U.S. Court of International Trade

Slip Op. 17–30

ZHEJIANG NATIVE PRODUCE & ANIMAL BY-PRODUCTS IMPORT & EXPORT CORP., et al., Plaintiffs, v. UNITED STATES, Defendant, and SIOUX HONEY ASSOCIATION AND AMERICAN HONEY PRODUCERS ASSOCIATION, Defendant-Intervenors.

Before: Richard K. Eaton, Judge
Court No. 02–00064
PUBLIC VERSION

[Plaintiffs' motion for judgment on the agency record is denied; the final affirmative material injury determination of the United States International Trade Commission is sustained.]

Dated: March 22, 2017

Ned H. Marshak, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY, argued for plaintiffs. With him on the brief were *Bruce M. Mitchell* and *Andrew T. Schutz*.

Karl S. von Schriltz, Attorney, Office of the General Counsel, United States International Trade Commission, of Washington, DC, argued for defendant. With him on the brief were *Dominic L. Bianchi*, General Counsel, and *Andrea C. Casson*, Assistant General Counsel for Litigation.

Michael J. Coursey, Kelley Drye & Warren LLP, of Washington, DC, argued for defendant-intervenors. With him on the brief was *R. Alan Luberda*.

OPINION

Eaton, Judge:

Before the court is the motion for judgment on the agency record of plaintiffs Zhejiang Native Produce & Animal By-Products Import & Export Corp., *et al*.[1] ("plaintiffs"). *See* Pls.' Rule 56.2 Mot. J. Agency R., ECF No. 55 ("Pls.' Br."); Pls.' Reply Br., ECF No. 69 ("Pls.' Reply"). By their motion, plaintiffs challenge the United States International Trade Commission's (the "Commission") final affirmative material injury determination in *Honey From Argentina and China*, USITC Pub. 3470, Invs. Nos. 701-TA-402 and 731-TA-892-893 (Nov. 2001),

[1] Plaintiffs are Zhejiang Native Produce & Animal By-Products Import & Export Corp., Kunshan Foreign Trade Co., China (Tushu) Super Food Import & Export Corp., High Hope International Group Jiangsu Foodstuffs Import & Export Corp., National Honey Packers & Dealers Association, Alfred L. Wolff, Inc., C.M. Goettsche & Co., China Products North America, Inc., D.F. International (USA) Inc., Evergreen Coyle Group, Inc., Evergreen Produce, Inc., Pure Sweet Honey Farm, Inc., and Sunland International, Inc.

List 1–75, ECF No. 57, Doc. 1 ("Final Views"), published as *Honey From Argentina and China*, 66 Fed. Reg. 59,026 (Int'l Trade Comm'n Nov. 26, 2001) (final material injury determination) ("Final Determination").[2] Plaintiffs maintain that the Commission unreasonably failed to consider adequately the impact of a suspension agreement when making its cumulation and material injury determinations. *See* Pls.' Br. 22–23; Pls.' Reply 6–9.

In response, the Commission argues that it properly evaluated the impact of the suspension agreement and that its cumulation and material injury determinations were reasonable based on the record evidence. *See* Def.'s Opp'n Pls.' Mot. J. Agency R., ECF No. 61 ("Def.'s Br.") 2–7. Defendant-intervenors Sioux Honey Association and the American Honey Producers Association join the Commission in urging the court to sustain the Final Determination. *See* Def.-Ints.' Opp'n Pls.' Rule 56.2 Mot. J. Agency R., ECF No. 63.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000)[3] and 19 U.S.C. § 1516a(a)(2)(B)(i). For the reasons set forth below, the court denies plaintiffs' motion and sustains the Final Determination.

BACKGROUND

In 1994, the United States Department of Commerce ("Commerce") initiated an antidumping investigation of honey from the People's Republic of China ("PRC" or "China") in response to petitions filed by the domestic honey industry. *Honey From the PRC*, 59 Fed. Reg. 54,434 (Dep't Commerce Oct. 31, 1994) (notice of initiation). Subsequently, Commerce preliminarily determined that imports of honey from China were being sold or were likely to be sold at less than fair value ("LTFV") in the United States. *Honey From the PRC*, 60 Fed. Reg. 14,725 (Dep't Commerce Mar. 20, 1995) (notice of prelim. determination).

In 1995, Commerce halted its investigation and entered into a suspension agreement with the Government of China, pursuant to 19 U.S.C. § 1673c(*l*). *Honey From the PRC*, 60 Fed. Reg. 42,521 (Dep't Commerce Aug. 16, 1995) (suspension of inv.) (the "Suspension Agreement"). The Suspension Agreement placed annual quantity and price restraints on imports of honey from China. Specifically, the Suspension Agreement stated:

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[2] Shortly after this action was commenced in 2002, it was stayed until December 1, 2014, the date on which the Federal Circuit issued its final mandate regarding USCIT Court No. 02–00057. *See* Order of May 20, 2002, ECF No. 25 (staying case pending final disposition of USCIT Court No. 01–00103); Order of Jan. 30, 2008, ECF No. 27 (staying case pending final disposition in USCIT Court No. 02–00057).

[3] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2000 edition.

> For the purpose of encouraging free and fair trade in honey, establishing more normal market relations, and preventing the suppression or undercutting of price levels of the domestic product, [Commerce] and the Government of the [PRC] enter into this suspension agreement . . . .
>
> Pursuant to this Agreement, the Government of the PRC will restrict the volume of direct or indirect exports to the United States of honey products from all PRC producers/exporters, subject to the terms and provisions set forth below.
>
> On the basis of this Agreement, pursuant to the provisions of [19 U.S.C. § 1673c(*l*)], [Commerce] shall suspend its antidumping investigation with respect to honey produced in the PRC, subject to the terms and provisions set forth below.
>
> . . .
>
> The export limits for subject merchandise in each Relevant Period [*i.e.*, August 1 through July 31] shall be 43,925,000 pounds plus or minus a maximum of six percent per year of quota based upon the U.S. honey market growth in each Relevant Period.
>
> . . .
>
> The reference price equals the product of 92 percent and the weighted-average of the honey unit import values from all other countries for the most recent six months of data available at the time the reference price is calculated.

Id. at 42,522–24. The agreement was to be in effect for five years and expired by its terms on August 1, 2000. *Id*. at 42,526.

In September 2000, the domestic honey industry filed new petitions with Commerce and the Commission. *See* Final Determination, 66 Fed. Reg. at 59,026. The petitions alleged, among other things, that dumped honey imports from Argentina and China were causing, or threatening to cause, material injury to an industry in the United States. *See id*. Accordingly, Commerce and the Commission initiated their respective investigations. *Honey From Arg. and the PRC*, 65 Fed. Reg. 65,831 (Dep't Commerce Nov. 2, 2000) (initiation of antidumping duty inv.); *Honey From Arg. and China*, USITC Pub. 3369, Invs. Nos. 701-TA-402 and 731-TA-892–893 (Nov. 2000), List 1–28, ECF No. 57, Doc. 4 ("Preliminary Views").

The Commission's period of investigation covered 1998, 1999, interim 2000, and interim 2001 ("POI"). *See generally* Staff Report accompanying Final Views, List 2–567 ("Staff Report"). The Suspension Agreement was in effect for part of that period. Based on its preliminary investigation, the Commission determined that there was a reasonable indication that the domestic honey industry was materially injured by reason of allegedly dumped honey imports from Argentina and China. *See* Preliminary Views at 3.

Meanwhile, Commerce proceeded with its antidumping investigation and preliminarily determined that Chinese honey imports were being sold, or were likely to be sold, at LTFV in the United States. *Honey From the PRC*, 66 Fed. Reg. 24,101 (Dep't Commerce May 11, 2001) (notice of prelim. LTFV determination); *Am. Prelim. Antidumping Duty Determination of Sales at Less Than Fair Value: Honey From the PRC*, 66 Fed. Reg. 40,191 (Dep't Commerce Aug. 2, 2001). Commerce examined the period of January 1, 2000 to June 30, 2000—a period during which the Suspension Agreement was in effect. *Honey From the PRC*, 66 Fed. Reg. 24,102. In October 2001, Commerce notified the Commission of its final affirmative LTFV determination.[4] *Honey From the PRC*, 66 Fed. Reg. 50,608 (Dep't Commerce Oct. 4, 2001). Commerce found dumping margins ranging from 25.88 percent to 183.80 percent. *See Honey From the PRC*, 66 Fed. Reg. 63,670, 63,672 (Dep't Commerce Dec. 10, 2001) (notice of amended final determination of sales at LTFV and antidumping duty order).

[4] Issues surrounding Commerce's investigation and the Suspension Agreement were heavily litigated in Court No. 02–00057. *See Zhejiang Native Produce & Animal By-Prods. Imp. & Exp. Corp. v. United States*, 27 CIT 1827, Slip Op. 03–151 (Nov. 21, 2003) ("*Zhejiang I*"); *Zhejiang Native Produce & Animal By-Prods. Imp. & Exp. Corp. v. United States*, 28 CIT 1427 (2004), *rev'd and remanded*, 432 F.3d 1363 (Fed. Cir. 2005) ("*Zhejiang II*"); *Zhejiang Native Produce & Animal By-Prods. Imp. & Exp. Corp. v. United States*, 30 CIT 725, Slip Op. 06–85 (June 6, 2006) (remanding to Commerce for further consideration of its critical circumstances finding in accordance with *Zhejiang II*); Order of Sept. 26, 2007 *Zhejiang Native Produce & Animal By-Prods. Imp. & Exp. Corp. v. United States*, Court No. 02–00057 (denying plaintiffs' motion for relief from judgment in *Zhejiang I* pursuant to USCIT Rule 60(b)) ("Sept. 26, 2007 Order"); Order of Jan. 11, 2008 *Zhejiang Native Produce & Animal By-Prods. Imp. & Exp. Corp. v. United States*, Court No. 02–00057 (staying proceedings during appeal of the Sept. 26, 2007 Order); *Zhejiang Native Produce & Animal By-Prods. Imp. & Exp. Corp. v. United States*, 339 Fed. Appx. 992 (Fed. Cir. 2009) (dismissing plaintiffs' appeal for lack of jurisdiction because the Sept. 26, 2007 Order was interlocutory); *Zhejiang Native Produce & Animal By-Prods. Imp. & Exp. Corp. v. United States*, 34 CIT 283, Slip Op. 10–30 (Mar. 24, 2010) (remanding critical circumstances finding a second time); *Zhejiang Native Produce & Animal By-Prods. Imp. & Exp. Corp. v. United States*, 35 CIT __, Slip Op. 11–110 (Sept. 6, 2011) (remanding critical circumstances finding a third time); *Zhejiang Native Produce & Animal By-Prods. Imp. & Exp. Corp. v. United States*, 37 CIT __, Slip Op. 13–76 (June 18, 2013) (sustaining Commerce's third remand results); *Zhejiang Native Produce & Animal By-Prods. Imp. & Exp. Corp. v. United States*, 580 Fed. Appx. 906 (Mem.) (Fed. Cir. 2014) (affirming USCIT's ruling that Commerce's Final Determination, as supplemented in remand proceedings, was supported by substantial evidence and in accordance with law).

In turn, the Commission proceeded to make its final material injury determination. When doing so, the Commission assessed the volume and effect of the dumped honey imports from Argentina and China cumulatively, since plaintiffs' petitions regarding honey imports from those countries were filed on the same day. *See* Final Views at 11 (citing 19 U.S.C. § 1677(7)(G)(i)). The Commission determined that there was a sufficient overlap of competition between the subject imports and between the imports and the domestic product to warrant cumulation by considering four factors: (1) fungibility of the imports, (2) the geographic overlap of the markets, (3) the similar channels of distribution, and (4) whether subject imports are simultaneously present in the U.S. market. *Id*. at 11–12. Additionally, the Commission discussed the Suspension Agreement's impact on its decision to cumulate imports:

> The fact that subject imports from China were subject to a suspension agreement for part of the Commission's period examined does not detract from this conclusion. . . . The suspension agreement did not entirely preclude subject imports from China from entering the U.S. market in competition with domestically-produced honey and honey from other imported sources. In addition, the reference price for imports from China under the agreement was tied to that of imports from other countries, and Argentina was the largest source of imports during the period.

Id. at 15 n.96 (citing Staff Report, tbl. IV-2). Upon completion of its investigation, the Commission issued the Final Determination, concluding, among other things, that the domestic honey industry was materially injured by reason of dumped honey imports from China. *See* Final Determination, 66 Fed. Reg. at 59,026.

STANDARD OF REVIEW

"The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) ("As required by statute, [the court] will sustain the agency's antidumping determinations unless they are 'unsupported by substantial evidence on the record, or otherwise not in accordance with law.'" (quoting 19 U.S.C. § 1516a(b)(1)(B)(i) (2000))). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a

conclusion.'" *Huaiyin*, 322 F.3d at 1374 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

LEGAL FRAMEWORK

The Commission "shall cumulatively assess the volume and effect of imports of the subject merchandise from all countries . . . [where] petitions were filed under [title 19] section 1671a(b) or 1673a(b) . . . on the same day, . . . if such imports compete with each other and with domestic like products in the United States market." 19 U.S.C. § 1677(7)(G)(i)(I). This Court and the Federal Circuit have sustained the test developed by the Commission to determine whether there is a sufficient overlap of competition for the Commission to cumulate subject imports. *See Fundicao Tupy, S.A. v. United States*, 12 CIT 6, 10–11, 678 F. Supp. 898, 902 (1988), *aff'd*, 859 F.2d 915 (Fed. Cir. 1988); *see also* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No 103–316, vol. 1, at 848 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4182 ("The new section [1677(7)(G)(i)] will not affect current Commission practice under which the statutory requirement is satisfied if there is a reasonable overlap of competition, based on consideration of relevant factors." (citing *Fundicao Tupy, S.A.*, 12 CIT 6, 678 F. Supp. 898, *aff'd*, 859 F.2d 915)). The factors provided for in this test include "the fungibility and similar quality of the imports, the similar channels of distribution, the similar time period involved, and the geographic overlap of the markets . . . ." *Fundicao Tupy, S.A.*, 12 CIT at 10–11, 678 F. Supp. at 902. In addition, although these factors detect overlapping competition, courts have recognized that other factors may apply in separate cases, and "no single indicator for weighing competitive overlap is dispositive." *Goss Graphics Sys., Inc. v. United States*, 216 F.3d 1357, 1362 (Fed. Cir. 2000) ("[T]he *Fundicao* indicators provide a guiding framework within which the [Commission] may weigh the evidence to inquire whether 'reasonable overlap' of competition exists."). Moreover, "[i]n applying the four factor analysis, the Commission need not find a 'complete overlap' of competition, but merely a 'reasonable overlap' in order to cumulate imports." *Mukand Ltd. v. United States*, 20 CIT 903, 909, 937 F. Supp. 910, 916 (1996) (citing *Wieland Werke, AG v. United States*, 13 CIT 561, 563, 718 F. Supp. 50, 52 (1989)).

DISCUSSION

Plaintiffs challenge the reasonableness of the Commission's cumulation and material injury determinations, arguing that the Commission failed to consider adequately the impact of the Suspension Agreement. Plaintiffs maintain that "the terms of the Suspension Agreement were constructed to eliminate unfair imports, squarely

addressing the price and volume factors the Commission analyzes for injury . . . .” Pls.’ Br. 17; Pls.’ Br. 3 (“[T]he terms of the Suspension Agreement were plainly designed to eliminate the injurious effects of Chinese imports.”). Plaintiffs also argue that the Suspension Agreement “transform[ed]” unfairly traded Chinese honey imports into fairly traded imports, while the agreement was in effect. Pls.’ Br. 22; *see also* Pls.’ Reply 2 (referring to the agreement as an “antidumping duty Suspension Agreement”). Based on these ideas, plaintiffs argue that: (1) the Commission erred in cumulating “fairly traded” (*i.e.*, subject to the Suspension Agreement) Chinese honey imports with “unfairly traded” (*i.e.*, not subject to a suspension agreement) Argentine honey imports because it was unreasonable for the Commission to conclude that “fairly traded” Chinese honey imports “competed with” unfairly traded honey from Argentina, Pls.’ Br. 17, 18–23; and (2) because Chinese honey imports were “fairly traded” they could not be the cause of material injury to a U.S. industry. Pls.’ Br. 23–25. Plaintiffs contend that, “[a]t most, de-cumulated Chinese imports and related relevant economic factors during the [POI] and post-petition period could have only resulted in a threat finding under 19 U.S.C. § 1677(7)(F).” Pls.’ Br. 23. Since, in plaintiffs’ view, the Commission unreasonably failed to consider adequately the Suspension Agreement in its cumulation and material injury analyses and failed to conduct a threat analysis of non-cumulated Chinese honey imports, plaintiffs ask the court to remand the Final Determination to the Commission for further consideration. Pls.’ Br. 23.

A remand is not necessary in this case. The Commission’s determination to assess cumulatively the subject imports from China with honey imports from Argentina is in accordance with law and supported by substantial evidence. It is undisputed that petitions alleging LTFV sales of honey from China and Argentina were filed with Commerce and the Commission on the same day. *See* Final Views at 12. Thus, the cumulation statute directs the Commission to assess the volume and effect of imports cumulatively, if the imports compete with each other and the domestic product. 19 U.S.C. § 1677(7)(G)(i)(I). To determine whether there was a reasonable overlap of competition among Chinese and Argentine honey imports and the domestic product, the Commission applied its traditional four factor test. Specifically, the Commission analyzed:

> (1) the degree of fungibility between the subject imports from different countries and between imports and the domestic like product, including consideration of specific customer requirements and other quality related questions;

> (2) the presence of sales or offers to sell in the same geographic markets of subject imports from different countries and the domestic like product;
>
> (3) the existence of common or similar channels of distribution for subject imports from different countries and the domestic like product; and
>
> (4) whether the subject imports are simultaneously present in the market.

Final Views at 11–12 (citation omitted). Based on its analysis of the record evidence pertaining to each of these factors, the Commission concluded that there was a "reasonable overlap of competition between the domestic product and subject imports, and between subject honey imports from Argentina and China." *Id*. at 14.

Regarding fungibility, the Commission reviewed the questionnaire responses of beekeepers, importers, and independent packers pertaining to the interchangeability of domestic and imported honey. As to the interchangeability of domestic and Chinese honey, 84.8 percent of responding beekeepers indicated that domestic honey was "always" interchangeable with Chinese honey. *Id*. at 13. Seventy-five percent of responding packers and 61.5 percent of responding importers indicated that domestic and Chinese honey were "at least sometimes" interchangeable. *Id*. With respect to the interchangeability of Argentine and Chinese honey, 88.7 percent of responding beekeepers indicated that honey from these two countries was "always" interchangeable. *Id*. Sixty percent of responding packers indicated that Argentine and Chinese imports were "frequently or sometimes" interchangeable, and the same percentage of importers indicated that they were "at least sometimes" interchangeable. *Id*. Based on the record as a whole, the Commission found that there was "general interchangeability" between domestic and imported honey and between Argentine and Chinese honey. *Id*.

Regarding the second factor, the Commission found that there was "a reasonable geographic overlap" between domestic and imported honey and between Argentine and Chinese honey. *Id*. The Commission based this finding on the fact that beekeepers operated in every state in the United States, with a majority of total production coming from five states. Imports were also present in the same areas during the POI. *Id*. Regarding the last two factors, the Commission found that there was "at least a moderate level of overlap in channels of distribution between domestic and imported honey and between [Ar-

gentine and Chinese honey]," and that domestic, Argentine, and Chinese honey were simultaneously present in the U.S. market during the POI. *Id*. at 13, 14.

Plaintiffs do not challenge the Commission's application of the traditional four factor test, nor its findings regarding each factor. Rather, they argue that the Commission did not adequately consider the impact of the Suspension Agreement when determining whether Chinese honey imports competed with Argentine honey imports and domestic honey. Pls.' Br. 3 ("[T]he Commission blindly relied on the four 'competition' factors in its analysis, relegating this very unique circumstance [*i.e.*, that Chinese honey was imported at quantities and prices set by the U.S. government under the Suspension Agreement] to a single footnote."); Pls.' Reply 13.

Contrary to plaintiffs' argument, the Commission reasonably considered the Suspension Agreement in its cumulation analysis. It is evident in the Final Views that the Commission considered whether the Suspension Agreement prevented Chinese honey imports from competing with honey imports from Argentina and domestically produced honey. *See* Final Views at 15 n.96 (addressing the argument of "Chinese Respondents . . . that because the suspension agreement imposed price and quantity restrictions on subject imports from China that it did not impose on subject imports from Argentina, the Chinese product did not compete directly with subject imports from Argentina in the U.S. market."). Indeed, the Commission identified the Suspension Agreement as a "pertinent condition of competition" when it was in effect. *Id*. at 17 ("As we did in the preliminary phase of the investigations, we conclude that the suspension agreement does not preclude us from making either a finding of adverse price effects or an affirmative determination of material injury by reason of subject imports. Nonetheless, we do perceive the suspension agreement to be a pertinent condition of competition during the time it was in effect."). The Commission observed that the agreement "did not entirely preclude subject imports from China from entering the U.S. market in competition with domestically-produced honey and honey from other imported sources." *Id*. at 15 n.96.

The record and the law support the Commission's conclusion that the Suspension Agreement did not preclude competition by Chinese honey with domestic and imported honey. With respect to the quantity of Chinese imports, subject imports from China increased during the POI. Specifically, Chinese honey imports "increased 92.6 percent between 1998 and 2000, from 30.5 million pounds in 1998 to 51.0 million pounds in 1999 and 58.8 million pounds in 2000, and another 49.2 percent between interim 2000 and interim 2001, from 22.4 mil-

lion pounds to 33.5 million pounds." Def.'s Br. 17 (citing Staff Report, tbls. IV-2, C-1). Consumption of Chinese honey also increased during the POI, while the market share of the domestic industry decreased. Def.'s Br. 17 ("Subject imports from China as a share of apparent U.S. consumption increased from 8.6 percent in 1998 to 14.0 percent in 2000, capturing 5.4 of the 9.8 percentage points of market share lost by the domestic industry during the period." (citing Staff Report, tbl. IV-4)).

