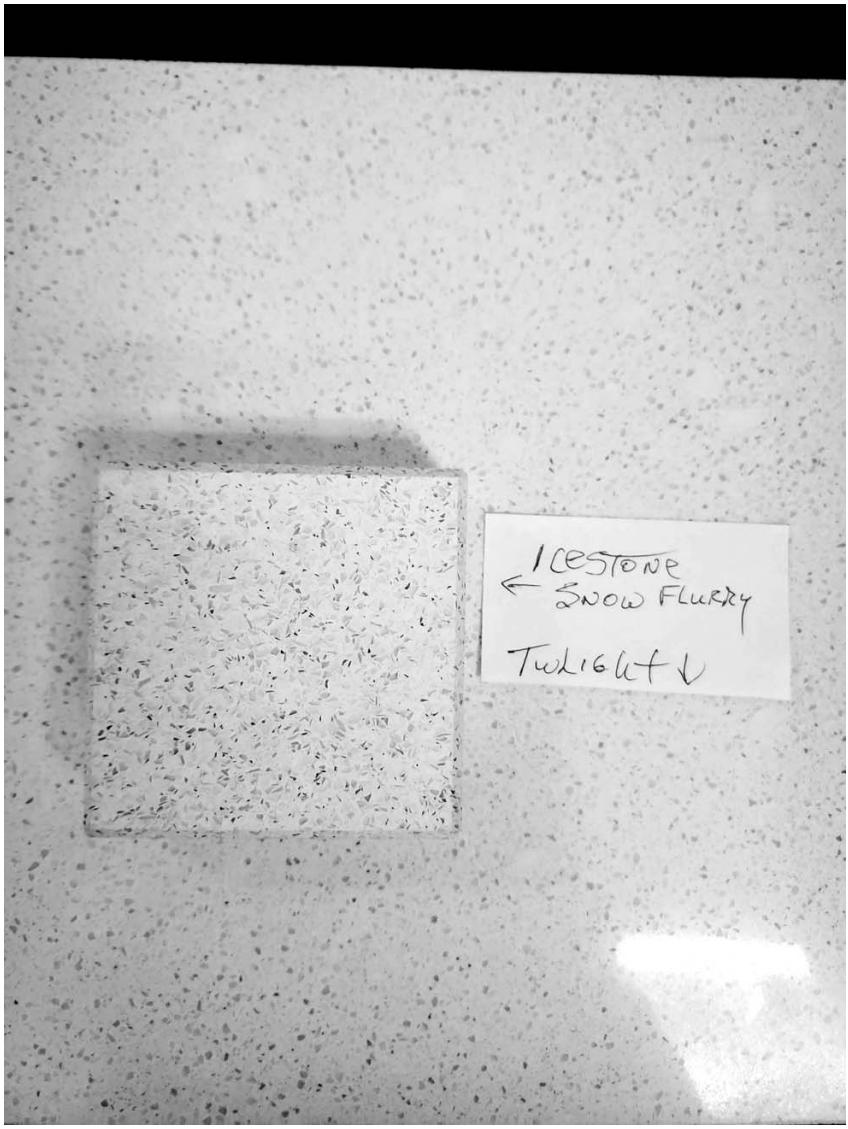
EXHIBIT 17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