Additionally, the Suspension Agreement's price restraints did not prevent Chinese honey from competing with domestic and Argentine honey in the U.S. market. The Suspension Agreement "tied the reference price for subject imports from China to the price of honey imported from all other sources, the largest being Argentina." Def.'s Br. 16 (citing Final Views at 15 n.96). The reference price was "the product of 92 percent and the weighted-average of the honey unit import values from all other countries for the most recent six months of data available at the time the reference price is calculated." Suspension Agreement, 60 Fed. Reg. at 42,524. Accordingly, price restraints on Chinese honey imports fluctuated based on the prices of Argentina's honey imports. Notably, prices of Chinese honey generally remained lower than both domestic and Argentine honey prices while the Suspension Agreement was in effect.[5] Therefore, the Commission considered the Suspension Agreement when making its cumulation determination and reasonably concluded that the Suspension Agreement did not preclude competition between domestic and imported honey and Argentine and Chinese honey during the POI. *See* Final Views at 15 n.96 ("The fact that subject imports from China were subject to a suspension agreement for part of the Commission's period examined does not detract from [the decision to cumulate imports].").

Plaintiffs' other arguments against the Commission's cumulation determination are unconvincing. Plaintiffs advance a number of theories including that Chinese honey imports sold under the Suspension Agreement were "fairly traded" and could not have caused injury to a U.S. industry. Pls.' Br. 22. To the extent plaintiffs argue that Chinese imports that were traded in compliance with the Suspension Agreement could not be found to have been sold at LTFV neither the record nor case law supports plaintiffs' contention.[6] Here, Commerce inves-

[5] Imports of Chinese honey undersold the domestic product "in 39 of 51 quarterly comparisons, or 76.5 percent of the time." Def.'s Br. 18 (citing Staff Report, tbl. V-5). They also undersold Argentine honey imports "in [[ ]] of [[ ]] quarterly comparisons, or [[ ]] percent of the time." Def.'s Br. 18 (Staff Report, tbl. V-1–4).

[6] Plaintiffs rely on *USEC, Inc. v. United States*, 25 CIT 49, 132 F. Supp. 2d 1 (2001), which, in part, addressed the proper construction of the pre-Uruguay Round Agreements Act

tigated alleged dumping of Chinese honey imports during a period when the Suspension Agreement was in effect and concluded that the imports were being sold at LTFV at margins ranging from 25.88 percent to 183.80 percent. *See Honey From the PRC*, 66 Fed. Reg. at 63,672. This Court held that Commerce's LTFV determination was supported by substantial evidence and otherwise in accordance with law—a holding that was not appealed. *See Zhejiang Native Produce & Animal By-Prods. Imp. & Exp. Corp. v. United States*, 27 CIT 1827, Slip Op. 03–151 (Nov. 21, 2003) ("*Zhejiang I*"); *Zhejiang Native Produce & Animal By-Prods. Imp. & Exp. Corp. v. United States*, 28 CIT 1427 (2004), *rev'd and remanded*, 432 F.3d 1363 (Fed. Cir. 2005) ("*Zhejiang II*").

Nonetheless, plaintiffs argue that the Federal Circuit's decision in *Zhejiang II* supports the view that since Chinese honey imports were sold in compliance with the pricing and volume terms of the Suspension Agreement, such imports were not dumped and could not cause present material injury. *See* Pls.' Br. 22 ("[T]he [*Zhejiang II* Court] . . . concluded that the [Suspension Agreement] necessarily complied with the criteria set out in 19 U.S.C. § 1673c(b), which authorizes the inclusion of a price restriction in a suspension agreement only to eliminate completely sales at less than fair value." (citing *Zhejiang II*, 432 F.3d at 1365, 1367; internal quotation marks omitted)). In taking this position, however, plaintiffs rely on a reading of *Zhejiang II* that is overbroad.[7] In *Zhejiang II*, the issue on appeal was the lawfulness of Commerce's critical circumstances determination—specifically,

version of the cumulation statute. *See USEC, Inc.*, 25 CIT at 58, 132 F. Supp. 2d at 5. In *USEC*, this Court sustained as reasonable the Commission's interpretation of the phrase "subject to investigation" (which does not appear in 19 U.S.C. § 1677(7)(G)(i)) in declining to cumulate, on one hand, imports that were subject to a suspension agreement at the time the Commission commenced its investigation with, on the other hand, imports that were not subject to a suspension agreement. *Id.*, 25 CIT at 59, 132 F. Supp. 2d at 10 (holding "[t]he ITC may reasonably interpret the 'subject to investigation' provision to mean that imports covered by a suspension agreement in which an investigation is temporarily terminated are not subject to investigation *while under that agreement*." (emphasis added)). *USEC* is inapposite here. Not only is the language of the cumulation statute applied by the Commission in the Final Determination different from that analyzed in *USEC*, but the cases are factually distinct. Unlike in *USEC*, here, neither the Chinese nor Argentine honey imports were subject to a suspension agreement at the time the Commission commenced its investigation.

[7] This Court has rejected a broad reading of *Zhejiang II*. In Court No. 02–00057, plaintiffs moved under USCIT Rule 60(b) to have the Judgment in *Zhejiang I* vacated, arguing that the Federal Circuit in *Zhejiang II* reversed Commerce's final dumping determination. Denying the plaintiffs' motion, the Court observed that the Court in *Zhejiang II* did "not reach the question of whether plaintiffs could be found to be dumping during the [period of investigation]." Sept. 26, 2007 Order at 9. Rather, in the context of its review of Commerce's critical circumstances determination the *Zhejiang II* Court "held that a suspension agreement designed to prevent the suppression and undercutting of price levels prevented the imputation of knowledge of dumping to the [plaintiffs]. The Court did not . . . equate dumping and price suppression." *Id.*

whether Commerce could use its standard 25 percent method to impute knowledge of dumping to plaintiffs during a period that a suspension agreement was in place. While the *Zhejiang II* Court discussed the Suspension Agreement in this context, it did not hold that imports sold in accordance with the terms of the Suspension Agreement could not be found to have been sold at LTFV—indeed, that issue was not before the Court. *See Zhejiang II*, 432 F.3d at 1366–67.

Moreover, nothing in the Suspension Agreement prevents an affirmative determination of either LTFV sales of Chinese honey imports or material injury to a U.S. industry. *See* Sept. 26, 2007 Order at 12–13 ("Agreements entered into under [19 U.S.C. § 1673c(*l*)] have as their purpose the prevention of undercutting or price suppression – not dumping. Price suppression and sales at less than fair value are just not the same thing."); *Zhejiang I*, 27 CIT at 1835 ("The[] reference prices were not formulated to eliminate completely all sales at less than fair value but rather were designed to meet the statutory criteria for [19 U.S.C. § 1673c(*l*)] agreements: the elimination of price suppression or undercutting." (quoting Issues and Dec. Mem. for the Antidumping Inv. of Honey from the PRC, 66 ITA DOC 50,608 at Comment 1; internal quotation marks omitted)); *see also* Final Views at 17 (concluding that "the suspension agreement does not preclude us from making either a finding of adverse price effects or an affirmative determination of material injury by reason of subject imports"); Preliminary Views at 14 n.80 (citing previous investigations where "[t]he Commission . . . rejected arguments that the existence of . . . [19 U.S.C. § 1673c(*l*)] suspension agreements mandate a conclusion that subject imports are not causing injury").

Because substantial evidence supports the Commission's cumulation determination, and there being no dispute as to any other aspect of the Commission's Final Determination, including its material injury findings under 19 U.S.C. § 1677(7)(C), the Final Determination is sustained. *See* 28 U.S.C. § 2639(a)(1) (a decision of the Commission is presumed to be correct, and the "burden of proving otherwise shall rest upon the party challenging such decision").

CONCLUSION

For the foregoing reasons, the court sustains the Commission's Final Determination as supported by substantial evidence and otherwise in accordance with law. Judgment will be entered accordingly.

Dated: March 22, 2017
New York, New York

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

Slip Op. 17–31

MID CONTINENT STEEL & WIRE, INC. et al., Plaintiff and Consolidated Plaintiffs, v. UNITED STATES, Defendant, and PT ENTERPRISE INC. et al., Defendant-Intervenors and Consolidated Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Court No. 15–00213
PUBLIC VERSION

[Sustaining in part and remanding in part the U.S. Department of Commerce's final determination in the investigation of the antidumping duty order covering certain steel nails from Taiwan.]

Dated: March 23, 2017

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

Andrew Thomas Schutz, *Max F. Schutzman*, and *Ned Herman Marshak*, Grunfeld Desiderio Lebowitz Silverman & Klestadt LLP of Washington, DC, and New York, NY, argued for Consolidated Plaintiffs and Defendant-Intervenors PT Enterprise Inc., Pro-Team Coil Nail Enterprise Inc., Unicatch Industrial Co., Ltd., WTA International Co., Ltd., Zon Mon Co., Ltd., Hor Liang Industrial Corporation, President Industrial Inc., Liang Chyuan Industrial Co., Ltd. With them on the brief was *Bruce M. Mitchell*.

Mikki Cottet, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Zachary Scott Simmons*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce of Washington, DC.

AMENDED OPINION

Kelly, Judge:

This consolidated action comes before the court on motions for judgment on the agency record pursuant to USCIT Rule 56.2. Rule 56.2 Mot. for J. Agency R. Pl. Mid Continent Steel & Wire, Inc., Feb. 26, 2016, ECF No. 28 ("Mid Continent Mot."); PT Pls.' Rule 56.2 Mot. J. Agency R., Feb. 26, 2016, ECF No. 30 ("PT Mot."). Plaintiff Mid Continent Steel & Wire, Inc. ("Mid Continent") and Consolidated Plaintiffs PT Enterprise Inc. et al. ("PT") challenge various aspects of the Department of Commerce's ("Department" or "Commerce") final determination in the antidumping duty ("ADD") investigation of imports of certain steel nails from Taiwan for the period April 1, 2013

through March 31, 2014. Br. Support Rule 56.2 Mot. J. Agency R. Pl. Mid Continent Steel & Wire, Inc. Confidential Version 17–42, Feb. 26, 2016, ECF No. 27–1 ("Mid Continent Br."); Br. Support Pls.' Rule 56.2 Mot. J. Agency R. Confidential Version 8–45, Feb. 26, 2016, ECF No. 29 ("PT Br."); *see Certain Steel Nails from Taiwan: Final Determination of Sales at Less Than Fair Value*, 80 Fed. Reg. 28,959 (Dep't Commerce May 20, 2015) (final determination of sales at less than fair value) ("*Final Results*"); *Certain Steel Nails From the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, and the Socialist Republic of Vietnam: Antidumping Duty Orders*, 80 Fed. Reg. 39,994 (July 13, 2015) ("*Order*").

Mid Continent commenced this action pursuant to section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a (2012).[1] Summons, Aug. 8, 2015, ECF No. 1; *see* Compl., Sept. 4, 2015, ECF No. 9. Mid Continent challenges Commerce's determination that PT's affiliated producer Pro-Team Coil Nail Enterprise Inc. ("Pro-Team") is not affiliated with [[ ]] of the [[ ]] tolling companies that do production activities for ProTeam.[2] Mid Continent Br. 17–41. PT challenges: (1) several aspects of Commerce's application of its differential pricing analysis as unreasonable and contrary to law, PT Br. 8–35; (2) Commerce's treatment of Pro-Team's costs/expenses relating to production/sales of steam as not supported by substantial evidence, *id.* at 35–42; and (3) Commerce's decision to adjust transfer prices paid for wire drawing and nail making to reflect market prices as not supported by substantial evidence, *id.* at 42–44.

Defendant, United States ("Defendant"), responds that the court should deny the motions of Mid Continent and PT and sustain Commerce's *Final Results* in full. *See* Def.'s Resp. Opp'n Pls.' Rule 56.2 Mots. J. Agency R. Confidential Version 9–54, Aug. 3, 2016, ECF No. 47 ("Def.'s Resp."). Mid Continent filed a response, as defendant-intervenor, in opposition to PT's motion, *see* Resp. Br. Mid Continent Steel & Wire, Inc. Opp'n PT Enterprise Inc. et al.'s R. 56.2 Mot. J. Agency R. Confidential Version, Aug. 3, 2016, ECF No. 42 ("Mid Continent Resp. Br."), and PT filed a response, as defendant-intervenors, in opposition to Mid Continent's motion. *See* Def.-Intervenors' Resp. Br. Opp'n Pl.'s Mot. J. Agency R. Confidential Version, Aug. 3, 2016, ECF No. 48 ("PT Resp. Br.").

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

[2] The court consolidated Mid Continent's challenge with an action filed by PT, an individual exporter of steel nails, and Pro-Team Coil Nail Enterprise Inc. ("Pro-Team"), Unicatch Industrial Co., Ltd., WTA International Co., Ltd., Zon Mon Co., Ltd., Hor Liang Industrial Corporation, President Industrial Inc., and Liang Chyuan Industrial Co., Ltd., producers of steel nails (collectively "PT"). *See* Order, November 19, 2015, ECF No. 20.

For the reasons that follow, Commerce's final results are sustained in part and remanded in part. Specifically, the court sustains Commerce's determinations: (1) that Pro-Team is unaffiliated with the [[ ]] tollers in question; (2) to use the Cohen's d test within the differential pricing analysis to determine the existence of a pattern of significant price differences; (3) to use a simple average to calculate the pooled standard deviation in the Cohen's d test of the differential pricing analysis; (4) to not offset dumped sales with non-dumped sales in calculating the respondent's antidumping duty margin using the average-to-transaction methodology; and (5) to disregard transfer prices paid by Pro-Team to certain affiliated tollers in its calculation of normal value ("NV"). The court remands Commerce's allocation of expenses associated with Pro-Team's separate steam line of business for further explanation and consideration consistent with this opinion.

BACKGROUND

On June 25, 2014, in response to a petition filed by Mid Continent, Commerce initiated an antidumping duty ("ADD") investigation of certain steel nails from six countries, including Taiwan. *See Certain Steel Nails from India, the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, the Republic of Turkey, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations*, 79 Fed. Reg. 36,019 (June 25, 2014) (notice of initiation of ADD investigations). Commerce selected Taiwanese exporters PT and its affiliated producer, Pro-Team, and Quick Advance, Inc. and its affiliated producer, Ko's Nails Inc., as mandatory respondents for the investigation. *See Certain Steel Nails from Taiwan: Negative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 79 Fed. Reg. 78,053, 78,054 (Dep't Commerce Dec. 29, 2014) (preliminary determination of sales at less than fair value, postponement of final determination) ("*Prelim. Results*"); Decision Memorandum for the Preliminary Determination in the Antidumping Duty Investigation of Certain Steel Nails from Taiwan at 2, PD 225, bar code 3247845–01 (Dec. 17, 2014) ("Prelim. Decision Memo");[3] *see* 19 U.S.C. § 1677f-1(c)(2)(B).

[3] On October 16, 2015, Defendant submitted indices to the public and confidential administrative records, which identify the documents that comprise the public and confidential administrative records to the Commerce's final determination. The indices to the public and confidential administrative records to Commerce's final determination can be located at ECF No. 17. All further references to the documents from the administrative records are identified by the numbers assigned by Commerce in these administrative records.

On December 29, 2014, Commerce issued its negative preliminary determination. *See Prelim. Results*, 79 Fed. Reg. at 78,053; Prelim. Decision Memo at 1. Commerce applied the differential pricing analysis and determined that, although 41.73% of PT's sales passed the Cohen's d test, a meaningful difference did not exist in the dumping margins that would result using the standard A-to-A methodology and the alternate mixed methodology. *Id.* at 12. Commerce accordingly applied the standard average-to-average ("A-to-A") methodology to all of PT's sales, *id.*, and preliminarily determined that respondents' steel nails from Taiwan "are not being, or are not likely to be, sold in the United States at less than fair value." *Id.* at 1. Commerce preliminarily assigned PT a weighted-average dumping margin of 0.00%. *Prelim. Results*, 79 Fed. Reg. at 78,054. Commerce found that PT used certain affiliated tollers to produce its steel nails and accordingly Commerce adjusted the transfer prices paid for wire drawing and nail making to reflect the market price. *See* Prelim. Decision Memo at 14. Commerce also disregarded certain transactions between Pro-Team and its affiliated tollers because it determined that there was a difference between the market price and transfer prices for wire drawing and nail making services. *Id.* at 14. Commerce also preliminarily determined that PT and the rest of its tollers were unaffiliated. Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination—PT Enterprise Inc. at 2, CD 200, bar code 3248421–01 (Dec. 17, 2014). Commerce further found that PT did not have a viable comparison market, so it calculated a constructed value ("CV") as the basis for NV using the financial statements of PT affiliate Pro-Team. Prelim. Decision Memo at 16.

On May 13, 2015, Commerce issued its final determination. *See Final Results*, 80 Fed. Reg. at 28,959 and accompanying Issues and Decision Memorandum for the Affirmative Final Determination in the Less than Fair Value Investigation of Certain Steel Nails from Taiwan, Oct. 16, 2015, ECF No. 17 ("Final Decision Memo"). Commerce continued to use Pro-Team's financial statements to calculate CV. Final Decision Memo at 10–15. However, Commerce declined to allow subsidy income received by Pro-Team to offset Pro-Team's general and administrative expenses because Commerce concluded "the subsidy is not related to the general operations of the company as a whole, but instead appears directly related to and intended for the company's other steam line of business." *Id.* at 55. Commerce applied this subsidy income as an offset to Pro-Team's cost of goods sold instead. *Id.* Commerce also continued to disregard transactions between Pro-Team and certain affiliated tollers for wire drawing and

nail making services, *id.* at 53, and continued to find Pro-Team unaffiliated with its other [[ ]] tollers. *Id.* at 50–53. Commerce determined that 42.27% of PT's U.S. sales had passed the Cohen's d test, *id.* at 19, and accordingly determined to apply the mixed methodology, by which Commerce applies the average-to-transaction ("A-to-T") method to PT's sales that passed the Cohen's d test and the A-to-A method to PT's sales that did not pass the Cohen's d test to calculate a respondent's weighted-average dumping margin. *Id.* Commerce determined that a meaningful difference existed between the resultant A-to-A margin and mixed methodology margin, so applied the mixed methodology to calculate PT's weighted-average dumping margin. Commerce subsequently assigned PT a weighted-average dumping margin of 2.24%. *Final Results*, 80 Fed. Reg. at 28,961. The final determination resulted in an ADD order on subject nails from Taiwan. *Order*, 80 Fed. Reg. at 39,994.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2012),[4] which grant the court authority to review actions contesting the final determination in an administrative review of an antidumping duty order. The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Affiliation Between Pro-Team and Certain of its Tollers

Mid Continent challenges as unsupported by substantial evidence Commerce's determination that PT's affiliate Pro-Team[5] is unaffiliated with [[ ]] of its tollers.[6] Mid Continent Br. 17–42; *see* Final Decision Memo at 50–53. In particular, Mid Continent argues that Pro-Team's purportedly unaffiliated tollers are and have been reliant upon Pro-Team, Mid Continent Br. 22–27, 35–37, and that Pro-Team

[4] Further citations to Title 28 of the U.S. Code are to the 2012 edition.

[5] Commerce determined that PT and Pro-Team are affiliated pursuant to 19 U.S.C. § 1677(33)(F) because PT and Pro-Team "shar[e] a common shareholder," who "owns a sufficient percentage of PT and Pro-Team to establish control over both companies." Prelim. Decision Memo at 7. The finding that PT and Pro-Team are affiliated has not been challenged here.

[6] PT indicated to Commerce that Pro-Team uses the services of tolling companies to produce its nails. *See*, *e.g.*, PT Enterprise Section D Response at 3, CD 61–61, bar code 3228714–01 (Sept. 16, 2014) ("[All production process activities] are done on a tolling basis. Pro-team [organizes all the production. As such, besides providing the raw material, collating materials and packing materials, Pro-team also incurred] labor, water, electricity and other common factory overhead expenses in its normal course of business.").

is "legally and operationally in a position to exercise restraint and direction over" the tollers through a close supplier relationship, such that Commerce should have found Pro-Team and the tollers affiliated and accordingly disregarded the transactions between them for purposes of calculating costs of production. *Id.* at 27–35; *see* 19 U.S.C. §§ 1677(33), 1677b(f)(2). Defendant responds that substantial evidence supports Commerce's determination that Pro-Team and the [[ ]] tollers are not affiliated. Def.'s Resp. 44–52. For the reasons that follow, Commerce's determination that Pro-Team is not affiliated with the [[ ]] tollers in question is supported by substantial evidence.

Pursuant to 19 U.S.C. § 1677b(f)(2), Commerce may disregard transactions between persons found to be affiliated for purposes of calculating costs of production, "if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration." 19 U.S.C. § 1677b(f)(2). Commerce finds affiliation where, inter alia, some form of control exists between persons or entities.[7] 19 U.S.C. §§ 1677(33)(F), (G); *see* SAA, H.R. Rep. No. 103–316, vol. 1 at 838, 1994 U.S.C.C.A.N. at 4,175.[8] Commerce finds that control exists where one person or entity is "legally or operationally in a position to exercise restraint or direction over the other person" or entity. 19 U.S.C. § 1677(33). To determine if control exists pursuant to 19 U.S.C. § 1677(33), Commerce considers the existence of certain relationships, including "corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships." 19 C.F.R. § 351.102(b)(3) (2013).[9] For the presence of these relationships to evidence control, however, the relationship must have "the potential to

[7] Specifically, relevant here, this control may be in the form of "two or more persons [or entities] directly or indirectly controlling, controlled by, or under common control with, any person [or entity]" or "any person [or entity] who controls any other person [or entity] and such other person [or entity]." 19 U.S.C. §§ 1677(33) (F), (G).

[8] The Statement of Administrative Action accompanying the Uruguay Round Agreements Act ("SAA") explains that control may also exist within corporate groupings, *see* SAA, H.R. Rep. No. 103–316, vol. 1 at 838, 1994 U.S.C.C.A.N. at 4,175, so "persons" here is considered to also apply to "entities." Specifically, the SAA explains that an emphasis on control was included in the statutory definition of affiliated persons due to the Administration's position

> that including control in the definition of "affiliated" will permit a more sophisticated analysis which better reflects the realities of the marketplace. The traditional focus on control through stock ownership fails to address adequately modem business arrangements, which often find one firm "operationally in a position to exercise restraint or direction" over another even in the absence of an equity relationship. A company may be in a position to exercise restraint or direction, for example, through corporate or family groupings, franchises or joint venture agreements, debt financing, or close supplier relationships in which the supplier or buyer becomes reliant upon the other.

SAA, H.R. Rep. No. 103–316, vol. 1 at 838, 1994 U.S.C.C.A.N. at 4,175.

[9] Further citations to Title 19 of the Code of Federal Regulations are to the 2013 edition.

impact decisions concerning production, pricing or cost." *Id.*

Here, Commerce sought and examined information from Pro-Team and its tollers for indications of control based on close supplier relationships,[10] and determined that the evidence could not support a finding of control. Final Decision Memo at 50–53. Commerce analyzed the nature of the tolling relationships, including the duration of the tolling relationships, whether Pro-Team owned the tollers' machinery, land, or buildings, and whether Pro-Team and the tollers shared common stock. *Id.* at 50. Commerce also considered "(i) the terms and provisions of supply agreements; (ii) the relative percentage that tolling services to Pro-Team represented of each of the suppliers' total sales; (iii) the terms of any financing agreements with the suppliers; and (iv) the overall profitability of the tollers." *Id.* Commerce found that many of the tollers operated as tollers prior to doing business with Pro-Team, *id.* at 51, there was no common stock or familial ownership between the entities, *id.* at 50–51, and Pro-Team did not share employees, officers, or managers with its tollers. *Id.* at 50. Commerce also found that: i) there were no contracts or supply agreements between Pro-Team and the unaffiliated tollers "locking the toller into providing services for a specific period of time," *id.* at 51; ii) although many of the tollers supplied Pro-Team exclusively, nothing prohibited those tollers from supplying services to others,[11] *see id.* at 51–52; iii) there were no debt financing agreements between Pro-Team and the tollers, *id.* at 52; and iv) most of the tollers were profitable during 2013.[12] *See id.* Based on these findings, Commerce determined that Pro-Team and the [[ ]] tollers exhibited "typical economic cooperation" of suppliers and a producer with a "decentralized business model," and did not evidence "the potential to impact decisions concerning production, pricing or cost" or the ability to "exercise restraint or direction" over the other. *See id.*; 19 C.F.R. § 351.102(b)(3); 19 U.S.C. § 1677(33). Commerce concluded that these relationships did not create affiliation between Pro-Team and its tollers. Final Decision Memo at 53.

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[10] The other factors Commerce may consider to find control under 19 C.F.R. § 351.102(b)(3)—corporate or family groupings; franchise or joint venture agreements; debt financing—are not applicable to the relationship between Pro-Team and its tollers. *See* Final Decision Memo 50–52.

[11] Commerce found that, to the contrary, the record "indicates that there are at least 136 producers/exporters of nails in Taiwan from which the U.S. and comparison-market customers can purchase nails, thereby eliminating any notion of dependence on Pro-Team by its unaffiliated tollers." Final Decision Memo at 52.

[12] This finding was significant to Commerce, as "[t]he fact that these suppliers were profitable suggests that Pro-Team lacks the ability to control completely the prices at which it purchases services from its tollers." Final Decision Memo at 52.

Commerce reasonably concluded that Pro-Team's relationships with its tollers do not rise to the level of control necessary to support a finding of affiliation. The statute, 19 U.S.C. § 1677(33), and the regulation, 19 C.F.R. § 351.102(b)(3), together seek to identify producer-supplier relationships of such an integrated nature that the two entities cannot be said to transact at arm's length. Commerce sought evidence of conditions that would logically indicate whether either party was able to operate freely from the other, including shared physical space, exclusivity contracts, lack of profitability of the tollers, the presence of control over prices, common ownership, and shared employees. Final Decision Memo at 50–52. Implicit in Commerce's focus on these conditions is that the presence of these conditions would indicate that one entity functionally controlled the other. Commerce reasonably concluded here, from the absence of most of these conditions, that the tolling relationships are not the type of close supplier relationships that the statute and regulation seek to identify (*i.e.*, those that lead to unfair transactions with unfair prices). Mid Continent's argument that the record does not support Commerce's findings is unavailing. Mid Continent contends that control exists because the tollers did the large majority of their business with Pro-Team, that many of the tollers share facilities with Pro-Team or its affiliated tollers, and that many of the relationships are long standing. *See* Mid Continent Br. 21–42. The fact that Pro-Team's relationships with tollers are long-standing or exclusive is not dispositive; Commerce found that many of the tollers had been in business before their relationships with Pro-Team, *see* Final Decision Memo at 51, and that none of the tollers had the "expectation of exclusively providing a particular service to Pro-Team." *Id.* at 52. [13] Commerce's assessment and ultimate conclusion is reasonable.[14]

[13] Mid Continent further contends that Commerce's determination conflicts with prior practice which, according to Mid Continent, requires Commerce to give great weight to the percentage of the business provided by the tollers to Pro-Team. Mid Continent Br. 20, 24, citing *Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation*, 65 Fed. Reg. 1139, 1143 (Dep't Commerce Jan. 7, 2000) (preliminary determination of sales at less than fair value). The cited case does not demonstrate the existence of such a practice. Rather it demonstrates only that Commerce has previously determined that "a close supplier relationship may occur when a majority of sales are made to one customer," *Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation*, 65 Fed. Reg. 1139, 1143 (Dep't Commerce Jan. 7, 2000), which is not inconsistent with Commerce's finding in the instant case.

[14] In the conclusion of its moving brief, Mid Continent requests in the alternative that the court remand to Commerce its determination regarding at least [[ ]] of Pro-Team's [[ ]] purportedly unaffiliated tollers:

> To the extent that the Court finds that the evidence does not support [a finding of affiliation] for all [[ ]] tollers, Mid Continent respectfully submits that the Court should remand the *Final Determination* to Commerce to find that the record contains substantial evidence to establish that the following [[ ]] purportedly unaffiliated

II. Differential Pricing Analysis

PT challenges three aspects of Commerce's differential pricing analysis and the resultant application of the alternate A-to-T methodology in this investigation. *See* PT Br. 8–35. First, PT contends that Commerce's application of the Cohen's d test, including the use of the coefficient threshold, in the differential pricing analysis is contrary to the statute, arbitrary, and otherwise unreasonable. *Id.* at 25–30. Second, PT also challenges as unreasonable, in general and as applied, Commerce's use of a simple rather than weighted-average to calculate the pooled standard deviation for the Cohen's d test. *Id.* at 30–35. Third, PT argues that Commerce's application of the alternate A-to-T methodology, and specifically its use of "double zeroing," to calculate PT's antidumping duty margin was contrary to the statute. *Id.* at 18–25. Each of PT's arguments with respect to Commerce's differential pricing analysis are unavailing. For the reasons that follow, Commerce's determination is supported by substantial evidence and in accordance with law.

A. Exhaustion

As an initial matter, Mid Continent argues that the court should reject PT's arguments related to Commerce's differential pricing analysis because PT failed to exhaust its substantial evidence argu-

tollers are affiliated with Pro-Team pursuant to 19 U.S.C. § 1677(33)(G), and the transactions between these tollers and Pro-Team should be evaluated pursuant to 19 U.S.C. § 1677b(f)(2): [[

]].

Mid Continent Br. 42. Mid Continent highlighted facts (taken from Pro-Team's submissions to Commerce) detailing the conditions of each of these tollers' tolling relationship with Pro-Team. *Id.* at 7–14. These facts include: the nature of the tolling activities provided by each toller; each toller's profit margin; whether the toller or Pro-Team owns the tolling machinery and space; whether the toller has its own employees; the percentage of its business that each toller conducts with Pro-Team; the duration of the tolling relationship; and the tolling fee charged to Pro-Team. *Id.* Mid Continent also highlighted these facts in its case brief to Commerce. *See* Petitioner's Administrative Case Brief at 57–70, CD 264, PD 285, bar code 3268085–01 (Mar. 31, 2015). Although Commerce did not specifically address any of the [[ ]] tollers in the Final Decision Memo, Commerce referenced certain facts highlighted in Mid Continent's case brief regarding these tollers, Final Decision Memo at 48, n.218, 219, 222, and cited Pro-Team's data for all of the [[ ]] tollers, which includes data for these [[ ]] tollers. Final Determination Memo at 50–52; Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination—PT Enterprise Inc., Department of Commerce, Attach. 1, CD 200, bar code 3248421–01 (Dec. 17, 2014). Mid Continent does not make explicit why it argues in the alternative for at least these [[ ]] tollers to be found affiliated, though it appears that these [[ ]] tollers conduct the highest percentages of their business with Pro-Team (with each of them doing either [[ ]]% or [[ ]]% of its business with Pro-Team, while each of the other [[ ]] tollers conducts much lower percentages of their business with Pro-Team). *See* PT Enterprise Supplemental Section D Response, Ex. SD-12, CD 79–84, PD 139, bar codes 3237002–01–05 (Oct. 21, 2014). Nothing in the details highlighted by Mid Continent undermines Commerce's determination that these [[ ]] tollers are unaffiliated.

ments before Commerce.[15] Mid Continent Resp. 11–16, 40. Mid Continent contends that, before Commerce, PT only challenged the differential pricing analysis on legal grounds while, before the court, PT challenges the differential pricing analysis on additional legal grounds and on substantial evidence grounds. *Id.* at 11–16. PT replies that the exhaustion doctrine is inapplicable here, because PT's substantial evidence challenges to the differential pricing analysis arose only upon Commerce's application of the analysis in the final determination and because Commerce was on notice of these arguments as PT raised these challenges "preemptively" in its administrative case brief to Commerce following the preliminary determination. Taiwan Plaintiffs' Reply Br. Confidential Version 11–13, Sept. 23, 2016, ECF No. 58 ("PT Reply Br."). For the reasons that follow, the exhaustion doctrine does not bar PT from bringing its challenges to the differential pricing analysis before this Court.

The court must, "where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). Commerce's regulations require parties to submit a case brief containing all their arguments. *See* 19 C.F.R. § 351.309(c)(2). Exhaustion ensures that the administrative agency maintains the authority to thoroughly perform its functions, including reviewing and responding to any perceived error, before any challenges to its actions are heard by this Court. *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952); *Carpenter Tech. Corp. v. United States*, 30 CIT 1373, 1374–75, 452 F. Supp. 2d 1344, 1346 (2006). Nonetheless, the application of the exhaustion doctrine in trade cases is to be exercised with a measure of discretion by the court. *See*, *e.g.*, *Corus Staal BV v. United States*, 502 F.3d 1370, 1381 (Fed. Cir. 2007) ("[A]pplying exhaustion principles in trade cases is subject to the discretion of the judge of the Court of International Trade.").

As discussed above, Commerce issued a negative preliminary determination in this investigation after preliminarily applying the standard A-to-A methodology to all of PT's sales. *See Prelim. Results*, 79 Fed. Reg. at 78,054; Prelim. Decision Memo at 1, 12. PT nonetheless included challenges to Commerce's differential pricing analysis in its administrative case brief, noting that it was raising the arguments should the differential pricing analysis result in the final determination "in different percentages,[. . . or in Commerce] deciding that the differences in prices cannot be taken into account using the preferred A-A methodology." Admin. Case Br. PT/Pro-Team, Antidumping Duty Investigation of Certain Steel Nails from Taiwan at

[15] Defendant does not argue exhaustion on this point. *See generally* Def.'s Resp.; Confidential Oral Arg. Tr. 63–64, Mar. 2, 2017, ECF No. 82.

8, CD 262, bar code 3267614–01 (Mar. 31, 2015) ("PT Admin. Case Br."), PT acknowledges that its arguments before the agency were unsupported by facts, but emphasizes it did not put forth specific facts because facts to support the challenges "*did not exist yet*" at the time of submission of its case brief to Commerce. PT Reply Br. 12–13 (emphasis in original). When Commerce did reach a different result in the final determination, after applying the mixed methodology and assigning PT a weighted-average dumping margin of 2.24%, *Final Results*, 80 Fed. Reg. at 28,961, PT challenged the differential pricing analysis before this court on substantial evidence grounds, supported by the facts of the case. *See generally* PT Br. 5–35.

PT's substantial evidence challenge and the facts to support it arose in the final determination, after Commerce applied a different methodology and reached a materially different result for PT than it had reached in the preliminary determination. Barring PT from bringing this claim now would leave PT without the opportunity to be heard on this substantial evidence challenge. Additionally, a party cannot be required to raise a particular challenge preemptively before the facts support it. Any such preemptive substantial evidence challenge would be necessarily speculative, illogical, and useless. Nonetheless, PT did raise relevant arguments in its administrative case brief to notify Commerce of its objections to the differential pricing analysis. The court finds that, under these circumstances, Commerce was on sufficient notice of PT's arguments, despite that the arguments did not include specific factual challenges.

B. Cohen's d coefficient threshold

PT challenges as contrary to law, unreasonable, and arbitrary Commerce's use of the Cohen's d test in its differential pricing analysis to assess whether there are significant price differences among a particular group of U.S. sales. PT Br. 25–30. Defendant responds that the Cohen's d test is in accordance with law and reasonable, generally and as applied to PT's sales in this investigation. *See* Def.'s Resp. 23–26. For the reasons that follow, PT's challenges are unavailing.

Section 19 U.S.C. §§ 1677f-1(d)(1)(B)(i) and (ii) provide that Commerce may use the alternate A-to-T methodology to calculate weighted-average dumping margins where (i) Commerce finds a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and (ii) Commerce explains why such differences cannot be taken into account

using the standard A-to-A methodology.[16] *See* 19 U.S.C. §§ 1677f-1(d)(1)(B)(i)–(ii).

As no statute or regulation guides Commerce in determining whether a pattern of significant price differences exists, Commerce is afforded broad discretion to select a methodology to make that determination. *See Fujitsu General Ltd.*, 88 F.3d 1034, 1039 (Fed. Cir. 1996); *Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995). In situations involving complex and technical methodological choices, Commerce has broad discretion and the court need only address whether Commerce's methodological choice is reasonable. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983) ("[A]n agency must cogently explain why it has exercised its discretion in a given manner."); *see Smith-Corona Group v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022, 104 S.Ct. 1274, 79 L.Ed.2d 679 (1984); *Fujitsu Gen. Ltd.*, 88 F.3d at 1039 (granting Commerce significant deference in determinations "involv[ing] complex economic and accounting decisions of a technical nature"); *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–405, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137, 1139 (Fed. Cir. 1987).

Commerce determines whether a pattern of significant price differences exists among purchasers, regions, or periods of time with the differential pricing analysis. Final Decision Memo at 16; Prelim. Decision Memo at 10. The first stage of the differential pricing analysis is the Cohen's d test, which Commerce uses to measure the degree of price disparity between two groups of sales. Prelim. Decision Memo at 11; *see* Final Decision Memo at 20–21, 24–26. In the Cohen's d test, Commerce calculates the number of standard deviations by which the weighted-average net prices of U.S. sales for a particular purchaser, region, or time period (the "test group") differ from the weighted-average net prices of all other U.S. sales of comparable merchandise (the "comparison group").[17] *See* Prelim. Decision Memo at 11; Final

[16] In an ADD investigation, Commerce ordinarily determines whether the subject merchandise is being sold in the United States at less than fair value by using the A-to-A methodology. *See* 19 U.S.C. § 1677f-1(d)(1)(A)(i). Under A-to-A, Commerce compares the weighted-average of the normal value of the merchandise to the weighted-average of the export prices (or constructed export prices) for comparable merchandise. *See id.* Although the transaction-to-transaction methodology ("T-to-T"), which is "a comparison of the normal values of individual transactions to the export prices of individual transactions," is also a statutorily preferred method (under 19 U.S.C. § 1677f-1(d)(1)(A)(ii)), Commerce's regulations provide that T-to-T will be employed only in rare cases, "such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made." 19 C.F.R. § 351.414(c)(2).

[17] As Commerce explained,

Decision Memo at 25. The result of this calculation is a coefficient. *See* Prelim. Decision Memo at 11; Final Decision Memo at 25. To arrive at the coefficient, Commerce divides the difference in the means of the net prices of the test group and comparison group by the pooled standard deviation.[18] Prelim. Decision Memo at 11; Def.'s Resp. 14. The coefficient is the number of standard deviations by which the weighted-average of the comparison group and the test group differ. *See* Def.'s Resp. 14; PT Br. 15. Commerce then uses a threshold to qualify the extent of the difference measured: a group of sales with a coefficient equal to or greater than 0.8 is said to "pass" the Cohen's d test, which signifies to Commerce that a pattern of price differences exists within that group of sales. *See* Prelim. Decision Memo at 11.

Commerce explained that the Cohen's d test identifies relative difference, rather than absolute difference, which allows Commerce to accurately assess the significance of price differences within a group. Final Decision Memo at 25. Commerce explained that a statistical tool which measures relative difference "quantifies the size of the difference between two groups, and may therefore be said to be a *true measure of the significance of the difference*." *Id.* (emphasis in original; internal quotation and citation omitted). Commerce explained that it finds the Cohen's d test to be useful for determining, per the statute, whether significant price differences exist within a certain group of sales, precisely because this test captures relative difference. *See id.* Commerce thus finds the Cohen's d test to be a "reasonable tool" for effectuating its statutory directive to assess whether there is a pattern of significant price differences among a particular group of U.S. sales. *Id.* at 26.

The court agrees that this methodology is reasonable. The significance of differences between prices will depend on the prices them-

> Purchasers are based on the reported customer codes reported by [mandatory respondents]. Regions are defined using the reported destination (*i.e.*, State) and are grouped into regions based upon standard definitions published by the U.S. Census Bureau. Time periods are defined by the quarter within the [period of investigation] being examined based upon the reported date of sale. For purposes of analyzing sales transactions by purchaser, region, and time period, comparable merchandise is considered using the product control number and any characteristics of the sales, other than purchaser, region, and time period, that [Commerce] uses in making comparisons between [export price] and NV for the individual [antidumping duty] margins.

Prelim. Decision Memo at 10–11. To calculate a Cohen's d coefficient for a particular test group (all sales of the comparable merchandise to a specific purchaser, region, or time period), the test group and comparison group (all other sales of the comparable merchandise) must each have at least two observations and the sales quantity for the comparison group must account for at least five percent of the total sales quantity of the comparable merchandise. *See* Prelim. Decision Memo at 11.

[18] The pooled standard deviation is derived using the simple average of the variances in the net prices within the test and comparison groups. *See* Final Decision Memo at 28–29; Def.'s Resp. 14.

selves. A test which calculates absolute difference would not afford Commerce an accurate picture in all instances of the significance of price differences within a group. It is reasonable for Commerce to instead use a test, such as the Cohen's d test, to evaluate the relative differences in the export prices between two groups in order to assess whether that difference is significant in accordance with the statutory directive of 19 U.S.C. § 1677f-1(d)(1)(B)(i). Commerce has sufficiently explained why its use of the Cohen's d test is a reasonable method by which to determine whether a pattern of significant price differences exists pursuant to 19 U.S.C. § 1677f-1(d)(1)(B)(i), and the court finds Commerce's methodological choice to make this determination using the Cohen's d test, including its fixed thresholds, to be a reasonable exercise of Commerce's discretion.

PT contends that Commerce should dispel with the 0.8 coefficient threshold and institute a more fluid test that considers case-by-case circumstances, in order to avoid arbitrary results based on insignificant differences deemed significant by application of a "rigid" threshold. *See* PT Br. 25–28. PT argues that Commerce's "use of these arbitrary thresholds without any further analysis of the relative or actual price differences at issue in a case, within the context of the industry being analyzed," does not comport with the statute, *id.* at 28, and that the test as applied here resulted in arbitrary and unreasonable results because there were instances in which "demonstrably insignificant price differences" passed the 0.8 threshold so were determined to be significant.[19] *See id.* at 28–29.

PT's argument misunderstands the Cohen's d test. As Commerce explained, the test gauges relative differences, Final Decision Memo at 25–26, and measurement of relative differences is necessarily case-by-case:

> The purpose of identifying a pattern of prices which differ significantly is to establish that the exporter's pricing behavior has created conditions under which dumping may be masked . . . . This is a determination made on the facts on the record, *i.e.*, the U.S. prices which exhibit the exporter's pricing behavior[.] . . . Without such a fact-based approach[,] . . . the Department's dumping calculations would be fraught with subjectivity with no regard to transparency and predictability.

Id. at 20. It is discernible from this explanation that Commerce uses the Cohen's d test because the test allows a case-by-case analysis of

[19] For example, PT notes that, in one case, a price difference of $0.0029 was found to be significant. *See* PT Br. 29.

whether the price differences between groups of sales are significant. The test's fixed 0.8 threshold allows Commerce to assess the significance of relative differences with a consistent benchmark.[20] *See id.* at 30. Without the consistent threshold, Commerce would have no way to assess the significance of relative differences which differ in every case. Commerce is best positioned to identify what constitutes a "significant" difference in a certain case. *See Fujitsu Gen. Ltd.*, 88 F.3d at 1039 (noting that Commerce is given significant deference in determinations "involv[ing] complex economic and accounting decisions of a technical nature"). Commerce sufficiently explained its methodology and that methodology appears tailored to achieve the statutory directive. This test, including its use of the 0.8 threshold, is reasonable and within Commerce's discretion to determine whether significant price differences exist.

PT also argues that Commerce's reliance on the Cohen's d test in this case is contrary to 19 U.S.C. § 1673b(b)(3), which instructs Commerce to consider price differences of less than 2% not to constitute actionable dumping. *See* PT Br. 29–30. PT emphasizes that, here, "there are [[ ]] instances where the price differences identified are less than 2% of the average price for the CONNUM," *id.*, and contends that "[i]t is hard to imagine the statutory directive that would consider a 2% price difference not to be indicative of dumping but sufficient to uncover targeted dumping." *Id.* at 30. Section 19 U.S.C. § 1673b(b)(3) is inapposite here, as the provision instructs Commerce in determining weighted-average dumping margins. The Cohen's d test does not measure dumping; it is a tool to measure price differences pursuant to 19 U.S.C. § 1677f1(d)(1)(B)(i). PT's argument is unpersuasive.

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[20] Commerce explained how the Cohen's d test identifies the significance of price differences:

> The Cohen's d coefficient measures the difference in the weighted-average prices between the test group and the comparison group relative to the distribution of prices within each group (*i.e.*, the variance or standard deviation). As a result, if prices within the test and comparison groups differ by only small amounts, then the variance within each group is small and there only needs to be a proportionally small difference in the weighted-average prices between the test group and the comparison group to identify a significant difference. Likewise, if there would be a wide dispersion of prices within either the test group or the comparison group, then a difference between the weighted-average prices between the test group and the comparison group would have to be correspondingly larger for the Cohen's d test to identify this difference to be significant.

Final Decision Memo at 30.

C. Use of a simple average to calculate the pooled standard deviation

PT argues that it is unreasonable for Commerce to use a simple average rather than a weighted-average to calculate the pooled standard deviation for the Cohen's d test, contending that a simple average is distortive and internally inconsistent.[21] *See* PT Br. 30–35. PT proposes that Commerce instead weight the averages by observations or sales quantities to ensure that every transaction is weighted equally, regardless of the number of sales in the group. *Id.* at 35. Defendant responds that Commerce's practice of using a simple average for the pooled standard deviation is reasonable. *See* Def.'s Resp. 26–29. PT has not demonstrated that Commerce's use of a simple average is unreasonable, in general or as applied to PT's sales in this investigation.

As mentioned above, to calculate the Cohen's d coefficient, Commerce divides the difference in the weighted-averages of the net prices of the test group and the comparison group by a pooled standard deviation of the comparison and test groups. Prelim. Decision Memo at 11; *see* Final Decision Memo at 25. The pooled standard deviation is derived using a simple average of the variances in the net prices within the test and comparison groups.[22] Final Decision Memo at 28–29. Commerce explained that it uses a simple average for the pooled standard deviation to calculate an average of the comparison and target group's pricing behaviors that equally reflects both groups:

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[21] PT claims that the use of simple averages in this stage of the differential pricing analysis is inconsistent with Commerce's use of weighted-averages elsewhere in the differential pricing analysis, *see* PT Br. 31–32, and contends that "there is a reason why [Commerce] use[s] weight averages in a lot of other places in this test and it doesn't make sense why they wouldn't use it" in this stage of the test as well. Confidential Oral Arg. Tr. 49, Mar. 2, 2017, ECF No. 82. Defendant acknowledges that Commerce generally uses weighted-averages. *Id.* at 40. But Commerce is not required to use a weighted-average in this part of the test simply because a weighted-average is used at another part of the test. Each stage of the test has a different objective, and Commerce should utilize the methodology it determines best achieves the objective of each, regardless of the methodology used at a different stage. The relevant inquiry is whether Commerce acted reasonably to achieve the objective of each stage.

[22] PT explains this practice in more detail:

> The standard deviation of each group assesses how much prices fluctuate within each group and is based on a weighted-average by quantity of the prices within each group. The higher the standard deviation, the more prices within the group fluctuate. The lower the standard deviation, the more stable the prices are. The Department then calculates what it refers to as the pooled variance or pooled standard deviation which is essentially a simple average of the standard deviations of the test group and the [comparison] group.

PT Br. 14. PT noted that square roots are used in the calculation of the standard deviation so that price changes above the mean do not cancel out price changes below the mean, and vice versa. *See id.* at 14, n.6.

"[b]y using a simple average, the respondent's pricing practices to each group [are] weighted equally, and the magnitude of the sales to one group does not skew the outcome." *Id.* At oral argument, the Government further explained that Commerce uses a simple average in the pooled standard deviation "to accord equal weight to pricing behavior to the test group and the comparison group." Confidential Oral Arg. Tr. 56, Mar. 2, 2017, ECF No. 82 ("Oral Arg. Tr."). Given this objective, weight-averaging by sales quantity "would inappropriately move the pooled standard deviation toward the pricing behavior of either the test or comparison group, depending on which had more weight." *Id.*

It is apparent that the parties disagree as to the purpose of the pooled standard deviation within the Cohen's d test. PT's position is that the pooled standard deviation is used to discern "whether specific price changes in the test group are significantly different from the rest" of the price changes overall for that CONNUM, Oral Arg. Tr. 60; PT Br. 30, 33, so the average used should reflect the overall average of the pricing behavior among all sales in the test and comparison groups, regardless of the size of each group. *See* Oral Arg. Tr. 60. PT argues that a weighted-average would account for size differences between the test and comparison groups and ensure that each transaction is accorded equal weight in the overall analysis. *See* PT Br. 30. Commerce does not dispute that each transaction is not equally weighted in the simple average, but explains that the objective of the pooled standard deviation is to calculate an average of the two groups' prices so weighting both groups equally is important. *See* Final Decision Memo at 28–29. Commerce explains that the pooled standard deviation should reflect the overall average of the pricing behavior in the test and comparison groups, regardless of the number of transactions or quantity of sales within each group. *See id.* Commerce explains that a simple average ensures that the two groups' average pricing behaviors are weighted equally. *Id.* ; *see also* Oral Arg. Tr. 56.

It is discernible from Commerce's explanations that Commerce views the pooled standard deviation as an average reflective of the respondent's average pricing behavior for these two groups, rather than an average reflective of all of the individual prices. A simple average does ensure that "equal weight of pricing behavior [is given] to the test and comparison groups." Oral Arg. Tr. 57. The standard deviation is intended to serve as a "yardstick" by which to measure the difference in a certain group of sales from the overall spread of difference in the test and comparison groups. *Id.* at 52; Final Decision Memo at 26. One logical way to create this yardstick is to average the pricing behaviors of the two groups together. Although PT's alternate

weighted-average approach may be another reasonable way of achieving this yardstick, using a simple average to achieve it is also reasonable.

PT's contention that the simple average achieves a distorted standard deviation is therefore unavailing. PT argues that the simple average is distortive because it gives more power to the pricing of sales in lower-quantity groups, PT Br. 30–33; *see also* PT Admin. Case Br. 20–22; Oral Arg. Tr. 49, which distorts the standard deviation given "[t]he point of a pooled standard deviation is to come up with a coefficient that is representative of the price changes that are going on within that time." Oral Arg. Tr. 49. PT's argument of distortion is founded on a misunderstanding of the objective of the pooled standard deviation. Using a simple average, certain sales have more effect over the outcome than other sales. However, a different outcome is not a distortion; a distortion requires a different result due to an unreasonable practice. Here, as Commerce's practice is reasonable within the objective of this stage of the test and achieves a coefficient representative of the average price changes between the two groups, the use of a simple average cannot be said to lead to distortive results here.[23]

Finally, PT contends that the use of a simple average in the pooled standard deviation was unreasonable as applied in this case. *See* PT Br. 34–35. Specifically, PT presents calculations which it argues demonstrate that using an average weighted by sales or quantity in the standard deviation would result in a *de minimis* dumping margin for PT, while using a simple average resulted in a non-*de minimis* dumping margin. *See id.* Calculations demonstrating this potential impact to this respondent of using a different methodology are insufficient to demonstrate that Commerce's use of the simple average is unreasonable. PT has not presented evidence demonstrating that the use of a simple average to calculate the pooled standard deviation is unreasonable as applied here. Although understandably PT would prefer the methodology that leads to a *de minimis* margin for PT, calculations resulting in a *de minimis* margin, without more, do not demon-

[23] Commerce also explains that weight-averaging is inferior to simple averaging because it would allow respondents to potentially manipulate the data. Final Decision Memo at 29. PT argues that it is speculative that a respondent could or would manipulate by observations and that, regardless, it would not be possible to manipulate by quantity of sales. PT Br. 33–34. Defendant conceded at oral argument that it would not be possible to manipulate by quantity of sales. Oral Arg. Tr. 40–41. (Defendant-Intervenor disagreed, contending that it would also theoretically be possible for a respondent to manipulate its reporting of quantity. *See* Oral Arg. Tr. 41–43). Commerce's argument that weight-averaging is inferior due to the possibility of manipulation therefore seems problematic, but the court finds it is a secondary argument subsumed within the court's determination that the use of a simple average here is reasonable.

strate that the methodology which did resulted in a non-*de minimis* margin is unreasonable or distortive.

D. "Double Zeroing"

PT argues that Commerce's application of the mixed methodology, and specifically its use of "double zeroing" when aggregating the A-to-A and A-to-T results, was contrary to the statute. PT Br. 18–25. Defendant responds that its application of the mixed methodology in this case was consistent with the statute and reasonable because allowing negative A-to-A results to offset positive A-to-T results would defeat the purpose of the methodology. Def.'s Resp. 18–23. Commerce's application of the mixed methodology is in accordance with law and is reasonable in this case.

Commerce applies the alternate A-to-T methodology based on the percentage of U.S. sales found to pass the Cohen's d test.[24] *See* Prelim. Decision Memo at 11. When the value of a respondent's U.S. sales passing the Cohen's d test accounts for more than 33 percent but less than 66 percent of the value of the respondent's total U.S. sales, Commerce applies a "mixed methodology" to calculate the weighted-average dumping margin, using the standard A-to-A method (with offsetting dumped sales with non-dumped sales) to calculate the dumping margin for the sales that did not pass the Cohen's d test and using the alternate A-to-T method (without offsetting dumped sales with non-dumped sales) to calculate the dumping margin for the sales that did pass the Cohen's d test. *Id.*; Final Decision Memo at 26. Commerce then aggregates the results of the two calculations to arrive at a weighted-average dumping margin for all of the respondent's U.S. sales. Prelim. Decision Memo at 11; Final Decision Memo at 26. When aggregating the two calculations, Commerce does not offset the dumped sales by the non-dumped sales from either the

[24] Commerce makes this determination through conducting its "ratio test":

> The "ratio test" assesses the extent of the significant price differences for all sales as measured by the Cohen's d test. If the value of sales to purchasers, regions, and time periods that pass the Cohen's d test accounts for 66 percent or more of the value of total sales, then the identified pattern of [export prices] that differ significantly supports the consideration of the application of the A-to-T method to all sales as an alternative to the A-to-A method. If the value of sales to purchasers, regions, and time periods that pass the Cohen's d test accounts for more than 33 percent and less than 66 percent of the value of total sales, then the results support consideration of the application of an A-to-T method to those sales identified as passing the Cohen's d test as an alternative to the A-to-A method, and application of the A-to-A method to those sales identified as not passing the Cohen's d test. If 33 percent or less of the value of total sales passes the Cohen's d test, then the results of the Cohen's d test do not support consideration of an alternative to the A-to-A method.

Prelim. Decision Memo at 11.

A-to-A or A-to-T calculation. *See* Final Decision Memo at 26. PT refers to this practice as "double zeroing." *See* PT Br. 19.

Commerce explained that zeroing the non-dumped sales is required to ensure that the masked dumping uncovered by the A-to-T method is preserved when the margin is aggregated with the A-to-A results in the mixed methodology, just as the uncovered masked dumping is preserved when the A-to-T method is applied to all of a respondent's sales. *See* Final Decision Memo at 26–27. Commerce explained that allowing the non-dumped sales to instead offset the dumped sales would allow the non-dumped sales to "reduce or completely negate" the masked dumping uncovered by A-to-T, rendering the alternate method provided by the statute useless. *Id.* at 26. Thus, disallowing offsets when aggregating in the mixed methodology allows Commerce to preserve the statutory alternate remedy while also applying the A-to-T methodology proportionately based on the degree of masked dumping identified. This methodological choice to not offset when aggregating the margins in the mixed methodology is reasonable, as offsetting the dumped sales with the non-dumped sales when aggregating would make it impossible for Commerce to both preserve unmasked dumping uncovered with A-to-T and apply a proportionate remedy.

The reasonableness of this methodology does not depend on the presence of a pattern established for every sale, contrary to PT's argument. *See* PT Br. 18–25. PT focuses on the pattern to suggest that only sales within the pattern may be subject to the remedy, including not offsetting non-dumped sales during the aggregation stage in the mixed methodology. *See id.* at 25. However, Commerce's test uses the existence of the pattern within the sales as a trigger for applying the alternate method, and Commerce then uses the ratio test to decide what remedy to apply; not allowing offsets in the aggregation step preserves that remedy. The statute provides Commerce with the A-to-T methodology as a tool to capture masked dumping and thereby calculate more accurate margins than would be possible using A-to-A. *See* 19 U.S.C. § 1677f-1(d)(1)(B); *Yangzhou Bestpak Gifts & Crafts Co., Ltd. v. United States*, 716 F.3d 1370, 1379 (Fed. Cir. 2013) ("An overriding purpose of Commerce's administration of antidumping laws is to calculate dumping margins as accurately as possible."). Commerce's decision to effectuate the statute by applying the mixed methodology, without offsets during the aggregation stage, to both preserve the masked dumping uncovered with A-to-T and achieve a proportionate remedy is reasonable.

III. G&A Expense Ratio

PT challenges Commerce's calculation of the General and Administrative ("G&A") expense ratio within its constructed value calculation. PT Br. 35–42. PT contests Commerce's determination to include in the calculation of PT's G&A expense ratio certain costs and expenses generated in the production and sale of steam, which Commerce concluded is a separate line of business unrelated to the production of subject merchandise by PT affiliate, Pro-Team. *See id.* at 38–39; *see also* Final Decision Memo at 55. PT notes Defendant's description of how Commerce calculated PT's G&A expense ratio in its brief before the court is not consistent with Commerce's actual calculation.[25] PT Reply Br. 15. Alternatively, PT argues that, if Commerce includes costs related to Pro-Team's separate steam production, subsidy income should offset G&A expenses. *Id.* at 39–42. Defendant counters that Commerce followed its normal practice of allocating company-wide costs to cost of goods sold ("COGS), Def.'s Resp. 35–36, and Commerce acted reasonably and consistently with its practice in allocating the subsidy income attributable to Pro-Team's separate steam line of business. *Id.* at 39–40. Commerce fails to state or explain how its cost allocation methodology could result in allocating certain steam-related costs to G&A expenses, when it claims to have allocated all those costs to COGS. On remand, Commerce must explain how it allocates different costs to the respective components G&A expense ratio and explain why its determination is supported by the record evidence or reconsider its determination.

Commerce calculates a respondent's dumping margin by determining "the amount by which the [NV] exceeds the export price . . . of the subject merchandise." 19 U.S.C. § 1677(35)(A). NV should normally be calculated based on "the price at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade." 19 U.S.C. § 1677b(a)(1)(B)(i). However, when, as here, Commerce determines that the respondent does not have viable home or third-country market sales, the statute directs that Commerce may use a constructed value to calculate a NV for respondent (*i.e.*, CV).[26] *See* 19 U.S.C. §

[25] In its reply brief, PT points out that Commerce did not allocate all expenses attributable to steam to cost of goods sold, as Defendant says Commerce did. PT Reply 15 (citing Def.'s Resp. 38). Rather, PT claims that Commerce allocated research and development and depreciation costs to G&A expenses, not to cost of goods sold. *Id.* (citing id. at Addendum). PT argues that, to the extent steam expenses are properly included, they should all be allocated to COGS to be consistent with Commerce's practice, as described by Defendant. *See id.* at 17, n 7.

[26] The statute provides that CV of imported merchandise is equal to the sum of: (1) the cost of materials of fabrication or other processing of any kind in producing the merchandise; (2) some representation of the amounts incurred and realized for selling, general, and

1677b(a)(4); 19 U.S.C. § 1677b(a)(1)(B)–(C); *see also* Prelim. Decision Memo at 13 (stating that Commerce used CV as the basis for NV because PT did not have a viable comparison market).

In calculating constructed value, Commerce is required to include selling, general, and administrative expenses. *See* 19 U.S.C. § 1677b(e)(3)(1)–(3). The statute does not define selling, general, and administrative expenses. However, G&A expenses are generally understood to mean "expenses which relate to the activities of the company as a whole rather than to the production process." *Torrington Co. v. United States*, 25 CIT 395, 431, 146 F. Supp. 2d 845, 885 (2001) (internal quotations omitted). The court affords Commerce significant deference in developing a methodology for determining this component of CV because it is a determination "involv[ing] complex economic and accounting decisions of a technical nature." *Fujitsu Gen. Ltd. v. United States*, 88 F.3d at 1039. However, Commerce's "must cogently explain why it has exercised its discretion in a given manner." *State Farm*, 463 U.S. at 48–49.

Commerce states that its practice is to calculate and allocate G&A expenses based on company-wide G&A costs, which are the expenses that "relate to the general operations of the company as a whole" and not specific products and processes.[27] Final Decision Memo at 56 (citing Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review on Narrow Woven Ribbons with Woven Selvedge from Taiwan at 29, A-583–844, (Apr. 6, 2015), *available at* http://ia.ita.doc.gov/frn/summary/taiwan/2015–08436–1.pdf (last visited Mar. 20, 2017) ("Ribbons with Woven Selvedge from Taiwan I&D"). Therefore, according to Commerce's stated practice, the numerator for the G&A expense ratio is the respondent's expenses attributable to general operations of the company and the denominator is the respondent's company-wide COGS. *See id.* Thus, the G&A expense ratio, expressed as an equation is as follows:

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administrative expenses and for profits in connection with the production and sale of merchandise for consumption in the foreign country; and (3) packing and other expenses incidental to placing the subject merchandise in condition packed and ready for shipment to the United States. 19 U.S.C. § 1677b(e)(1)–(3). If actual data are not available for selling, general, and administrative expenses, then Commerce may calculate selling, general and administrative expenses based on: (1) the actual amounts incurred and realized by the specific exporter or producer for selling, general, and administrative expenses in connection with the production and sale, for consumption in the foreign country, of merchandise of the same general category of products as the subject merchandise; (2) the weighted-average of the actual amounts actually incurred and realized by other exporters or producers subject to the investigation; or (3) based on any other reasonable method. 19 U.S.C. § 1677b(e)(2)(B)(i)–(iii).

[27] Defendant restates Commerce's practice in materially identical terms. *See* Def.'s Resp. 8.

$$G\&A\ Expense\ Ratio = \frac{G\&A\ Expenses\ (company\ wide)}{COGS\ (company\ wide)}$$

To compute the per-unit amount of G&A expense, the G&A expense ratio is multiplied by the total costs of manufacture for each product assigned a control number by Commerce.[28] *See* PT Enterprise Section D Response at 26, CD 60–62, bar code 3228714–01–03 (Sept. 16, 2014) ("PT Sec. D. Resp.").

Here, Commerce relied on Pro-Team's financial statements to calculate the G&A expense ratio in its preliminary determination. *See* Prelim. Decision Memo at 16. In its initial questionnaire response, Pro-Team calculated its G&A expense ratio by excluding all expenses related to its production and sale of steam from both G&A and COGS.[29] *See* PT Sec. D. Resp. at 21, 34, Exs. D-15, D-16. Following comments from interested parties, Commerce asked Pro-Team to recalculate G&A to include steam related production costs and expenses, and Pro-Team complied. *See* PT Enterprise Supplemental Section D Response at 11–12, Exs. SD-21, SD-24, CD 79–84, bar codes 3237002–01–05 (Oct. 21, 2014). Pro-Team offset the G&A expenses generated in the production of steam by certain other income. *Id.* at Ex. SD-24. These adjustments resulted in an increase in Pro-Team's G&A expense ratio for Commerce's preliminary determination.[30] *See* Analysis of Data Submitted by PT Enterprise Inc. in Certain Nails from Taiwan at Attach. 2, CD 194, bar code 3248230–01 (Dec. 14, 2014).

In its final determination, Commerce found that some portion of the other income Pro-Team had offset against G&A expenses represented an energy subsidy for steam provided by the government of Taiwan to promote energy production. *See* Final Decision Memo at 56 (citing PT Cost Verification Rep. at 22). Commerce did not allow the income attributable to this subsidy to offset Pro-Team's G&A expenses because Commerce concluded "the subsidy is not related to the general

[28] In its Section D questionnaire, Commerce defines G&A expenses as

> those period expenses which relate indirectly to the general operations of the company rather than directly to the production process. G&A expenses include amounts incurred for general R&D activities, executive salaries and bonuses, and operations relating to your company's corporate headquarters.

PT Enterprise Section D Response at 26, CD 60–62, bar code 3228714–01–03 (Sept. 16, 2014). Commerce does not define COGS either in its questionnaire or in its final determination. *See id.*; Final Decision Memo.

[29] The resulting G&A ratio calculated by Pro-Team was [[ ]]%. PT Sec. D. Resp. at Ex. D-16.

[30] The resulting G&A ratio increased to [[ ]]%. *See* Analysis of Data Submitted by PT Enterprise Inc. in Certain Nails from Taiwan at Attach. 2, CD 194, bar code 3248230–01 (Dec. 14, 2014).

operations of the company as a whole, but instead appears directly related to and intended for the company's other steam line of business." *Id.* Therefore, Commerce applied this income as an offset to COGS denominator, not the G&A expense numerator. *Id.*

Commerce does not specify exactly how it allocates costs and expenses attributable to a separate line of business, except to say that "[t]he costs associated with the steam line of business were properly included in the denominator of the G&A expense ratio calculation (*i.e.*, COGS)."[31] Final Decision Memo at 55. Defendant states that Commerce allocates all costs and expenses attributable to Pro-Team's steam business, including research and development ("R&D") expenses and depreciation expenses attributable to steam production, to COGS (*i.e.*, the denominator of the G&A expense ratio). *See* Def.'s Resp. 32, 37–38. PT correctly points out that Defendant's statement "does not accurately reflect the manner in which Commerce actually calculated COGS and G&A." Pl.'s Reply Br. 15, Addendum, Sept. 23, 2016, ECF No. 58; *see generally* Verification of the Cost Response of PT Enterprise Inc. in the Antidumping Duty Investigation of Certain Steel Nails from Taiwan at 20, Ex. CVE-9, CD 261, bar code 3265886–01 (Mar. 19, 2015) ("PT Cost Verification Rep.") (demonstrating that Commerce allocated certain expenses, including R&D, depreciation, and other expenses attributable to Pro-Team's steam line of business, to G&A expenses, and other expenses to COGS). Commerce's statement of its practice does not address why certain costs, specifically R&D and depreciation, were allocated to G&A while others were allocated to COGS when Commerce claims its practice is to allocate all expenses not attributable to the administration of the company as a whole, including expenses attributable to the production of non-subject merchandise, to COGS.[32] On remand, Commerce must explain its methodology for allocating costs associated with Pro Team's separate steam business and explain why that methodology is reasonable or reconsider its determination. Commerce does not ex-

[31] Because PT does not have a viable home or third-country market, Commerce concluded that it lacked a comparison market for selling expenses to use in its CV calculations. Prelim. Decision Memo at 16. Commerce used PT's financial statements to calculate the selling, general, and administrative expenses component of CV. *Id.*; *see also* Final Decision Memo at 55; 19 U.S.C. § 1677b(e)(2)(B)(iii).

[32] Defendant states that Commerce has a practice of including R&D activities in COGS where these expenses are not considered to be part of a company's general expenses in the calculation of its G&A expense ratio. Def.'s Resp. Br. 37. However, neither Defendant nor Commerce cites any practice that either states explicitly that R&D expenses attributable to non-subject merchandise are allocated to COGS or explaining why it is reasonable to do so.

plain why it allocates certain types of expenses related to steam production to G&A and others to COGS.[33]

In the alternative, PT argues that, if Commerce includes costs related to ProTeam's separate steam production in G&A, Commerce's practice must require the income from the subsidy benefiting ProTeam's steam production to offset those G&A expenses attributable to its steam production. PT Br. 39–42. PT contends it would be inconsistent to offset all subsidy income to COGS if some costs attributable to steam are allocated to G&A. *Id.* Defendant counters that Commerce offset COGS (*i.e.*, the denominator) by the amount of government subsidy for the production of steam because Commerce determined that the subsidy is unrelated to the general operation of the company. Def.'s Resp. Br. 39 (citing Final Decision Memo at 56).

Defendant contends that Commerce's practice permits income from a subsidy to offset G&A expenses (*i.e.*, the numerator of the G&A expense ratio) only where the subsidy benefits the company as a whole, not where Commerce specifically finds that a subsidy only benefits a particular line of business. *See* id. (citing Final Decision Memo at 56). Although Commerce cites this same statement of its practice, Final Decision Memo at 56 (citing Certain Pasta From Italy, 64 Fed. Reg. 6,615, 6,626–27 (Dep't Commerce Feb. 10, 1999) (final results and partial rescission of antidumping duty administrative review) (treating grants for equipment purchases and loan-restitution payments as offsets to total G&A expenses where Commerce found they relate to the company's general operations)), the court cannot assess the reasonableness of this practice for offsetting subsidies subsidy income generally or as applied here until Commerce has clarified its practice of allocating all costs not attributable to company-wide administrative expenses, including those relating to

[33] Missing from Commerce's analysis and Defendant's brief is an explanation why R&D and depreciation expenses not attributable to production of subject merchandise (*i.e.*, cost of manufacture) and that cannot be attributed to company-wide administration (*i.e.*, G&A) are allocated to COGS. The proceedings cited by Defendant, focus on the propriety of including certain expenses in G&A (*i.e.*, the numerator of the G&A expense ratio), but they do not address why it is reasonable to include all other company-wide expenses in COGS (*i.e.*, the denominator of the G&A expense ratio). *See* Issues and Decision Memorandum for the Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from India – August 4, 2004, through January 31, 2006 at 15–18, A-533–850, (Sept. 5, 2007), *available at* http://ia.ita.doc.gov/frn/summary/india/E7–18006–1.pdf (last visited Mar. 20, 2017) (addressing the propriety of including expenses attributable R&D, supply, support and chain management, compensation, and other voluntary retirement schemes in the numerator of the G&A expense ratio); Issues and Decision memorandum for the Final Determination in the Antidumping Duty Investigation of Certain Lined Paper Products from India at 9–10, A-533–843, (Aug. 8, 2006), *available at* http://ia.ita.doc.gov/frn/summary/india/E6–12811–1.pdf (last visited Mar. 20, 2017) (addressing why G&A expenses need to reflect company-wide administrative costs and why certain expenses attributable to non-subject merchandise should not be allocated to G&A, but not why it is reasonable to allocate those expenses to COGS).

non-subject merchandise, to COGS. Only once Commerce has clarified the apparent inconsistencies in its allocation of costs in this investigation and explained the reasonableness of its cost allocation methodology can the court assess if allocating all non-administrative company-wide expenses to COGS is reasonable and supported by the record here. The court defers consideration of this issue.

IV. Transfer Prices Paid by Pro-Team to Tollers for Wire Drawing and Nail Making Services

PT argues that Commerce's rejection of transfer prices paid by Pro-Team to affiliated tollers for wire drawing and nail making services performed for Pro-Team is not supported by substantial evidence because the prices Pro-Team paid to affiliated and unaffiliated tollers were substantially similar. PT Br. 42–44. Defendant responds that Commerce reasonably disregarded transfer prices paid to affiliated tollers because it determined that the average amount paid to unaffiliated tollers (*i.e.*, average market price) is greater than the average amount paid to affiliated tollers (*i.e.*, average transfer price). Def.'s Resp. 42–44. Commerce's determination is supported by substantial evidence.

In the calculation of CV, the statute permits Commerce to disregard transactions "directly or indirectly between affiliated persons" if those transactions do not fairly reflect an arm's-length price. *See* 19 U.S.C. § 1677b(f)(2). If Commerce disregards affiliated party transactions and no other transactions are available for consideration, the determination of the amount shall be based on the information on the record as to what an arm's-length price would have been if the transaction had occurred between unaffiliated persons. *Id.* The statute does not define what it means for affiliated party transactions to not fairly reflect an arm's-length transaction. *See id.*

In order to determine whether affiliated party transactions fairly reflect the market price for such transactions, Commerce's practice is to compare the average transfer prices for affiliated tollers with the average market prices for unaffiliated tollers. *See*, *e.g.*, *Polyethylene Retail Carrier Bags From Thailand*, 76 Fed. Reg. 12,700 (Dep't Commerce Mar. 8, 2011) (final results of antidumping duty administrative review) and accompanying Issues and Decision Memorandum for the Antidumping Duty Administrative Review of Polyethylene Retail Carrier Bags from Thailand for the Period of Review August 1, 2008, through July 31, 2009 at 19, A-549–821, (Mar. 1, 2011), *available at* http://ia.ita.doc.gov/frn/summary/thailand/2011–5267–1.pdf (last visited Mar. 20, 2017) ("Polyethylene Retail Carrier Bags from Thailand I&D"). Where transfer prices (*i.e.*, affiliated party transactions) are

lower than those made at arm's length prices (*i.e.*, unaffiliated party transactions) on a weighted-average basis, Commerce may disregard those transactions as not fairly reflecting the amount usually reflected in sales of merchandise under consideration in the market under consideration. *See id.*; *see generally* 19 U.S.C. § 1677b(f)(2).

Here, Commerce reasonably disregarded transactions for low carbon wire drawing and steel nail making services performed by Pro-Team's tollers because it found the average market price for such services performed by unaffiliated tollers was higher than those of affiliated tollers.[34] Final Decision Memo at 53. Commerce did not disregard affiliated party transactions for coating and wire strip collating services performed by tollers because it found the average market price for coating and wire strip collating services performed by affiliated tollers was higher than the price paid to unaffiliated tollers.[35] *See id.*

PT argues that Commerce lacked substantial evidence to disregard the transfer prices paid to affiliated tollers for low carbon wire drawing and steel nail making services because the prices paid to affiliated tollers and those paid to unaffiliated tollers are substantially similar.[36] PT Br. 42–43. PT does not contest Commerce's findings that Pro-Team paid a higher weighted-average price to unaffiliated tollers than it did to affiliated tollers for both services. *See id.* The record therefore indicates that the weighted-average of the prices paid to affiliated tollers was lower than that paid to unaffiliated tollers for such services. *See* Final Decision Memo at 53; PT Verification Rep. at 19–20. PT does not argue that Commerce's practice is unreasonable, and Commerce's determination to follow its practice is supported by record evidence here.

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[34] Commerce compared tolling services purchased by Pro-Team from affiliated and unaffiliated suppliers, which included wire drawing, nail making, threading, coating, wire strip collating. *See* PT Enterprise Cost Verification Rep at 19–20. Commerce determined that for wire drawing of low carbon steel, the average transfer price paid to affiliated tollers was [[ ]] while the average price paid for such services purchased from unaffiliated tollers was [[ ]]. *Id.* at 19. For steel nail making services, the average price paid to affiliated tollers was [[ ]] while the average price paid to unaffiliated tollers was [[ ]]. *Id.*

[35] For coating services, the average price paid to affiliated tollers was [[ ]] while the average price paid to unaffiliated tollers was [[ ]]. PT Enterprise Cost Verification Report at 19. For wire strip collating services, the average price paid to affiliated tollers was [[ ]] while the average price paid to unaffiliated tollers was [[ ]]. *Id.* at 20.

[36] Specifically, PT argues that, for wire drawing of low carbon steel, the affiliated party transfer price of [[ ]] is "only [[ ]] percent less than the [[ ]] price paid to the unaffiliated company responsible for [[ ]] percent of wire drawing." PT Br. 42. For nail making, PT argues "the prices paid to affiliated tollers ([[ ]] and [[ ]]) were greater than prices paid to two unaffiliated tollers ([[ ]]) and merely [[ ]] percent less than the average. *Id.*

In the alternative, PT argues that even if the weighted-average prices paid by Pro-Team to its affiliated wire drawing and nail making tollers were lower, Commerce abused its discretion in applying its transactions disregarded practice here because the price differences were too small to justify rejecting them. *See* PT Br. 44. A determination by Commerce is an abuse of discretion if it is clearly unreasonable, arbitrary, or fanciful, is based on an erroneous conclusion of law, rests on clearly erroneous fact findings, or follows from a record that contains no evidence on which Commerce could rationally base its decision. *See Gerritsen v. Shirai*, 979 F.2d 1524, 1529 (Fed. Cir. 1992). Although the statute does not require Commerce to disregard transactions that do not reflect non-arm's-length transactions between affiliated purchasers, the statute permits Commerce to do so where the transaction does not fairly reflect an arm's-length transaction. *See* 19 U.S.C. § 1677b(f)(2).

PT does not demonstrate why it is unreasonable or arbitrary for Commerce conclude that even slightly lower weighted-average prices paid to affiliated tollers do not fairly reflect the amount usually reflected in such transactions. Nor does PT point to affiliated party transactions for other services where the weighted-average transfer price was lower than for unaffiliated party transactions but Commerce opted not to exclude such prices. The fact that Commerce elected not to exclude transactions to unaffiliated tollers for coating or to affiliated tollers for wire strip collating does not demonstrate Commerce's determination is arbitrary. *See* Final Decision Memo at 53. For coating and wire strip collating services performed for tollers, the weighted-average prices for those services performed by affiliated tollers was higher than for the same services performed by unaffiliated tollers. *See* PT Cost Verification Report at 19–20. Commerce excluded these transactions because the weighted-average prices paid to unaffiliated tollers is higher. *See* Final Decision Memo at 53; PT Cost Verification Report at 19–20. It is reasonably discernible that Commerce determined that higher prices paid to unaffiliated tollers reflect an arms-length transaction because affiliates that are not pricing their services at arms-length would reflect lower pricing. *See* Final Decision Memo at 53; PT Cost Verification Report at 19–20. PT points to no reason why it is irrational or arbitrary for Commerce to conclude that slightly lower weighted-average prices paid to affiliated parties reflect transactions that have not occurred at arm's length. Therefore, Commerce's determination to disregard transactions to affiliated tollers performing low carbon wire drawing and steel nail making services is reasonable and not an abuse of discretion.

CONCLUSION

For the foregoing reasons, the U.S. Department of Commerce's final determination in the investigation of the antidumping duty order covering certain nails from Taiwan is sustained in part and remanded in part.

The final determination is sustained with respect to Commerce's determinations:

(1) that Pro-Team is unaffiliated with the [[ ]] tollers in question; (2) to use the Cohen's d test within the differential pricing analysis to determine the existence of a pattern of significant price differences; (3) to use a simple average to calculate the pooled standard deviation in the Cohen's d test of the differential pricing analysis; (4) to not offset dumped sales with non-dumped sales in calculating the respondent's antidumping duty margin using the average-to-transaction methodology; and (5) to disregard transfer prices paid by Pro-Team to certain affiliated tollers in its calculation of normal value ("NV"). The final determination is remanded with respect to Commerce's allocation of expenses associated with Pro-Team's separate steam line of business.

In accordance with the foregoing, it is hereby

ORDERED that Commerce's allocation of expenses associated with Pro-Team's separate steam line of business for further explanation and consideration consistent with this opinion. On remand, Commerce must:

(1) Explain its methodology for allocating costs associated with Pro Team's separate steam business and explain why that methodology is reasonable or reconsider its determination, and

(2) Explain how its cost allocation methodology in this case conformed with its practice or reconsider its determination; and it is further

ORDERED that Commerce shall file its remand determination with the court within 45 days of this date; and it is further

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

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

Dated: March 23, 2017
New York, New York

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

Slip Op. 17–32

COOPER TIRE & RUBBER COMPANY, COOPER (KUNSHAN) TIRE CO., LTD., AND COOPER CHENGSHAN (SHANDONG) TIRE CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and THE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, Defendant-Intervenor.

Before: Timothy C. Stanceu, Chief Judge
Court No. 15–00251

[Remanding for redetermination a cash deposit rate applied to secure estimated antidumping duties]

Dated: March 29, 2017

Gregory C. Dorris, Pepper Hamilton LLP, of Washington, D.C., for plaintiffs.

John J. Todor, Senior Trial Counsel, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel was *Mercedes C. Morno*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Geert De Prest, Stewart and Stewart, of Washington, D.C., for defendant-intervenor. With him on the brief were *Terence P. Stewart*, *Phillip A. Butler*, and *Nicholas J. Birch*.

OPINION AND ORDER

Stanceu, Chief Judge:

Plaintiffs challenge the antidumping duty cash deposit rate of 11.12% *ad valorem* that the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") applied to imports of passenger car and light truck tires that they produced and exported from the People's Republic of China. For the reasons discussed below, the court sets the cash deposit rate aside as contrary to law.

I. BACKGROUND

A. The Parties in this Litigation

Plaintiffs Cooper (Kunshan) Tire Co., Ltd. and Cooper Chengshan (Shandong) Tire Co., Ltd. are affiliated Chinese producers and exporters of tires for passenger cars and light trucks. Plaintiff Cooper Tire & Rubber Company is an affiliated exporter of the subject merchandise of these producers. In this Opinion, the court refers to plaintiffs collectively as "Cooper."

Cooper was a respondent in parallel antidumping duty ("AD") and countervailing duty ("CVD") investigations conducted by Commerce.

The petitioner in the investigations was the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the "USW"), which is the defendant-intervenor in this litigation.

B. The Contested Determination and the Contested Cash Deposit Rate

In June 2015, Commerce issued a decision published as *Antidumping Duty Investigation of Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, In Part*, 80 Fed. Reg. 34,893 (Int'l Trade Admin. June 18, 2015) ("*Final AD Determination*"). Commerce subsequently issued an "Amended Final Determination" accompanied by antidumping duty and countervailing duty orders, published as *Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China: Amended Final Affirmative Antidumping Duty Determination and Antidumping Duty Order; and Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 80 Fed. Reg. 47,902 (Int'l Trade Admin. Aug. 10, 2015) ("*Amended Final Determination*"). In the Amended Final Determination, Commerce assigned Cooper an estimated dumping margin of 25.84%. *Id.* at 47,905. Commerce nominally set the cash deposit rate at the same rate as the margin but made a downward adjustment resulting in an applied cash deposit rate of 11.12% for the merchandise Cooper exported to the United States. *Amended Final Determination*, 80 Fed. Reg. at 47,904 n.19; *see also Final AD Determination*, 80 Fed. Reg. at 34,897. Cooper claims that the downward adjustment was improperly calculated and is therefore insufficient. Commerce determined a CVD cash deposit rate of 20.73% for Cooper, *Amended Final Determination*, 80 Fed. Reg. at 47,907, which Cooper does not contest in this litigation.

C. The Parallel AD and CVD Investigations

On July 21, 2014, Commerce initiated the parallel AD and CVD investigations. *Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China: Initiation of Antidumping Duty Investigation*, 79 Fed. Reg. 42,292 (Int'l Trade Admin. July 21, 2014); *Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China: Initiation of Countervailing Duty Investigation*, 79 Fed. Reg. 42,285 (Int'l Trade Admin. July 21, 2014). On January 27, 2015, Commerce published its preliminary less-than-fair value determination in the AD investigation ("Preliminary AD Determination").

Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value; Preliminary Affirmative Determination of Critical Circumstances; In Part and Postponement of Final Determination, 80 Fed. Reg. 4,250 (Int'l Trade Admin. Jan. 27, 2015) ("*Preliminary AD Determination*").

Commerce initially selected Shandong Yongsheng Rubber Group Co., Ltd. ("Yongsheng") and GITI Tire Global Trading Pte. Ltd. and its affiliates ("GITI") as the only two mandatory respondents in the AD investigation. *Antidumping Duty Investigation of Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Respondent Selection* 4–5 (Int'l Trade Admin. Aug. 27, 2014), ECF No. 33 (Admin.R.Doc. No. 304). Commerce initially chose the same two companies as the mandatory respondents in the parallel CVD investigation. *See* Def.-Int. the USW's Opp'n to Pls.' Mot. for J. on the Agency R., Ex. 1 at 4–5 (Apr. 14, 2016), ECF No. 30 ("USW's Br."). In the Preliminary AD Determination, Commerce stated that Yongsheng "did not demonstrate that it is entitled to a separate rate" and that "[a]ccordingly, we consider Yongsheng to be part of the PRC-Wide Entity." *Preliminary AD Determination*, 80 Fed. Reg. at 4,252. The "PRC-Wide Entity" includes the Chinese exporters and producers Commerce determines not to have demonstrated independence from the government of the PRC.

Prior to publication of the Preliminary AD Determination, Commerce selected Sailun Group Co., Ltd. ("Sailun") to replace Yongsheng as the second mandatory respondent in the AD investigation. *See Antidumping Duty Investigation of Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Selection of Additional Mandatory Respondent* (Int'l Trade Admin. Oct. 7, 2014), ECF. No. 33 (Admin.R.Doc. No. 617). Because Commerce decided not to select Cooper as a mandatory respondent, and because it rejected Cooper's request to be named a voluntary respondent, in the AD investigation (decisions Cooper does not challenge in this litigation), Cooper did not receive an individual weighted average margin in the AD investigation. Instead, Cooper was assigned the rate assigned to all "separate rate" respondents in that investigation, i.e., respondents that qualified for a rate separate from the rate Commerce applied to the PRC-Wide Entity. Commerce, however, chose Cooper as the second mandatory respondent in the CVD investigation. USW's Br., Ex. 2 at 2. GITI remained as a mandatory respondent in both investigations.

On June 18, 2015, Commerce published the final determination in the antidumping duty investigation, *Final AD Determination*, 80 Fed. Reg. at 34,893, which Commerce amended on August 10, 2015 for correction of ministerial errors, *Amended Final Determination*, 80 Fed. Reg. at 47,902. The final individual weighted average dumping margins in the Amended Final Determination were 30.74% for GITI and 14.35% for Sailun; Commerce assigned a rate of 25.84% to the separate rate respondents in the antidumping duty investigation, including Cooper, calculated as the weighted average of the two individual margins. *Amended Final Determination*, 80 Fed. Reg. at 47,905.

In the Final AD Determination, Commerce announced that the cash deposit rate for merchandise produced or exported by Cooper would be calculated by making two downward adjustments to Cooper's nominal cash deposit rate, which was the same as the final dumping margin (determined at that time as 25.30%, which Commerce applied to Cooper and all other separate rate respondents). *Final AD Determination*, 80 Fed. Reg. at 34,897. For the first adjustment to the cash deposit rate, Commerce stated that it would subtract from the percentage the "export subsidy rate" of 11.13%, which Commerce determined individually for Cooper in the course of the companion countervailing duty investigation. *Id*. The other separate rate respondents in the AD investigation received an "all-others" export subsidy downward adjustment of 13.53% to their cash deposit rate. *Id.*

For the second adjustment, Commerce announced that it would make a further reduction in the cash deposit rate for Cooper, as well as for the other separate rate respondents, of 3.59% "to account for estimated domestic subsidy pass-through." *Id.* (footnote omitted). As applied to Cooper's amended final dumping margin and nominal cash deposit rate of 25.84% as determined in the Amended Final Results, the two downward adjustments resulted in the applied AD cash deposit rate of 11.12% that Cooper contests in this action. *See Amended Final Determination*, 80 Fed. Reg. at 47,904 n.19.

D. Cooper's Initiation of this Action and the USW's Intervention as of Right

On September 8, 2015, Cooper filed its summons, Summons, ECF No. 1; Cooper filed its complaint on October 7, 2015, Compl., ECF No. 9. On January 15, 2016, Cooper moved for judgment on the agency record pursuant to USCIT R. 56.2. *See* Rule 56.2 Mot. for J. on the Agency R. of Pls. Cooper Tire & Rubber Company, Cooper (Kunshan) Tire Co., Ltd., and Cooper Chengshan (Shandong) Tire Co., Ltd. and Mem. in Supp. (Jan. 15, 2016), ECF No. 22 ("Cooper's Br."). This

motion, opposed by defendant United States, is now before the court. Def.'s Resp. to Pls.' Rule 56.2 Mot. for J. upon the Agency R. (Apr. 14, 2016), ECF No. 31 ("Def.'s Br.").

On November 10, 2015, the court granted the USW's motion to intervene as of right in this action as defendant-intervenor. Order (Nov. 10, 2015), ECF No. 15. The USW also opposes Cooper's Rule 56.2 motion. *See* USW's Br.

The court held oral argument on Cooper's Rule 56.2 motion on September 22, 2016.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction according to section 201 of the Customs Court Act of 1980, 28 U.S.C. § 1581(c). In reviewing a determination in an antidumping duty investigation, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i).

Section 735(c)(1)(B)(i) of the Tariff Act of 1930 as amended ("Tariff Act") provides that Commerce, upon reaching a final affirmative less-than-fair-value determination in an antidumping duty investigation, shall "determine the estimated weighted average dumping margin for each exporter and producer individually investigated," 19 U.S.C. § 1673d(c)(1)(B)(i)(I), and "determine . . . the estimated all-others rate for all exporters and producers not individually investigated," *id.* § 1673d(c)(1)(B)(i)(II).[1]

B. The Statutory Framework

Commerce determines a "dumping margin" according to "the amount by which the normal value[[2]] exceeds the export price or constructed export price of the subject merchandise."[3] 19 U.S.C. §

[1] Citations herein to the United States Code are to the 2012 edition. Citations to the Code of Federal Regulations are to the 2015 edition.

[2] Although usually determined from the price at which a product identical or similar to the subject merchandise is sold or offered for sale in the home market of the exporting country, *see* 19 U.S.C. §§ 1677(16), 1677b(a), the normal value of subject merchandise exported from a country, such as China, that Commerce considers to be a nonmarket economy country is determined according to specialized procedures. Under these procedures, Commerce typically determines normal value "on the basis of the value of the factors of production utilized in producing the merchandise," adding amounts for expenses and profit. *Id.* § 1677b(c)(1). The "factors of production" include labor hours and the quantities of materials used in production. *Id.* § 1677b(c)(3).

[3] "Export price" is an adjusted price determined from the "price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated

1677(35)(A). A "weighted average dumping margin" is calculated as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." *Id.* § 1677(35)(B).

1. Estimated Weighted Average Dumping Margins

The statute describes, in 19 U.S.C. § 1673d(c)(1)(B)(i)(I), the individual weighted average dumping margin and, in § 1673d(c)(1)(B)(i)(II), the all-others rate as "estimated," consistent with the retrospective statutory scheme for assessment of antidumping duties, under which Commerce, at a later time, determines the amount of antidumping duty that actually is to be assessed and collected upon the liquidation of entries of subject merchandise. *See* 19 C.F.R. § 351.212 ("[T]he United States uses a 'retrospective' assessment system under which final liability for antidumping and countervailing duties is determined after merchandise is imported.").

2. The Cash Deposit Requirement

Further to the retrospective statutory scheme, the Tariff Act provides for security for the future collection of antidumping duties. Commerce "shall order the posting of a cash deposit, bond, or other security," as Commerce "deems appropriate, for each entry of the subject merchandise . . . ." 19 U.S.C. § 1673d(c)(1)(B)(ii). The statute directs that the cash deposit or other security be "in an amount based on the estimated weighted average dumping margin or the estimated all-others rate, whichever is applicable."[4] *Id*. Although generally allowing the posting of bonds as security for "provisional measures," i.e., antidumping duty deposits on importations of merchandise subject to an AD investigation made prior to the issuance of an antidumping duty order, the Department's regulations provide that "[g]enerally, upon the issuance of an order, importers no longer may post bonds as security for antidumping or countervailing duties, but instead must make a cash deposit of estimated duties." 19 C.F.R. § 351.211(a).

purchaser in the United States or to an unaffiliated purchaser for exportation to the United States . . . ." 19 U.S.C. § 1677a(a). "Constructed export price" is an adjusted price determined from the "price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter . . . ." *Id.* § 1677a(b).

[4] Under a parallel countervailing duty provision in the Tariff Act, Commerce is to order security for potential countervailing duty liability upon reaching a final affirmative determination that a countervailable subsidy is being provided. 19 U.S.C. § 1671d(c)(1)(B)(ii).

3. The "Export Subsidy" and "Domestic Subsidy Pass-Through" Provisions

The "export subsidy" provision of section 772 of the Tariff Act, 19 U.S.C. § 1677a(c)(1)(C), directs Commerce to increase the "[t]he price used to establish export price and constructed export price" (the "starting price")[5] by "the amount of any countervailable duty imposed on the subject merchandise under part 1 of this subtitle to offset an export subsidy."[6] 19 U.S.C. § 1677a(c)(1)(C). In determining the estimated weighted average dumping margins of the two mandatory respondents, Commerce did not make upward adjustments to the starting prices for any countervailable duty imposed to offset an export subsidy. As a result, the all-others rate of 25.84% that Commerce applied to Cooper and the other separate rate respondents, which was derived from the individually determined margins, does not reflect an adjustment made under § 1677a(c)(1)(C). During the investigation, Commerce explained that "[u]nlike in administrative reviews, the Department calculates the adjustment for export subsidies in investigations not in the margin-calculation program, but in the cash-deposit instructions issued to [U.S. Customs and Border Protection ("CBP")]." *Final AD Determination*, 80 Fed. Reg. at 34,897 n.12.

The "domestic subsidy pass-through" provision of section 777A(f) of the Tariff Act, 19 U.S.C. § 1677f-1(f), applies only to imported merchandise (1) that is from a nonmarket economy country and (2) for which Commerce determines normal value according to the method of 19 U.S.C. § 1677b(c), both of which conditions applied in the instant investigation. Described in general terms, this provision applies if Commerce determines that a countervailable subsidy (other than an export subsidy referred to in 19 U.S.C. § 1677a(c)(1)(C)) has been provided that reduced the average price of the subject imports and increased the weighted average dumping margin. 19 U.S.C. § 1677f-1(f). In that event, Commerce is directed to reduce the antidumping duty by the amount of the increase in the dumping margin that Commerce can reasonably estimate. *Id.*

C. Summary of Plaintiffs' Claims

Cooper's principal claim is that Commerce should not have based the downward adjustment for 19 U.S.C. § 1677a(c)(1)(C), i.e., the

[5] Commerce refers to the price used to establish export price or constructed export price, prior to upward and downward adjustments, as the "starting price." 19 C.F.R. § 351.402(a).

[6] The reference to "part 1 of this subtitle" is a reference to "Part I—Imposition of Countervailing Duties" and to "Subtitle IV—Countervailing and Antidumping Duties" of the Tariff Act of 1930.

export subsidy adjustment, on information specific to Cooper that was on the record of the parallel countervailing duty investigation. Cooper claims that Commerce erred in not allowing Cooper the benefit of a 13.53% downward export subsidy adjustment, which was the adjustment Commerce allowed for all other separate rate respondents in the AD investigation. Cooper points out that "even though Cooper is an AD separate rate respondent like the 62 other separate rate respondents, the AD cash deposit rate for Cooper is 11.12% *ad valorem* and that of all the other 62 separate rate respondents is 8.72% *ad valorem*." Cooper's Br. 7 (citation omitted). According to Cooper, Commerce, lacking a rational basis to treat Cooper differently than it treated the other separate rate respondents, acted arbitrarily and capriciously in limiting the export subsidy deduction to 11.13%. Cooper submits that Commerce should have applied to its subject merchandise a cash deposit requirement calculated as 8.72%, i.e., 25.84% (the all-others AD rate and nominal cash deposit) adjusted downward by 13.53% (the export subsidy adjustment applied to the cash deposit rate for the other separate rate respondents in the AD investigation) and by 3.59% (the domestic pass-through subsidy adjustment applied to the cash deposit rate for those other separate rate respondents).

Cooper's second claim is in the alternative and is conditioned on the court's deciding, contrary to Cooper's first claim, that Commerce had a rational basis to treat Cooper differently than other AD separate rate respondents. If the court were to so decide, Cooper's claim would be that Commerce erred in making a downward adjustment of only 3.59% to account for domestic "pass-through" subsidies pursuant to 19 U.S.C. § 1677f-1(f). Cooper argues that Commerce should be directed to use the record evidence from the CVD investigation pertaining to Cooper, under which, Cooper submits, the domestic subsidy adjustment to the cash deposit rate would be 8.68%, not 3.59%. Cooper maintains that if Commerce uses 11.13% as the export subsidy adjustment, which is based on Cooper's own data, then as a matter of consistency it also must use Cooper's actual domestic pass-through adjustment. Cooper's Br. 19. This would result in a cash deposit rate of 6.03% for Cooper, calculated by subtracting 11.13% and 8.68% from 25.84%.

Cooper's claims are confined to the 11.12% adjusted cash deposit rate. Cooper does not challenge the calculation of the estimated all-others rate of 25.84% that Commerce applied to it. Nor does Cooper claim that Commerce acted unlawfully in effectuating 19 U.S.C. § 1677a(c)(1)(C) by making a downward adjustment to its nominal cash deposit rate of 25.84% rather than by adjusting the export price ("EP") or constructed export price ("CEP") of the mandatory respon-

dents. Cooper makes no claim that Commerce acted contrary to law in implementing 19 U.S.C. § 1677f-1(f) by means of a downward adjustment to its nominal cash deposit rate.

D. Adjudication of Cooper's Primary Claim

In summary, Cooper's argument is that Commerce, lacking a rational basis to treat Cooper differently than it treated the other separate rate respondents, acted arbitrarily and capriciously in making the 11.13% export subsidy adjustment. Cooper's Br. 14–15. The Department's methodology, in Cooper's view, was applied with no valid explanation, was designed to apply only to respondents in Cooper's specific situation (a separate rate respondent in the AD investigation and a mandatory respondent in the CVD investigation), and "ensures that such respondents will receive a cash deposit rate that most likely is higher than (or at best the same as) the other separate rate respondents." Cooper's Br. 14. Arguing that Commerce chose to offset the cash deposit rate by the lower of the rate specific to Cooper or that of the separate rate respondents, Cooper comments that its "actual data will only be used to make it suffer." *Id*. at 16.

Under 19 U.S.C. § 1516a(b)(1)(B)(i), the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." This standard of review has been recognized to encompass the "arbitrary and capricious" standard established under the Administrative Procedure Act ("APA"). *Changzhou Wujin Fine Chemical Factory Co.*, 701 F.3d 1367, 1377 (Fed. Cir. 2012) (citing *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 284 (1974)). "[A]n agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently." *RHP Bearings Ltd. v. United States,* 288 F.3d 1334, 1347 (Fed. Cir. 2002) (quoting *Transactive Corp. v. United States,* 91 F.3d 232, 237 (D.C. Cir. 1996)). For an agency action to be upheld, it must "offer some rationale that could explain the maintenance of different standards for similarly situated claimants, or it must explain why such claimants are in fact not similarly situated." *Serv. Women's Action Network v. Sec'y of Veterans Affairs*, 815 F.3d 1369, 1380 (Fed. Cir. 2016).

The uncontested record facts pertaining to the cash deposits did not provide Commerce a rational basis upon which to treat Cooper differently than the other separate rate respondents. While Commerce had a *basis* for treating Cooper differently, it was not a *rational* basis because it relied upon a method of determining an estimated antidumping duty rate that was unrelated to Cooper's future antidump-

ing duty liability. The basis for the different treatment was the Department's selection of Cooper as a mandatory respondent in the parallel countervailing duty investigation. That provided Commerce with data from which it could calculate, at 11.13%, a percentage for the export subsidy adjustment that was individual to Cooper. Commerce could not do so for the merchandise of the other AD separate rate respondents, who were not mandatory respondents in the CVD investigation. Commerce reasoned that "for the final CVD determination, the Department has determined that Cooper has received export subsidies" that "are countervailed at a lower rate than the weighted-average export subsidy rate applied to the AD mandatory respondents, upon which Cooper's antidumping duty is based." *Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China*, A-570–016, at 21 (Int'l Trade Admin. June 11, 2015) (footnote omitted), *available at* http://enforcement.trade.gov/frn/summary/prc/2015–15058–1.pdf (last visited Mar. 21, 2017). The "weighted-average export subsidy rate applied to the AD mandatory respondents" was 13.53%, which Commerce used to adjust the cash deposit rates of the separate rate respondents in the AD investigation other than Cooper. Commerce also concluded that "[a]lthough Cooper's dumping margin is based on the rates for the mandatory respondents in the AD investigation, there is no double remedy applied to Cooper once its AD rate is adjusted for its calculated export subsidy rate." *Id.*

As the Tariff Act provides in 19 U.S.C. § 1673d(c)(1)(B)(ii) and related provisions, the cash deposit or other security for merchandise exported or produced by any respondent, including a respondent not individually investigated, is to be based on an estimate of the antidumping duty that in the future will be imposed on that merchandise. Therefore, there could have been a rational basis for treating Cooper differently than the other separate rate respondents in the AD investigation only if the difference in Cooper's treatment as to the export subsidy adjustment were rationally related to estimated future antidumping duties. Under the Department's method of calculating the cash deposits, it was not.

The statute provides separately for "individually investigated" exporters and producers, 19 U.S.C. § 1673d(c)(1)(B)(i)(I), and for "all exporters and producers not individually investigated," *id.* § 1673d(c)(1)(B)(i)(II). Upon a final affirmative less-than-fair-value determination, each of the former receives an individual "estimated weighted average dumping margin." *Id.* § 1673d(c)(1)(B)(i)(I). The

latter receive an "estimated all-others rate." *Id.* § 1673d(c)(1)(B)(i)(II). The statute draws the same basic distinction with respect to the cash deposit or other security.

Commerce sets the cash deposit rate as "security" for the potential antidumping duty liability according to its authority under 19 U.S.C. § 1673d(c)(1)(B)(ii), under which Commerce "shall order the posting of a cash deposit, bond, or other security, as [Commerce] deems appropriate, for each entry of the subject merchandise in an amount based on the estimated weighted average dumping margin or the estimated all-others rate, *whichever is applicable*." *Id.* § 1673d(c)(1)(B)(ii) (emphasis added). Thus, the statutory scheme distinguishes between individually investigated respondents and all other respondents, both as to the type of weighted average dumping margin each type receives and as to the security for future antidumping duty liability that Commerce is to order. In contrast to the "estimated" rate, which is an estimate of the potential antidumping duty liability, the actual antidumping duty ordinarily is determined upon completion of an administrative review of the order; an exception occurs where, for example, no review of a respondent has been completed, in which event the cash deposit rate becomes the assessment rate.[7] *See* 19 C.F.R. § 351.212.

If reviewed, Cooper may receive an individual weighted average dumping margin in the first administrative review if Commerce chooses it for individual examination. *See* 19 U.S.C. § 1677f-1(c). Because such a margin must be individual to Cooper, it will not depend on, and it will not be related to, the margin or margins Commerce assigns in the review to respondents who are reviewed but not individually examined. Instead, Commerce will calculate the export price (or constructed export price) of Cooper's subject merchandise according to Cooper's own data. The individual calculation of EP or CEP will include an individual adjustment made for any countervailable export subsidy imposed. *See* 19 U.S.C. § 1677a(c)(1)(C) (increasing the starting price for EP or CEP by "the amount of any

[7] In a notice published subsequent to this action (of which the court takes judicial notice), Commerce announced that a request for review of Cooper was received for the first administrative review of the AD order. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 81 Fed. Reg. 71,061 (Int'l Trade Admin. Oct. 14, 2016). If reviewed, Cooper either will be an individually examined respondent in the first review or will be reviewed but not individually examined. *See* 19 U.S.C. § 1677f-1(c). In the unlikely event that all requests for review of Cooper are effectively withdrawn, entries of Cooper's merchandise will be assessed antidumping duties at "the cash deposit rate applicable at the time merchandise was entered." 19 C.F.R. § 351.212(a). It is possible to interpret this regulation to mean that the assessment rate would be the adjusted cash deposit rate (in which case Cooper would be treated differently than any other separate rate respondent in the AD investigation for which no review was requested), but the regulations are not clear on the point.

countervailing duty imposed *on the subject merchandise* . . . to offset an export subsidy" (emphasis added)). In other words, if Cooper is individually examined in the first review, Cooper will not receive a dumping margin determined by a method parallel to the "hybrid" method Commerce used to calculate its adjusted cash deposit in the AD investigation, which combines an all-others antidumping duty margin and an individually-determined export subsidy adjustment. Notably, the statute ties the export subsidy adjustment to the specific export prices or constructed export prices of a respondent that is individually investigated (in an investigation) or that is individually examined (in a review), not to the margin of an uninvestigated or non-individually-examined respondent or to the U.S. prices at which such a respondent's subject merchandise is sold.

Nor will Cooper receive a dumping margin determined by a method parallel to the Department's hybrid method of calculating the adjusted cash deposit if Cooper is reviewed but *not* selected for individual examination in the administrative review. In that event, Commerce will be required to apply any adjustment for export subsidies in calculating EP or CEP, and therefore in calculating the individual weighted average margins, for the individually examined respondents. *See* 19 U.S.C. § 1677a(c)(1)(C). In the investigation, Commerce has indicated that in an AD review, it makes the export subsidy adjustment "in the margin-calculation program." *Final AD Determination*, 80 Fed. Reg. at 34,897 n.12 ("*Unlike in administrative reviews*, the Department calculates the adjustment for export subsidies in investigations not in the margin-calculation program, but in the cash-deposit instructions issued to CBP." (emphasis added)). Based on the statutory scheme, and consistent with the procedure the Department announced, a margin for a reviewed respondent that is not individually examined in the first administrative review will not be affected by its own individual export subsidy adjustment in that review.

In conclusion, the cash deposit rate Commerce applied to Cooper's merchandise in the antidumping duty investigation is designated by statute as an estimate of the future antidumping duty liability. In this instance, however, Commerce determined the contested cash deposit rate according to a method unrelated to the future antidumping duties that will be owed on that merchandise. That the estimate might turn out to be a reasonable estimate of future AD liability in a numerical sense is not sufficient to save the decision where, as here, the method by which the estimate was derived cannot be justified under the relevant statutory provisions. In subjecting Cooper's merchandise to a cash deposit that varied from the cash deposit applied

to all other separate rate respondents in the antidumping duty investigation, Commerce acted arbitrarily and capriciously and, therefore, impermissibly.

Because the court finds merit in Cooper's primary claim, the court does not consider the claim Cooper makes in the alternative.

Defendant takes the position that Commerce acted permissibly in making the 11.13% export subsidy adjustment to the cash deposit rate, arguing that "Commerce reasonably looked to the actual export subsidy rate that would be assessed on Cooper's subject merchandise and applied that amount for Cooper's export subsidy adjustment." Def.'s Br. 21. According to defendant, "Commerce's actions were consistent with the statute and moreover, ensured that the export subsidy adjustment credited Cooper for the export subsidy rate that will be applied to it." *Id.* This argument fails to confront the problem the court has identified. As the court has explained, the export subsidy adjustment that will be made in the first periodic administrative review will be specific to the export prices or constructed export prices of an individually examined respondent, and if Cooper is individually examined, any adjustment will be made to its own EP or CEP starting prices. If not, any adjustment Cooper receives will be that of the mandatory respondents. Because the "hybrid" method Commerce employed as a means of estimating future AD duty liability has no basis in the statute, Commerce acted arbitrarily and capriciously in treating Cooper differently from the other separate rate respondents in the investigation. Therefore, defendant is not correct in arguing that the adjustment Commerce made "ensured that the export subsidy adjustment credited Cooper for the export subsidy rate that will be applied to it." *Id*.

Defendant-intervenor's argument is also unpersuasive. The USW argues that the export subsidy adjustment is mandated by the statute, requiring no additional demonstration in the AD investigation and reflecting the presumption that export subsidies directly contribute to the lowering of import prices. USW's Br. 10. The USW points out that "[w]hen there is not yet a countervailing duty order, the agency performs the adjustment for export subsidies by reducing the antidumping deposit rate by the CVD deposit rate attributable to the export subsidy as found in the parallel CVD investigation." *Id.* at 11. Cooper, however, does not contest the Department's practice of making the export subsidy adjustment to the cash deposit rate rather than in a margin analysis when it is conducting the AD investigation. The USW's argument does not provide a convincing reason why Commerce did not act arbitrarily and capriciously in treating Cooper differently than other separate rate respondents in the investigation,

and it does not address the problem posed by the Department's using a method of estimating future AD liability that does not accord with what will occur in the subsequent administrative review.

E. Remedy Sought by Cooper

On its primary claim, Cooper argues that "[t]he Court should order the Department on remand to determine Cooper's AD cash deposit rate the same as all other separate rate respondents." Cooper's Br. 19. Because it was arbitrary and capricious for Commerce to assign to Cooper's subject merchandise an adjusted cash deposit rate that differed from the cash deposit rate assigned to the subject merchandise of the other separate rate respondents, the court agrees that Cooper is entitled to this remedy. To date, Cooper has not sought injunctive or other equitable relief as to the implementation of the remedy it is pursuing.

Because this matter is time sensitive, the court is ordering that Commerce expedite its issuance of its decision upon remand (the "Remand Redetermination"). For the same reason, the court is ordering the parties to address in their comment submissions the issue of when the remedy will be effectuated in instructions issued to U.S. Customs and Border Protection.). For the same reason, the court is ordering the parties to address in their comment submissions the issue of when the remedy will be effectuated in instructions issued to U.S. Customs and Border Protection.

III. CONCLUSION

For the reasons stated in the foregoing, the court concludes that the Department's method of determining Cooper's cash deposit rate was arbitrary and capricious and, accordingly, that the determination of the cash deposit rate must be set aside as unlawful.

Therefore, upon consideration of the contested decision and all papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that Commerce, within fifteen days of the issuance of this Opinion and Order, shall issue a redetermination upon remand ("Remand Redetermination") in which it redetermines in accordance with this Opinion and Order the contested cash deposit rate and informs the court of the date by which it will place the redetermined cash deposit rate into effect by means of instructions issued to U.S. Customs and Border Protection; it is further

ORDERED that plaintiffs and defendant-intervenor may submit comments on the Remand Redetermination within ten days of the filing of the Remand Redetermination; it is further

ORDERED that in their comment submissions the parties address the issue of when the remedy ordered by the court should be effectuated in instructions issued to U.S. Customs and Border Protection; and it is further

ORDERED that defendant may respond to plaintiffs' comments within ten days of the filing of such comments.

Dated: March 29, 2017
New York, New York

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

Slip Op. 17–33

UNITED STATES, Plaintiff, v. PAUL PUENTES, Defendant.

Court No. 14–00310

[Granting Plaintiff's Motion for Entry of Default Judgment]

Dated: March 29, 2017

Albert S. Iarossi, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington D.C., for Plaintiff. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, Civil Division, and *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch.

OPINION

RIDGWAY, Judge:

Plaintiff, the United States, brings this action to recover a civil penalty imposed on Defendant Paul Puentes ("Puentes") by the Bureau of Customs and Border Protection ("Customs").[1] *See generally* Complaint; Plaintiff's Motion for Entry of Default Judgment ("Pl.'s Brief"). Now pending is Plaintiff's Motion for Entry of Default Judgment, which seeks judgment against Puentes in the amount of $30,000, as well as post-judgment interest and costs. Complaint at 6; Pl.'s Brief at 1, 9.[2]

[1] The Bureau of Customs and Border Protection is part of the U.S. Department of Homeland Security. It is commonly known as U.S. Customs and Border Protection (or simply "CBP") and is referred to as "Customs" herein.

[2] The paragraphs of the Complaint are misnumbered. Specifically, there are no paragraphs numbered 28 and 29. In other words, paragraph 27 is followed immediately by paragraph 30. In the interest of simplicity, the paragraphs of the Complaint are cited herein as they are (mis)numbered in the Complaint itself.

Jurisdiction lies under 28 U.S.C. § 1582(1) (2006).[3] For the reasons summarized below, Plaintiff's Motion for Entry of Default Judgment must be granted.

I. *Background*

At the time of the events giving rise to this action, Paul Puentes was a licensed customs broker. Complaint ¶ 3.[4] At issue is a $30,000 penalty that Customs assessed against Puentes in early 2011, pursuant to 19 U.S.C. § 1641(d). *See generally* Complaint; *see also* Declaration of Delia Crawford *passim* (Attachment A to Pl.'s Brief) ("Crawford Declaration"); Pl.'s Brief at 3–4, 8–9. The two counts of the Government's Complaint address four types of misconduct, which the Government characterizes as "Merchandise Processing Fees Deception," "Late Entry Summaries," "Failure To File Entry Summaries," and "Misrepresentation Of The Importer of Record." *See generally* Pl.'s Brief at 1–3. As explained below, because Puentes failed to plead or otherwise respond to the Complaint, the factual allegations that follow, as set forth in the Complaint, must be taken as true. *See generally infra* section II.

Payment of Merchandise Processing Fees. First, between April 2008 and February 2009, Puentes filed Customs Forms 7501s ("CF 7501s") – also known as "entry summaries" – for 88 entries of merchandise on behalf of his client Florexpo, LLC ("Florexpo"). Complaint ¶ 4.[5] However, as to 79 of the 88 entries, Puentes collected merchandise processing fees from Florexpo in an amount that exceeded the sum that he ultimately remitted to Customs on the company's behalf. *Id*. ¶¶ 5–7.[6]

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[3] All citations to statutes herein are to the 2006 edition of the United States Code. Similarly, all citations to regulations are to the 2008 edition of the Code of Federal Regulations. The pertinent text of all cited statutes and regulations remained the same at all times relevant herein.

[4] In December 2012, Puentes' customs broker's license was revoked by operation of law after he failed to file the requisite triennial status report. Notice of Revocation of Customs Broker Licenses, 77 Fed. Reg. 72,873, 72,876 (Dec. 6, 2012); *see also* Crawford Declaration ¶ 12; Pl.'s Brief at 4.

[5] CF 7501s ("entry summaries") provide the information necessary for Customs to assess duties, compile import statistics, and fulfill other functions. CF 7501s must be filed for all merchandise that is formally entered for consumption, within 10 working days after entry. *See* 19 C.F.R. §§ 142.11, 142.12(b).

[6] Merchandise processing fees ("MPFs") are administrative fees charged "for the provision of customs services" and are used to offset expenses that Customs incurs in processing merchandise that is formally entered or released. 19 U.S.C. § 58c(a)(9); *see also* 19 C.F.R. § 24.23; *Shell Oil Co. v. United States*, 35 CIT ____, ____ n.4, 781 F. Supp. 2d 1313, 1317 n.4 (2011), *aff'd*, 688 F.3d 1376 (Fed. Cir. 2012). At the time of the entries at issue in this case, the merchandise processing fee was an *ad valorem* fee of 0.21% of the value of the imported merchandise. 19 C.F.R. § 24.23(b)(1)(i)(A). The amount of the merchandise processing fees imposed on each CF 7501 (*i.e.*, each entry summary) "shall not exceed $485" or be less than $25. 19 C.F.R. § 24.23(b)(1)(i)(B).

Specifically, for the 79 entries in question, the CF 7501s that Puentes sent to Florexpo reflected the true value of the imported merchandise and correctly calculated the amount that the company owed to Customs for merchandise processing fees. Complaint ¶ 5. But, after receiving payment from Florexpo in the full and correct amount due, Puentes submitted different CF 7501s to Customs – *i.e.*, CF 7501s that reflected lower declared values and correspondingly lower merchandise processing fees. *Id*. ¶¶ 5–7. As a result of these actions, Puentes collected from Florexpo approximately $6437.05 more in merchandise processing fees than he paid to Customs on the company's behalf. *Id*. ¶ 7, Ex. A (list of 79 entries where Puentes allegedly misrepresented on CF 7501s the value of merchandise, as well as the merchandise processing fees due to Customs).

On September 1, 2009, Florexpo filed a "Prior Disclosure" reporting to Customs conduct that Puentes engaged in during the time that he served as the company's customs broker. Complaint ¶ 8.[7] In its Prior Disclosure, Florexpo informed Customs that the company "had paid Mr. Puentes the MPF[s] that [were] actually owed on the entries at issue and that it had 'believed that the correct value information, including MPF[s], was being declared'" to the agency. *Id*.; Crawford Declaration ¶ 7, Exs. C-D (Florexpo's Prior Disclosure and Customs' acceptance of the Prior Disclosure). These findings outlined above are the subject of both Count I and Count II of the Complaint. *See* Complaint ¶¶ 17–19 (Count I); *id*. ¶ 25 (Count II, re: 19 C.F.R. § 111.29); *id*. ¶ 31 (Count II, re: 19 C.F.R. § 111.32).

Timeliness of CF 7501s. Customs requires that a CF 7501 must be filed for any merchandise that is formally entered for consumption, no more than 10 working days after entry. 19 C.F.R. §§ 142.11(a), 142.12(b). However, between September 2008 and February 2009, Puentes filed CF 7501s out of time for some 250 entries, on behalf of seven separate clients. Complaint ¶ 9, Ex. B (listing the 250 late-filed CF 7501s and identifying the seven clients). These findings are the subject of Count II of the Complaint. *See id*. ¶ 26.

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[7] The disclosure of an import law violation may provide a safe harbor for the disclosing party if the disclosure is made "before, or without knowledge of, the commencement of a formal investigation of the violation." *United States v. Ford Motor Co.*, 463 F.3d 1286, 1294–95 (Fed. Cir. 2006) (citing 19 U.S.C. § 1592(c)(4)); *see also* 19 C.F.R. § 162.74 (explaining purpose and process of filing a valid prior disclosure). Submission of a valid prior disclosure may reduce or eliminate the penalties for which an importer might otherwise be liable due to noncompliance with import laws and regulations. *See generally Brother Int'l Corp. v. United States*, 27 CIT 1744, 1744 n.2, 294 F. Supp. 2d 1373, 1374 n.2 (2003); *see also* U.S. Customs and Border Protection, What Every Member of the Trade Community Should Know About: The ABC's of Prior Disclosure, p.7 (April 2004). Customs' official policy is to encourage the submission of prior disclosures. *See* What Every Member of the Trade Community Should Know About: The ABC's of Prior Disclosure, p.7.

Filing of CF 7501s. Apart from the 250 entries where Puentes late-filed the requisite CF 7501s (discussed immediately above), there were another 58 entries between September 2008 and January 2009 as to which Puentes failed to file any CF 7501s at all. In other words, during that timeframe, Puentes made 58 entries as to which he filed no CF 7501 whatsoever. Complaint ¶ 10, Ex. C (listing the 58 entries as to which no CF 7501s were filed). These findings are the subject of Count II of the Complaint. *See id*. ¶ 26.

Identification of the Importer of Record. Lastly, between April 2009 and April 2010, Puentes filed CF 7501s for 43 entries that identified WorldFresh Express Inc. ("WorldFresh") as the importer of record, although WorldFresh had not authorized Puentes to clear those entries on its behalf and had no knowledge that he was doing so. Complaint ¶¶ 11–13; Crawford Declaration ¶¶ 9–10, Ex. E (Customs' Notice of Action sent to WorldFresh and WorldFresh's response). The actual importer of record for the 43 entries was Puentes himself. Complaint ¶ 13. These findings are the subject of Count II of the Complaint. *See id*. ¶¶ 27, 32.

Procedural History. Customs sent Puentes both a pre-penalty notice and a penalty notice. Complaint ¶ 14; *see also* Crawford Declaration ¶ 11; Pl.'s Brief at 3–4, 8. The pre-penalty and penalty notices were followed by four demand letters seeking payment of the $30,000 penalty. Crawford Declaration ¶ 11; Pl.'s Brief at 3–4, 8. With one exception (where, in any event, he failed to follow through), Puentes failed to respond to Customs' notices and demands, and the penalty still remains unpaid. Complaint ¶¶ 20, 33; Crawford Declaration ¶ 11; Pl.'s Brief at 4, 8.[8]

To remedy Puentes' nonpayment, the Government commenced suit in this court, filing its Summons and Complaint on November 25, 2014, and Proof of Service was filed on March 17, 2015. Puentes failed to respond to the Complaint, and, upon Plaintiff's Request for Entry of Default, the Clerk of the Court entered default on September 16, 2015. *See* Entry of Default (Sept. 16, 2015). The Government subsequently filed the pending Motion for Entry of Default Judgment. Again, Puentes has failed to respond.

II. *Standard of Review*

A case brought pursuant to 28 U.S.C. § 1582(1) is subject to *de novo* review. 28 U.S.C. § 2640(a)(6) (providing that, in cases commenced

[8] Following the fourth demand letter (which was sent by Customs' Office of the Chief Counsel), Puentes contacted Customs to discuss options for resolving his case. According to the Government, "[a]lthough Mr. Puentes appeared ready to make 15 monthly payments of $2,000 to resolve the penalty, he never executed the promissory note" that Customs required. Pl.'s Brief at 8.

under 28 U.S.C. § 1582, "[t]he Court of International Trade shall make its determinations upon the basis of the record made before the court"); *United States v. Santos*, 36 CIT ____, ____, 883 F. Supp. 2d 1322, 1326 (2012). Specifically, in analyzing a penalty enforcement action under § 1582(1), the court must consider both whether the penalty imposed has a sufficient basis in law and fact, and whether Customs accorded the customs broker all the process to which he is entitled by statute and regulation. *United States v. Santos*, 36 CIT at ____, 883 F. Supp. 2d at 1326 (citation omitted).

Section 2640(a) draws no distinction between the determination as to the validity of a penalty claim and the determination as to the amount of the penalty. 28 U.S.C. § 2640(a); *United States v. Santos*, 36 CIT at ____, 883 F. Supp. 2d at 1326. Therefore, pursuant to § 2640(a), both the validity of a claim for a penalty and the amount of that penalty are reviewed *de novo*. *United States v. Santos*, 36 CIT at ____, 883 F. Supp. 2d at 1326 (citation omitted).

When a defendant has been found to be in default, all well-pled facts in the complaint are taken as true for purposes of establishing the defendant's liability. *See* USCIT R. 8(c)(6); 10 James Wm. Moore *et al.*, Moore's Federal Practice § 55.32[1][a], at 55–38 to 55–39 (3d ed. 2015) ("Moore's Federal Practice"); 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2688.1, at 84–92 (4th ed. 2016) ("Wright & Miller"); *Finkel v. Romanowicz*, 577 F.3d 79, 83–84 & n.6 (2d Cir. 2009) (citing, *inter alia*, *Au Bon Pain Corp. v. Artect, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981)).

That said, however, a default does not admit legal claims. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (reasoning, in context of motion to dismiss for failure to state a claim, that when a court accepts factual allegations as true, it does not also accept legal conclusions as true). Thus, an entry of default alone does not suffice to entitle a plaintiff to any relief. Even after an entry of default, "it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit conclusions of law." *See* 10A Wright & Miller § 2688.1, at 91; *see also* 10 Moore's Federal Practice § 55.32[1][b], at 55–40.

Further, even if it is determined that the unchallenged facts constitute a legitimate cause of action, "a default does not concede the amount demanded." *See* 10A Wright & Miller § 2688, at 80; *see also* 10 Moore's Federal Practice § 55.32[1][c], at 55–41 (explaining that defaulting party "does not admit the allegations in the claim as to the amount of damages"). The plaintiff bears the burden of proving the extent of the relief to which it is entitled. *See* 10 Moore's Federal Practice § 55.32[1][c], at 55–41. The court is obligated to ensure that

there is an adequate evidentiary basis for any relief awarded. *See Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp.*, 109 F.3d 105, 111 (2d Cir. 1997) (quoting *Fustok v. ContiCommodity Services, Inc.*, 873 F.2d 38, 40 (2d Cir. 1989)).

In addition, in the case of a motion for default judgment, the court may look beyond the complaint if necessary to "establish the truth of an allegation by evidence," to "determine the amount of damages or other relief," or to "investigate any other matter." *See* USCIT R. 55(b); *United States v. Santos*, 36 CIT at ____, 883 F. Supp. 2d at 1327 (citation omitted).

III. *Analysis*

As explained above, Puentes' default means that all well-pled facts set forth in the Government's Complaint are taken as true for purposes of establishing liability – but the legal conclusions are not. Accordingly, the threshold issue presented is whether the well-pled facts set forth in the Complaint establish Puentes' liability. The issue of liability is analyzed separately as to each of the two counts of the Complaint below. *See infra* section III.A & III.B.

Further, even if the Government has established that Puentes is liable, that is not the end of the matter. The inquiry then turns to the amount of the penalty imposed by Customs, which is similarly reviewed *de novo*. *See infra* section III.C.

A. *Liability Under Count I – 19 U.S.C. § 1641(d)(1)(F)*

Count I of the Government's Complaint is predicated on 19 U.S.C. § 1641(d)(1)(F), which authorizes Customs to impose a monetary penalty on any customs broker who, "in the course of its customs business, with intent to defraud, in any matter willfully and knowingly deceived, misled or threatened any client." 19 U.S.C. § 1641(d)(1)(F); Complaint ¶ 16. The Government alleges that Puentes "deceived" and "misled" his client Florexpo as to 79 entries, by collecting merchandise processing fees from the company in excess of what he ultimately paid to Customs on the company's behalf, and then pocketing the difference, all without Florexpo's knowledge. Complaint ¶¶ 17–19, Ex. A; Pl.'s Brief at 6; *see also* Complaint ¶¶ 4–8; Crawford Declaration ¶¶ 5–8, Exs. C-D; Pl.'s Brief at 1–2.[9] The Government further alleges that the "willful" and "knowing" nature of Puentes' conduct is evidenced by the fact that he prepared two entirely different sets of CF 7501s – one set of CF 7501s that he

[9] The Government points to Florexpo's Prior Disclosure as further evidence of Puentes' deception. *See* Pl.'s Brief at 6 (citing Complaint ¶¶ 8, 25); Crawford Declaration ¶ 7, Exs. C-D.

submitted to Florexpo (reflecting the true value of the imported merchandise and accurately stating the associated merchandise processing fees), and a second set of CF 7501s that he filed with Customs (which specified declared values and merchandise processing fees that were lower than those stated in the CF 7501s provided to Florexpo). Complaint ¶ 19, Ex. A; *see also id*. ¶¶ 4–8; Crawford Declaration ¶¶ 5–8, Exs. C-D; Pl.'s Brief at 1–2, 6.

Taking these alleged facts as true, the Government has established Puentes' liability under 19 U.S.C. § 1641(d)(1)(F), because, "with intent to defraud," he "willfully and knowingly deceived[] [and] misled" his client Florexpo through his merchandise processing fees scheme, personally profiting by more than $6400.[10]

B. *Liability Under Count II – 19 U.S.C. § 1641(d)(1)(C)*

Count II of the Government's Complaint invokes 19 U.S.C. § 1641(d)(1)(C), which authorizes Customs to impose a penalty on any customs broker who "has violated any provision of any law enforced by [Customs] or the rules or regulations issued under any such provision." 19 U.S.C. § 1641(d)(1)(C); Complaint ¶ 22.

Here, the Government alleges that Puentes violated two applicable customs regulations. Complaint ¶ 23; Pl.'s Brief at 7–8; *see generally* Complaint ¶¶ 21–32; Crawford Declaration ¶¶ 310; Pl.'s Brief at 2–3. First, the Government asserts that Puentes violated 19 C.F.R. § 111.29, which is titled "Diligence in correspondence and paying monies." Complaint ¶¶ 23, 24–27; Pl.'s Brief at 7; *see also* Complaint ¶¶ 4–13; Crawford Declaration ¶¶ 3–10; Pl.'s Brief at 1–3.[11] And, second, the Government asserts that Puentes knowingly gave false or mis-

[10] As explained in section III.B below, these same facts also underpin, in part, Count II of the Complaint. *See generally* Complaint ¶¶ 25, 31; 19 U.S.C. § 1641(d)(1)(C) (authorizing imposition of penalty on any customs broker who has violated any customs law, rule, or regulation); 19 C.F.R. § 111.29 (requiring customs brokers to exercise "due diligence" in correspondence and making payments); 19 C.F.R. § 111.32 (prohibiting customs brokers from knowingly giving Customs false or misleading information).

[11] 19 C.F.R. § 111.29(a) states:

> Each broker must exercise due diligence in making financial settlements, in answering correspondence, and in preparing or assisting in the preparation and filing of records relating to any customs business matter handled by him as a broker. Payment of duty, tax, or other debt or obligation owing to the Government for which the broker is responsible, or for which the broker has received payment from a client, must be made to the Government on or before the date that payment is due. Payments received by a broker from a client after the due date must be transmitted to the Government within 5 working days from receipt by the broker. Each broker must provide a written statement to a client accounting for funds received for the client from the Government, or received from a client where no payment to the Government has been made, or received from a client in excess of the Governmental or other charges properly payable as part of the client's customs business, within 60 calendar days of receipt. No written statement is required if there is actual payment of the funds by a broker.

leading information to Customs, in violation of 19 C.F.R. § 111.32, which is titled "False information." Complaint ¶¶ 23, 30–32; Pl.'s Brief at 7–8; *see also* Complaint ¶¶ 4–8, 11–13; Crawford Declaration ¶¶ 5–10; Pl.'s Brief at 1–3.[12] The specific facts alleged to give rise to the violations of 19 C.F.R. § 111.29 and § 111.32, respectively, are reviewed in turn below.

1. *Violations of 19 C.F.R. § 111.29*

Section 111.29 of the customs regulations requires that a customs broker "exercise due diligence in making financial settlements, in answering correspondence, and in preparing or assisting in the preparation and filing of records relating to any customs business matter" handled by the broker. 19 C.F.R. § 111.29. The same regulation further requires that "[p]ayment of duty, tax, or other debt or obligation owing to the Government for which the broker is responsible, or for which the broker has received payment from a client, must be made to the Government on or before the date that payment is due." *Id*.

Count II first alleges that Puentes violated 19 C.F.R. § 111.29 when he failed to forward to Customs all of the monies for payment of merchandise processing fees that he received from his client Florexpo. *See* Complaint ¶ 25, Ex. A; *see also id*. ¶¶ 4–8; Crawford Declaration ¶¶ 5–8, Exs. C-D; Pl.'s Brief at 1–2.[13] As discussed above, the Government alleges that, as to 79 entries, Puentes collected merchandise processing fees from Florexpo in an amount that exceeded the sum that he remitted to Customs on the company's behalf.

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[12] Pursuant to 19 C.F.R. § 111.32:

> A broker must not file or procure or assist in the filing of any claim, or of any document, affidavit, or other papers, known by such broker to be false. In addition, a broker must not knowingly give, or solicit or procure the giving of, any false or misleading information or testimony in any matter pending before the Department of Homeland Security or any representative of the Department of Homeland Security.

[13] In its Complaint, the Government claims that Puentes' handling of Florexpo's merchandise processing fees constitutes a violation of 19 C.F.R. § 111.29. *See* Complaint ¶¶ 24–25. However, the Government does not argue that claim in its brief. *See* Pl.'s Brief at 7 (claiming, as violations of 19 C.F.R. § 111.29, only Puentes' untimely filing of CF 7501s as to 250 entries and his wholesale failure to file CF 7501s as to another 58 entries).

Ordinarily, arguments that are not briefed are deemed waived. *See*, *e.g.*, *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319–20 (Fed. Cir. 2006) (and cases cited there); *Novosteel SA v. United States*, 284 F.3d 1261, 1273–74 (Fed. Cir. 2002). Indeed, here it is a claim – not a mere argument – that the Government has failed to brief.

However, a court has discretion to consider arguments (and claims) that might otherwise be considered to have been waived. *See*, *e.g.*, *SmithKline Beecham Corp.*, 439 F.3d at 1320 n.9. Moreover, in the case at bar, Puentes has not appeared, and thus no party has argued waiver. Further, in this case, both the basis for (*i.e.*, the validity of) the penalty and the amount of the penalty are subject to *de novo* review. Under these circumstances, it is within the court's authority to consider the Government's claim which it asserted in its Complaint but did not brief. *Cf. United States v. Santos*, 36 CIT at ____ n.2, 883 F. Supp. 2d at 1325 n.2

Complaint ¶¶ 5–7, 25, Ex. A; *see also* Crawford Declaration ¶¶ 5–8, Exs. C-D; Pl.'s Brief at 1–2.[14]

Specifically, for the 79 entries in question, Puentes sent Florexpo CF 7501s that reflected the true value of the imported merchandise and correctly calculated the amount that the company owed to Customs for merchandise processing fees. Complaint ¶ 5; *see also id*. ¶ 25; Crawford Declaration ¶ 7, Exs. C-D; Pl.'s Brief at 2. But, after receiving payment from Florexpo in the full and correct amount due, Puentes submitted different CF 7501s to Customs – *i.e.*, CF 7501s that reflected lower declared values and correspondingly lower merchandise processing fees. Complaint ¶¶ 6–7, Ex. A; *see also id*. ¶ 25; Crawford Declaration ¶ 7, Exs. C-D; Pl.'s Brief at 2. As such, Puentes failed to "exercise due diligence in making financial settlements, . . . and in preparing or assisting in the preparation and filing of records." 19 C.F.R. § 111.29.

Similarly, when Puentes failed to forward to Customs the full amount of the merchandise processing fees that were paid by Florexpo and due to Customs, Puentes failed to make "[p]ayment of duty, tax, or other debt or obligation owing to the Government" for which he was responsible and "for which [he] ha[d] received payment from a client." 19 C.F.R. § 111.29. Taking as true the facts alleged in the Complaint, Puentes' handling of Florexpo's merchandise processing fees violated 19 C.F.R. § 111.29.

Count II next alleges that Puentes violated 19 C.F.R. § 111.29 by filing untimely CF 7501s. *See* Complaint ¶ 26, Ex. B; *see also id*. ¶ 9; Crawford Declaration ¶ 3, Ex. A (listing the 250 late-filed CF 7501s); Pl.'s Brief at 2–3, 7. As explained above, customs regulations generally require the filing of a CF 7501 no later than 10 working days after merchandise is entered. 19 C.F.R. §§ 142.11(a), 142.12(b). According to the Government, however, between September 2008 and February 2009, Puentes late-filed CF 7501s as to some 250 entries, on behalf of seven separate clients. Complaint ¶¶ 9, 26, Ex. B; Crawford Declaration ¶ 3, Ex. A; Pl.'s Brief at 2–3, 7. At a minimum, Puentes thus failed to "exercise due diligence . . . in preparing or assisting in the preparation and filing of records" relating to customs business that had been entrusted to him as a broker. 19 C.F.R. § 111.29. Taking as true the facts alleged in the Complaint, Puentes violated 19 C.F.R. § 111.29 by failing to timely file CF 7501s on his clients' behalf.

(holding that, "[b]ecause the court determines the amount of the penalty *de novo*," court had authority to correct error where complaint alleged penalty of $4000, but penalty notice stated that penalty was $5000).

[14] As explained above, Puentes' handling of Florexpo's merchandise processing fees is also the subject of Count I of the Complaint. *See supra* section III.A. In Count II, that same conduct is alleged to violate both 19 C.F.R. § 111.29 and 19 C.F.R. § 111.32. *See* sections III.B.1 & III.B.2.

Count II further alleges that Puentes violated 19 C.F.R. § 111.29 by failing to file any CF 7501s whatsoever for dozens of entries of merchandise. Complaint ¶ 26, Ex. C; *see also id*. ¶ 10; Crawford Declaration ¶ 4, Ex. B (listing the 58 entries as to which no CF 7501s were filed); Pl.'s Brief at 3, 7. Although customs regulations generally require the filing of a CF 7501 no later than 10 working days after merchandise is entered (19 C.F.R. §§ 142.11(a), 142.12(b)), the Government alleges that – as to 58 entries made between September 2008 and January 2009 – Puentes failed to file any CF 7501s whatsoever. Complaint ¶¶ 10, 26, Ex. C; Crawford Declaration ¶ 4, Ex. B; Pl.'s Brief at 3, 7. Taking as true these facts alleged in the Complaint, Puentes failed to "exercise due diligence . . . in preparing or assisting in the preparation and filing of records" relating to customs business that had been entrusted to him as a broker and thus violated 19 C.F.R. § 111.29 when he failed to file 58 CF 7501s on behalf of his clients.

Lastly, Count II alleges that Puentes violated 19 C.F.R. § 111.29 by misstating the importer of record on certain CF 7501s that he submitted to Customs. Complaint ¶ 27; *see also id*. ¶¶ 1113; Crawford Declaration ¶¶ 9–10, Ex. E; Pl.'s Brief at 3.[15] In particular, the Government alleges that, between April 2009 and April 2010, Puentes filed CF 7501s for 43 entries where he identified WorldFresh as the importer of record, without the authorization or knowledge of that company. Complaint ¶¶ 11–12, 27; *see also* Crawford Declaration ¶¶ 9–10, Ex. E; Pl.'s Brief at 3. However, Puentes was the actual importer of record for the 43 entries. He therefore should have identified himself as such on the CF 7501s. Complaint ¶ 13; *see also* Crawford Declaration ¶¶ 9–10; Pl.'s Brief at 3.[16] Again, at a minimum, Puentes thus failed to "exercise due diligence . . . in preparing or assisting in the preparation and filing of records." 19 C.F.R. § 111.29. Taking as true the facts alleged in the Complaint, Puentes' failure to correctly identify the importer of record on the CF 7501s in question constituted a violation of 19 C.F.R. § 111.29.

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[15] Again the Government has asserted a claim in its Complaint that it has failed to brief. *See supra* n.13 (addressing Government's failure to brief claim that Puentes' handling of Florexpo's merchandise processing fees constituted violation of 19 C.F.R § 111.29). Specifically, in its Complaint, the Government claims that Puentes' identification of WorldFresh as the importer of record on CF 7501s for 43 entries, without the company's knowledge or authorization, constitutes a violation of 19 C.F.R § 111.29. *See* Complaint ¶¶ 24, 27. But the Government failed to brief that claim. *See* Pl.'s Brief at 7 (claiming, as violations of 19 C.F.R § 111.29, only Puentes' untimely filing of CF 7501s as to 250 entries and his wholesale failure to file CF 7501s as to another 58 entries). The claim is nonetheless considered here, for the reasons summarized in note 13 above.

[16] Count II of the Complaint alleges that Puentes' identification of WorldFresh as the importer of record on the 43 CF 7501s at issue violates both 19 C.F.R § 111.29 and 19 C.F.R § 111.32. *See* sections III.B.1 & III.B.2.

2. *Violations of 19 C.F.R. § 111.32*

In relevant part, 19 C.F.R. § 111.32 prohibits a broker from "fil[ing] . . . any document . . . known by such broker to be false." 19 C.F.R. § 111.32. Count II first alleges that – as to 79 entries between April 2008 and February 2009 – Puentes violated 19 C.F.R. § 111.32 by filing with Customs CF 7501s which he knew at the time included false valuations for Florexpo's merchandise. *See* Complaint ¶ 31, Ex. A; *see also id*. ¶¶ 4–8; Crawford Declaration ¶¶ 5–8, Exs. C-D; Pl.'s Brief at 1–2, 7–8.

According to the Government, Puentes prepared two separate sets of CF 7501s – one set of CF 7501s that he submitted to Florexpo (reflecting the true value of the imported merchandise and accurately stating the associated merchandise processing fees), and a second set of CF 7501s that he filed with Customs (which specified declared values and merchandise processing fees that were lower than those stated in the CF 7501s provided to Florexpo). Complaint ¶¶ 5–7, Ex. A; *see also id*. ¶¶ 4–8; Crawford Declaration ¶¶ 5–8, Exs. C-D; Pl.'s Brief at 1–2, 7–8. Thus, on at least these 79 occasions, Puentes "fil[ed] . . . [a] document . . . known by [him] to be false." Taking as true the facts alleged in the Complaint, Puentes violated 19 C.F.R. § 111.32 by filing CF 7501s which misstated the value of Florexpo's imported merchandise as well as the amount of merchandise processing fees owed to Customs.

Lastly, Count II alleges that Puentes violated 19 C.F.R. § 111.32 by filing with Customs CF 7501s that he knew falsely identified WorldFresh as the importer of record. Complaint ¶ 32; *see also id*. ¶¶ 11–13; Crawford Declaration ¶¶ 9–10, Ex. E; Pl.'s Brief at 3. In particular, the Government alleges that, between April 2009 and April 2010, Puentes filed CF 7501s for 43 entries where he identified WorldFresh as the importer of record, without the company's knowledge or authorization. Complaint ¶¶ 11–12, 32; *see also* Crawford Declaration ¶¶ 9–10, Ex. E; Pl.'s Brief at 3. The actual importer of record for the 43 entries was Puentes, who should have identified himself as such on the CF 7501s for those entries. Complaint ¶¶ 13, 32; *see also* Pl.'s Brief at 3. Thus, on these 43 occasions, Puentes "fil[ed] . . . [a] document . . . known by [him] to be false." Taking as true the facts alleged in the Complaint, Puentes violated 19 C.F.R. § 111.32 by filing with Customs CF 7501s that falsely identified WorldFresh as the importer of record.

3. *Implications of Violations of 19 C.F.R. § 111.29 and 19 C.F.R. § 111.32*

As detailed above, taking the facts alleged in the Complaint as true, Puentes violated both 19 C.F.R. § 111.29 and 19 C.F.R. § 111.32 on numerous occasions. *See supra* sections III.B.1 & III.B.2. Accordingly, above and beyond his liability pursuant to 19 U.S.C. § 1641(d)(1)(F) (*see supra* section III.A), Puentes is also liable under 19 U.S.C. § 1641(d)(1)(C), which authorizes Customs to impose a penalty on any customs broker who has violated customs regulations. 19 U.S.C. § 1641(d)(1)(C).

C. *The Amount of the Penalty*

Customs imposed a $30,000 penalty on Puentes. *See* Complaint ¶¶ 20, 33; Crawford Declaration ¶ 11; Pl.'s Brief at 3–4, 8–9. The Government requests that default judgment be entered against Puentes for that sum, together with post-judgment interest and costs. *See* Complaint at 6 (*ad damnum* clause, seeking judgment "in the amount of $30,000.00, plus interest and costs"); Pl.'s Brief at 1, 9.

Neither the statute nor the regulations provide any particular framework for determining the amount of the penalty here, except that such penalties are "not to exceed $30,000 in total." 19 U.S.C. § 1641(d)(2)(A); *see also* 19 C.F.R. § 111.91 (stating that monetary penalty may not "exceed an aggregate of $30,000 for one or more of the reasons set forth in [19 C.F.R. § 111.53] (a) through (f) . . ."). Within these bounds, the amount of the penalty is largely committed to Customs' sound discretion. *See*, *e.g.*, *United States v. Santos*, 36 CIT at ____, 883 F. Supp. 2d at 1330. Although the court is required to review the amount of a penalty *de novo*, where – as here – Customs' determination as to the amount is unchallenged, the agency's determination generally will be upheld so long as it is reasonable and supported by the facts. *See* 28 U.S.C. § 2640(a)(5); *see also United States v. Santos*, 36 CIT at ____, 883 F. Supp. 2d at 1330 (citation omitted); *United States v. Santos*, 37 CIT at ____, 2013 WL 6801087, at *5 (2013).

The $30,000 penalty that Customs imposed on Puentes is the maximum permitted by statute. *See* 19 U.S.C. § 1641(d)(2)(A). However, that penalty is the result of multiple serious statutory and regulatory violations, concerning a substantial number of entries (and on behalf of numerous clients), over an extended period of time. Further, many, if not all, of the violations were intentional. These facts support Customs' decision to impose the maximum penalty under the law. *See generally* Pl.'s Brief at 9. Moreover, although he had the opportunity to do so, Puentes sought no relief from the monetary penalty that

Customs imposed. *See* Pl.'s Brief at 8–9; *see also id*. at 3–4; Complaint ¶ 14; Crawford Declaration ¶ 11. More generally, he has been accorded all the process to which he is entitled by law. 19 U.S.C. § 1641(d)(2)(A); Complaint ¶ 14; Crawford Declaration ¶ 11; Pl.'s Brief at 3–4, 8.

Based on the record as it stands, the $30,000 penalty imposed on Puentes is reasonable and supported by the facts and the law. *Cf. United States v. Ricci*, 21 CIT 1145, 985 F. Supp. 125 (1997) (holding that penalty in amount of $30,000 was warranted where customs broker intentionally made 145 late payments of duties).[17]

IV. *Conclusion*

For the reasons set forth above, Plaintiff's Motion for Entry of Default Judgment in the amount of $30,000, together with post-judgment interest and costs, is granted. *See* 28 U.S.C. § 1961 (interest); 28 U.S.C. § 1920 (costs); USCIT R. 54(d) (same).

Judgment will enter accordingly.

Dated: March 29, 2017
New York, New York

/*s*/ *Delissa A. Ridgway*
DELISSA A. RIDGWAY
JUDGE

Slip Op. 17–34

MONDIV, DIVISION OF LASSONDE SPECIALTIES INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Court No. 16–00038

[Plaintiff's consent motion to amend the scheduling order to extend the deadline for discovery is denied without prejudice.]

[17] The Complaint requests the entry of judgment in the amount of $30,000, which is the amount of the penalty that Customs imposed for all of the violations alleged pursuant to 19 U.S.C. § 1641(d)(1)(C) and 19 U.S.C. § 1641(d)(1)(F). *See* Complaint at 6 (*ad damnum* clause, seeking judgment "in the amount of $30,000.00, plus interest and costs"). However, the Complaint also asserts that the violation alleged as the basis for the imposition of a penalty pursuant to 19 U.S.C. § 1641(d)(1)(F) is itself alone sufficient to justify a penalty of $30,000. *See id*. ¶ 20. Similarly, the Complaint asserts that the violations alleged as the basis for the imposition of a penalty pursuant to 19 U.S.C. § 1641(d)(1)(C) alone warrant a penalty of $30,000 (*i.e.*, without regard to the violation alleged pursuant to § 1641(d)(1)(F)). *See id*. ¶ 33.

As set forth above, the record as it stands establishes Puentes' liability under both Count I and Count II for a penalty in the amount of $30,000. There is therefore no need to consider whether a $30,000 penalty might have been justified on the basis of fewer than all of the violations alleged in the Complaint.

Dated: March 30, 2017

John M. Peterson, Neville Peterson LLP, of New York, NY, for Plaintiff Mondiv, Division of Lassonde Specialties Inc.

Stephen Andrew Josey, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for Defendant United States. With him were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, and *Amy M. Rubin*, Assistant Director. Of Counsel was *Paula Smith*, Attorney, Office of the Assistant Chief Counsel International Trade Litigation, U.S. Customs and Border Protection, of New York, NY.

MEMORANDUM AND ORDER

Choe-Groves, Judge:

Before the court is Plaintiff Mondiv, Division of Lassonde Specialties Inc.'s ("Plaintiff") consent motion to amend the scheduling order. *See* Consent Mot. to Am. Scheduling Order, Mar. 13, 2017, ECF No. 25. Plaintiff seeks to amend the scheduling order by extending the deadline for discovery by sixty days and all subsequent deadlines by thirty days respectively. *See id.* Once a scheduling order is issued, "[a] schedule may be modified only for good cause and with the judge's consent." USCIT R. 16(b)(4). Good cause requires the moving party to show that the deadline for which an extension is sought cannot reasonably be met despite the movant's diligent efforts to comply with the schedule. *See High Point Design LLC v. Buyers Direct, Inc.*, 730 F.3d 1301, 1319 (Fed. Cir. 2013).

Plaintiff asserts that good cause exists because:

> Plaintiff has been involved in a number of other litigation matters with deadlines that have coincided with the discovery deadlines, as well as maintained a busy travel schedule. The additional time would allow counsel the attention to respond to the interrogatory and production requests, and would allow government counsel the necessary time to review the responses and schedule depositions.

Consent Mot. to Am. Scheduling Order. Plaintiff has failed here to articulate sufficient detail to support a good cause modification of the scheduling order. An "overextended caseload is not 'good cause shown,' unless it is the result of events unforeseen and uncontrollable by both counsel and client." *Mississippi v. Turner*, 498 U.S. 1306, 1306 (1991) (Scalia, Circuit Justice). Plaintiff's general assertion of a busy schedule does not satisfy the good cause standard. *See Pfeiffer v. Merit Sys. Prot. Bd.*, 230 F.3d 1375 (Fed. Cir. 1999) (affirming decision that a heavy attorney workload and busy travel schedule does not constitute good cause).

Therefore, upon consideration of Plaintiff's motion to amend the scheduling order and in accordance with the foregoing, it is hereby

ORDERED that Plaintiff's motion is denied without prejudice.

Dated: March 30, 2017
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 17–35

MONDIV, DIVISION OF LASSONDE SPECIALTIES INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves
Judge Court No. 16–00038

[Defendant's consent motion to amend the scheduling order to extend the deadline for discovery is granted.]

Dated: March 30, 2017

John M. Peterson, Neville Peterson LLP, of New York, NY, for Plaintiff Mondiv, Division of Lassonde Specialties Inc.

Stephen Andrew Josey, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for Defendant United States. With him were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, and *Amy M. Rubin*, Assistant Director. Of Counsel was *Paula Smith*, Attorney, Office of the Assistant Chief Counsel International Trade Litigation, U.S. Customs and Border Protection, of New York, NY.

MEMORANDUM AND ORDER

Choe-Groves, Judge:

Before the court is the United States' ("Defendant") consent motion to amend the scheduling order pursuant to USCIT Rule 16(b)(4). *See* Mot. Am. Scheduling Order, Mar. 23, 2017, ECF No. 27 ("Def. Mot."). On October 28, 2016, the court issued a scheduling order providing, *inter alia*, that discovery be completed by May 8, 2017 and all discovery-related motions be filed by June 8, 2017. *See* Scheduling Order, Oct. 28, 2016, ECF No. 21. Defendant's motion requests extension of the discovery deadline by sixty days and all subsequent deadlines by thirty days respectively. *See* Def. Mot. A previous motion with an identical extension request was filed on March 13, 2017, which this court denied without prejudice because counsel failed to articulate good cause. *See* Mot. Am. Scheduling Order, Mar. 13, 2017, ECF No. 25. As explained below, this subsequent motion is granted because counsel has now articulated sufficient reasons to support good cause warranting modification of the scheduling order.

A scheduling order establishes a timetable by which the case should proceed. *See* USCIT R. 16. Once a scheduling order is issued, "[a] schedule may be modified only for good cause and with the judge's consent." USCIT R. 16(b)(4). Good cause requires the moving party to show that the deadline for which an extension is sought cannot reasonably be met despite the movant's diligent efforts to comply with the schedule. *See High Point Design LLC v. Buyers Direct, Inc.*, 730 F.3d 1301, 1319 (Fed. Cir. 2013).

The Parties' previous motion to amend the scheduling order was denied because counsel's general assertion of a heavy workload and busy travel schedule did not constitute good cause. *See* Mem. and Order, Mar. 30, 2017, ECF No. 28. By contrast, here counsel has articulated sufficient details in its motion to explain the diligent efforts taken to comply with the discovery deadline and why, despite such efforts, Defendant will not be able to complete discovery by May 8, 2017. *See* Def. Mot. 2–3. Counsel noted that Defendant served Plaintiff with document requests and interrogatories on December 27, 2016, with responses due within 30 days. *See id.* at 2. Plaintiff could not meet that deadline due to a delay in obtaining information from its client and a death in counsel's family and, therefore, needed additional time to respond. *See id.* at 2–3. Plaintiff is expected to respond to Defendant's document requests and interrogatories by March 31, 2017. *See id.* at 3. Defendant asserts that it requires additional time beyond the original discovery deadline to review Plaintiff's documents and interrogatory responses, permit U.S. Customs and Border Protection attorneys to review Plaintiff's responsive materials, conduct depositions of factual and 30(b)(6) witnesses, review Plaintiff's expert witness report, depose Plaintiff's expert witness, and, if Defendant retains its own expert witness, submit an expert report and allow Plaintiff the opportunity to depose the expert. *See id.*

Upon consideration of Defendant's motion to amend the scheduling order and in accordance with the foregoing, it is hereby

ORDERED that Defendant's motion is granted; and it is further

ORDERED that the Scheduling Order, ECF No. 21, is amended so that the action shall proceed as follows:

1. On or before April 7, 2017, counsel shall confer and provide the court with agreed upon deadlines for the following:
    a. Factual discovery, including depositions of factual and 30(b)(6) witnesses, shall be completed by _____;
    b. If applicable, Plaintiff's expert report shall be due on or before _____;

c. If applicable, Defendant's expert report shall be due on or before _____;

d. Expert depositions shall be completed by *July 10, 2017*;

2. Discovery shall be completed by July 10, 2017;

3. Any motions regarding discovery shall be filed on or before August 8, 2017;

4. Dispositive motions, if any, shall be filed on or before September 8, 2017 and a brief in response to a dispositive motion may include a dispositive cross-motion; and

5. If no dispositive motions are filed, a request for trial, if any, accompanied by a proposed order governing preparation for trial, shall be filed on or before September 22, 2017.

Dated: March 30, 2017
New York, New York

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE