U.S. Court of International Trade

Slip Op. 17–17

ITOCHU BUILDING PRODUCTS, CO., INC., Plaintiff, v. UNITED STATES, Defendant, and MID CONTINENT STEEL & WIRE, INC., Defendant-Intervenor.

Before: Mark A. Barnett, Judge
Court No. 15–00009
PUBLIC VERSION

[The court sustains Commerce's Remand Redetermination on the issue of affiliation and denies Plaintiff's Motion for Judgment on the Agency Record on the use of third country sales to determine normal value.]

Dated: February 16, 2017

Bruce M. Mitchell, Ned H. Marshak, and *Andrew T. Schutz*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP of New York, NY for plaintiff.

Eric J. Singley, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel on the brief was *Henry J. Loyer*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Adam H. Gordon and *Ping Gong*, The Bristol Group PLLC of Washington DC, for defendant-intervenor.

OPINION

Barnett, Judge:

This case is before the court following the Department of Commerce's ("Commerce") remand redetermination in the first administrative review of the antidumping duty order on certain steel nails from the United Arab Emirates (UAE). Confidential Final Results of Redetermination Pursuant to *Itochu Building Products, Co., Inc. v. United States*, [ ] Court No. 15–00009, Slip Op. 16–37 (CIT April 15, 2016) ("Remand Redet."), ECF No. 63–1; *see also Itochu Building Products, Co., Inc. v. United States* ("*Itochu*"), 40 CIT ___, 163 F. Supp. 3d 1330 (2016); *Certain Steel Nails from the United Arab Emirates*, 79 Fed. Reg. 78,396 (Dep't Commerce Dec. 30, 2014) (final results of

antidumping duty admin. review; 2011–2013) ("Final Results"), Public Joint App. ("PJA") Doc. 34, ECF No. 40; Public Admin. R. ("PR")[1] 198, ECF No. 19; and accompanying *Issues and Decision Mem.*, A-520–804 (Dep't Commerce Dec. 22, 2014) ("I&D Mem."), PJA Doc. 35; PR 185. In *Itochu*, the court directed Commerce to "further explain its affiliation finding with respect to Dubai Wire . . . or to alter that determination." *Itochu*, 40 CIT at ___, 163 F. Supp. 3d at 1339. The court deferred ruling on Plaintiff Itochu Building Co., Inc.'s ("Plaintiff" or "Itochu")[2] alternative argument regarding the third country viability of Dubai Wire FZE's ("Dubai Wire") sales to Canada pending the remand redetermination. *Id.* Familiarity with the court's earlier decision in this case is presumed.

Upon consideration of the court's remand instructions, Commerce again determined that Dubai Wire and Itochu are affiliated via the joint-venture company Progressive Steel & Wire, LLC ("PSW"). Commerce also determined that this affiliation has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or the foreign like product. Remand Redet. at 1–2. Plaintiff challenges Commerce's finding as unsupported by substantial evidence. *See generally* Confidential Pl.'s Comments in Opp'n to the Redet. Pursuant to Court Remand, ECF No. 70 ("Pl.'s Opp'n to Remand Redet."). Defendant and Defendant-Intervenor, Mid Continent Steel & Wire, Inc. ("Mid Continent") support Commerce's remand redetermination. *See* Confidential Def.'s Resp. to Comments on the Remand Redet. ("Def.'s Resp. to Pl.'s Opp'n"), ECF No. 76; Confidential Def.-Intervenor Mid Continent Steel & Wire, Inc.'s Resp. Comments in Supp. of Remand Results ("Def.-Intervenor's Resp. to Pl.'s Opp'n"), ECF No. 74.

For the reasons discussed below, the court sustains Commerce's remand redetermination. The court also sustains Commerce's Final Results on the issue of the viability of Canadian sales to determine normal value.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012),[3]

[1] Parties filed a public and a confidential joint appendix, and the United States filed public and confidential versions of the administrative record. *See* PJA; Confidential Joint App. ("CJA"), ECF No. 39; PR; Confidential Admin. R. ("CR"), ECF No. 19. All further citations are to documents contained in the confidential joint appendix unless otherwise noted.

[2] The court will refer to Plaintiff as Itochu except in direct quotations from the Administrative Record, when Plaintiff self-identifies as IBP.

[3] All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2012 edition and all references to the United States Code are to the 2012 edition, unless otherwise stated.

and 28 U.S.C. § 1581(c). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Affiliation between Itochu and Dubai Wire

The issue before the court is whether Commerce's finding of affiliation between Itochu and Dubai Wire is supported by substantial evidence. Plaintiff asserts that Commerce ignored evidence showing that Itochu and Dubai Wire's corporate relationship did not impact production, pricing, or cost of subject merchandise because Itochu dealt with Dubai Wire in the same manner in which it dealt with dozens of other vendors, and the corporate relationship between Itochu and Dubai Wire did not impact the manner in which they conducted business with each other. *See generally* Pl.'s Opp'n to Remand Redet. Plaintiff's arguments are unavailing.

Briefly, 19 U.S.C. § 1677(33) defines affiliation, in relevant part, as "two or more persons directly or indirectly controlling, controlled by, or under common control with, any person" and further, that "a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." Commerce's regulations further provide that

> [i]n determining whether control over another person exists, within the meaning of section 771(33) of the Act, the Secretary will consider the following factors, among others: corporate or family groupings; franchise or *joint venture agreements*; debt financing; and close supplier relationships. The Secretary will not find that control exists on the basis of these factors unless the relationship has the *potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product*. . .

19 C.F.R. § 351.102(b)(3) (2012) (emphasis added). In the preamble to these regulations, Commerce confirmed its "focus on relationships that have the potential to impact decisions concerning production, pricing or cost" and that "section 771(33) . . . properly focuses [Commerce] on the ability to exercise 'control' rather than the actuality of control over specific decisions." *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,297–98 (Dep't Commerce May 19, 1997) (final rule).[4]

[4] For a more detailed discussion of the legal standard for affiliation, *see Itochu*, 40 CIT at ___, 163 F. Supp. 3d at 1336–37.

During the administrative review, Commerce described the corporate relationship between the relevant entities as follows:

> IBP is part of the Itochu group of companies, which includes its sister company PrimeSource, the joint venture partner with Integrated Business Group USA LLC (IBG), a wholly-owned subsidiary of DWE. PrimeSource and IBG each own 50 percent of the joint venture company Progressive Steel and Wire LLC (PSW), a producer of nails in the United States. The record indicates that DWE is 100 percent owned by its parent company Dubai Wire Products Limited (DWP), and DWE owns 100 percent of IBG, a company formed in November 2011 for the purpose of creating the joint venture company, PSW, with joint venture partner PrimeSource. DWE stated that PrimeSource and its sister company IBP are each 80 percent owned by Itochu International USA (Itochu USA), and Itochu USA's parent company, Itochu Corporation (Japan) (Itochu Japan) owns 100 percent of Itochu USA and 20 percent of both PrimeSource and IBP . . . [t]he record indicates that the PSW joint venture is 50 percent owned by the DWE business structure and 50 percent owned by the IBP business structure.

Affiliation Mem. for Dubai Wire FZE (Dep't Commerce May 28, 2014) at 3–4, CJA Doc 19; CR 52 (internal citations and bracketing omitted). Based on this understanding, Commerce concluded that "the relationship between [the Dubai Wire group] and [the Itochu group] via the PSW joint venture, which produces identical merchandise in the United States, has the potential to have an impact on decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product." *Id*. at 4. Upon review, the court found that Commerce had failed to adequately explain its finding. *See generally Itochu*, 40 CIT at ___, 163 F. Supp. 3d at 1338. Consequently, the court remanded the determination for Commerce to further explain or reconsider its reasoning.

In its Remand Redetermination, Commerce again found Itochu and Dubai Wire to be affiliated. *See generally* Remand Redet. Specifically, Commerce pointed to six factors to support its finding of affiliation: (1) Itochu was, by far, Dubai Wire's largest customer for nails in both the United States and Canada during the POR;[5] Itochu resold the nails purchased from Dubai Wire to PrimeSource, which in turn sold the nails, and nails it separately purchased from PSW, to unaffiliated

[5] Itochu purchased [[ ]] percent of Dubai Wire's total U.S. sales of subject merchandise, and [[ ]] percent of Dubai Wire's total Canada sales of subject merchandise during the POR. Remand Redet. at 8.

customers; (2) Dubai Wire sold a substantial portion of its total production of subject merchandise to Itochu;[6] (3) officers and directors from both PrimeSource/Itochu and Dubai Wire also serve on the board of PSW; (4) PSW produces merchandise that is identical to the subject merchandise; (5) Itochu sends both UAE origin nails (subject merchandise) and non-UAE origin nails to PrimeSource, where all nails are commingled and lose their identity of origin; and, (6) PrimeSource directs the production and pricing of nails by PSW, buys all PSW nail output, and commingles them with the nails produced by Dubai Wire. *Id*. at 8–9. In sum, Commerce found that "the relationship between [Itochu] and Dubai Wire accounts for a high percentage of Dubai Wire's sales, the PSW joint venture produces merchandise identical to the subject merchandise and foreign like product, and all such nails lose their 'identity' in PrimeSource's warehouse." *Id*. at 9. Commerce concluded that Itochu's relationship with Dubai Wire, through the joint venture, has the potential to impact production, cost, or pricing of the subject merchandise or foreign like product. *Id*.

Commerce also explained that, in addition to the six factors above, the PSW joint-venture was specifically created to produce steel nails in the United States and to be responsive to PrimeSource's (and consequently, Itochu's) needs. *Id*. at 15. When combined with the fact of overlapping officers and directors between Dubai Wire, Itochu and PSW, "the existence of the PSW joint venture to produce nails necessarily create[d] the potential to impact decisions concerning [. . .] the specific steel nail products that would be produced in Texas versus the UAE, where certain costs would be incurred, recorded, recognized, and what prices would be charged for subject merchandise." *Id*. at 15–16. This was particularly true here when the same employees could make these decisions for both Dubai Wire and PSW. *Id*. at 16.

In challenging the remand redetermination, Plaintiff argues that Commerce's finding was flawed because Itochu had the same degree of control in its purchases of nails from Dubai Wire as it did in its purchases from other vendors, and because Commerce failed to rebut Itochu's arguments (and evidence) that the joint venture between Itochu and Dubai Wire did not impact the relationship between the two corporate groupings. *See* Pl.'s Opp'n to Remand Redet. at 2–4.

Plaintiff's arguments to the court simply restate arguments it made during the remand proceeding and which Commerce considered and rejected. Those arguments are equally unconvincing to the court.

Plaintiff asserts that it treated Dubai Wire in the same manner it treated its other vendors. *See* Pl.'s Opp'n to Remand Redet. at 5–6. Commerce rejected this argument, finding that Itochu's relationship

[6] During the POR, Dubai Wire sold [[ ]] percent of its production of nails to Itochu. *Id.*

with other vendors is not relevant to whether Itochu had the potential to control production, pricing, or cost decisions with respect to Dubai Wire, with which it owned and operated a joint venture. *See* Remand Redet. at 9–10, 16–19. One record basis for Plaintiff's claim is a hand-written chart showing the average unit values for nails purchased by Itochu in the United States from its top 11 vendors. Dubai Wire Summary of Ex Parte Meeting of April 3, 2014 ("Ex Parte Meeting"), Ex. 1, CJA Doc. 15; CR 45. Commerce considered and declined to rely on this information, noting that it found CONNUM specific pricing data (i.e., data based on particular models of nails or "control numbers") to be more relevant. *See generally* Remand Redet. at 10–11, 18–19. Moreover, even Dubai Wire appears to have recognized the limited value of this chart, admitting that the differences in average unit values reflect the differences in product mixes purchased from the various vendors. Ex Parte Meeting at 2 n. 1.

The second record basis for Plaintiff's claim is a chart comparing the prices charged by Dubai Wire to Itochu with the prices charged by Dubai Wire to other, unaffiliated companies, when Dubai Wire had sales of the identical CONNUMs to both within the same month. *See* Ex Parte Meeting, Ex. 2. There were a significant number of such pairings,[7] *id.* at 1, and Dubai Wire/Itochu have argued that the fact that Itochu paid more than other customers approximately one-third of the time is indicative of the arm's length nature of the relationship between the two corporate groupings. *See* IBP's Case Br. (Oct. 31, 2014) at 4, CJA Doc 30; CR 151; *see also* IBP Comments on Draft Results of the Redetermination at 6, Confidential Joint Appendix of New Documents on Redetermination Pursuant to Court Remand ("Remand Redetermination CJA") Doc R 2, ECF No. 78; Public Remand R. ("PRR") 1, ECF No. 65; Pl.'s Opp'n to Remand Redet. at 5–8. Commerce considered this argument and found the fact that Itochu paid less to Dubai Wire in the other two-thirds of the comparisons to be more relevant to its determination of control. Remand Redet. at 9–10. In making the same argument to the court, Itochu is simply asking the court to reweigh the evidence that was considered by Commerce. This, the court will not do. *Downhole Pipe & Equip., L.P. v. United States,* 776 F.3d 1369, 1377 (Fed. Cir. 2015) (citation omitted) (the court may not "reweigh the evidence . . . or consider questions of fact anew"); *see also Usinor v. United States*, 28 CIT 1107, 1111, 342 F. Supp. 2d 1267, 1272 (2004) (citation omitted) (the court "may not reweigh the evidence or substitute its own judgment for that of the agency").

[7] Dubai Wire identified [[ ]] such pairings in its submission. Ex Parte Meeting, Ex. 2 at 1.

While Plaintiff's arguments to the court are made to appear broader, and more broadly supported, they are not. For example, Plaintiff cites to arguments made to Commerce about Itochu's and Dubai Wire's subjective perspectives on their relationship, *see* Pl.'s Opp'n to Remand Redet. at 2–4, but a party's subjective view of its corporate relationship, without more, does not rebut Commerce's record-based reasoning for finding that the relationship had the potential to influence decisions regarding the production, pricing and cost of subject merchandise or foreign like product. In addition to the two exhibits discussed above, Plaintiff referred the court to three other documents in the confidential record (CR 39, 70, and 83);[8] however, it provided no more precise citation within these documents or explanation of how it believed each of these documents supported its claim that Itochu "treated all of its vendors in the identical manner." Pl.'s Opp'n to Remand Redet. at 5, 6. Rather than providing supporting evidence for this claim, the referenced documents simply contain information regarding corporate structure and affiliations (CR 39 and 70), additional information on the sales process and adjustments to sales prices (CR 70), and explanation of the allocation methodology used to report sales of commingled nails out of PrimeSource's inventory in the United States (CR 83). Plaintiff has failed to identify how these documents support its claims regarding its treatment of different vendors and, upon review of the portions of the documents provided by Plaintiff in the Joint Appendix, the court was unable to discern any support for Plaintiff's position. Thus, while Itochu provided Commerce with "extensive documentation" relating to its purchases and sales, Commerce found that these documents did not support Itochu's contention that it treated all its vendors in an identical manner or that the joint venture did not create the potential to impact production, pricing, or cost of subject merchandise or foreign like product, and Plaintiff has identified no reason or evidence that would cause the court to disturb that finding. To the extent that documentary proof otherwise may exist, it was Plaintiff's burden to provide it to Commerce during the administrative proceeding. *Nan Ya Plastics Corp., Ltd. v. United States*, 810 F.3d 1333, 1337–38 (Fed. Cir. 2016) (citing *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011)) ("the burden of creating an adequate record lies with interested parties and not with Commerce").

[8] Dubai Wire Resp. to Suppl. Item 2(a) Questions (March 13, 2014), CJA Doc. 12; CR 39 (showing generally the corporate agreements in place between the Itochu and Dubai Wire entities); IBP Suppl. Section A and C Resp. (July 15, 2014), CJA Doc. 22; CR 70 (questionnaire response and corporate data pertaining to Dubai Wire); and Itochu Section C Resp. (July 15, 2014), CJA Doc. 24; CR 83 (U.S. sales data for Dubai Wire).

In sum, Commerce reviewed the record evidence submitted by Itochu and Dubai Wire and, on that basis, found that corporate affiliation existed between the two groups, and the relationship had the potential to impact Dubai Wire's decisions regarding the production, pricing, or cost of subject merchandise or foreign like product. For the reasons stated above, the court finds that Commerce's determination as to affiliation between the Itochu and Dubai Wire groups is supported by substantial evidence.

II. Using Third Country Sales to Canada to Establish Normal Value

The court now turns to Plaintiff's alternative argument that, assuming that the court sustains Commerce's finding on affiliation, it should remand Commerce's Final Results because Canada was not a viable third country market and Commerce should have based its normal value calculation on constructed value. *See* Confidential Br. in Supp. of Pl.'s Rule 56.2 Mot. for J. upon the Agency R. ("Pl.'s Br.") at 26–31, ECF No. 26. Plaintiff argues that Commerce should have conducted its third country market viability test in accordance with Itochu and Dubai Wire's "commercial reality" and the manner in which Itochu reported its sales, i.e. by using sales "databases [that] include all warehouse sales of SKUs purchased from [Dubai Wire], regardless of origin." Pl.'s Br. at 30. Plaintiff argues that doing so would have shown that Canada was not a viable comparison market. *Id.* Defendant contends that Commerce's market viability test complied with the statutory requirement set forth in 19 U.S.C. § 1677b(a)(1)(B)(ii)(II), and that Plaintiff's preferred approach is contrary to the statute and to Commerce's practice. Confidential Def.'s Opp'n to Pl.'s Rule 56.2 Mot. for J. upon the Agency R. ("Def's Opp'n") at 20, ECF No. 35; *see also* Confidential Resp. Br. of Def.-Intervenor Mid Continent Steel & Wire, Inc. ("Def.-Intervenor's Br.") at 16–18, ECF No. 33 (Defendant-Intervenor concurs in Defendant's argument). The court had deferred ruling on this claim in *Itochu.* 40 CIT at ___, 163 F. Supp. 3d at 1339. Neither party has raised new arguments with respect to this issue in their latest briefing. *See generally* Pl.'s Opp'n to Remand Redet.; Def.'s Resp. to Pl.'s Opp'n; Def.-Intervenor's Resp. to Pl.'s Opp'n.

Commerce determines dumping margins by "comparing the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise." 19 U.S.C. § 1677f-1(d)(1)(A)(i). The statute defines normal value as "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).

Thus, the starting point for determining normal value is home market sales. The statute provides that the home market is not a viable basis for determining normal value if:

> the administering authority determines that the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold in the exporting country is insufficient to permit a proper comparison with the sales of the subject merchandise to the United States.

19 U.S.C. § 1677b(a)(1)(C)(ii).

For the purposes of subparagraph (ii), home market sales "shall normally be considered to be insufficient if such quantity (or value) is less than 5 percent of the aggregate quantity (or value) of sales of the subject merchandise to the United States." 19 U.S.C. § 1677b(a)(1)(C). In this case, Commerce determined Dubai Wire's home market was not viable based on data provided by Dubai Wire, and Itochu does not dispute that finding. *Certain Steel Nails from the United Arab Emirates,* 79 Fed. Reg. 35,721 (Dep't Commerce June 24, 2014) (prelim. results of antidumping duty admin. review) ("Prelim. Results") and accompanying *Decision Mem.,* A-520–804 (June 18, 2014) ("Prelim. Mem.") at 8, PJA Doc. 21; PR 94 (internal citations omitted); *see also* Dubai Wire Section A Resp. (Aug. 22, 2013) at 4, CJA Doc. 3; CR 4.

When the home market is not viable, Commerce may look to third country sales to determine normal value. In such cases, the statute also provides that a third country market must, among other things, be viable – specifically:

> the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold by the exporter or producer in such other country is 5 percent or more of the aggregate quantity (or value) of the subject merchandise sold in the United States or for export to the United States.

19 U.S.C. 1677b(a)(1)(B)(ii)(II). Foreign like product is defined as merchandise "produced in the same country and by the same person as the subject merchandise." 19 U.S.C. § 1677(16)(B)(i).

If neither the home market nor the third country market are found to be viable, Commerce may use constructed value to determine normal value. 19 U.S.C. § 1677b(a)(4); *see also* 19 C.F.R. § 351.404(f) ("The Secretary normally will calculate normal value based on sales to a third country rather than on constructed value if adequate information is available and verifiable."). Once Commerce is satisfied that the third country market is viable, the party alleging that the

prices are not representative or otherwise should not be used (i.e., as a result of a particular market situation) bears the burden of establishing this fact. *See Alloy Piping Products v. United States,* 26 CIT 330, 339, 201 F. Supp. 2d 1267, 1276 (2002).

In its Preliminary Results, Commerce determined that Dubai Wire did not have a viable home market and instead used Dubai Wire's third country sales to Canada to calculate normal value. Prelim. Mem. at 7 n. 20, 8, 10; *see also* Analysis Mem. for Dubai Wire FZE (Dep't Commerce June 18, 2014) ("Third Country Analysis Mem.") at 1, 2, CJA Doc. 40; CR 59 (finding that the Canadian market was viable for third country comparison purposes because the "aggregate volume of third [ ] country sales to Canada was greater than five percent of its aggregate volume of U.S. sales of the subject merchandise").

In its briefing to Commerce, Plaintiff argued that Commerce "should conduct its comparison market viability test in the same commercially realistic manner as IBP reported its sales," i.e., based on all warehouse sales of product types identical to those purchased from Dubai Wire and regardless of origin. IBP's Case Br. at 11; *see also* I&D Mem. at 12. Commerce rejected this argument, explaining that "Dubai Wire's third [ ] country sales reported as derived quantities, as supported by the record of this case, appear to be legitimate sales of merchandise identical to that which is sold in the United States, in the usual commercial quantities" and that "we determine that IBP's reported third [ ] country sales quantity of foreign like product, which exceeds the five percent third [ ] country market viability threshold, satisfies the statutory and regulatory threshold of third [ ] country market viability on a volume basis." I&D Mem. at 14. As such, "for the final results . . . [Commerce] continue[d] to use Dubai Wire's third [ ] country sales as a basis for [normal value]." *Id.*

Plaintiff renews the same arguments before the court. In its brief to the court, Itochu reiterates that Commerce "should have conducted its comparison market viability test in the same commercially realistic manner as IBP reported its sales" and that doing so would show that Canada is not a viable third [ ] country market. Pl.'s Br. at 26–30; *see also* Confidential Pl.'s Reply Br. ("Pl.'s Reply") at 14, ECF No. 37 ("Since PrimeSource sells its nails in Canada and the United States without regard to, or mention of, origin and without any variation in the CONNUM specific price or quantity of nails based on source, [Commerce] should have based its viability analysis on PrimeSource's Canada and U.S. market sales as a whole"). According to Plaintiff, such a calculation would conform to the manner in which PrimeSource conducts its business, would accurately reflect the compara-

tive size and importance of each market, track observations and sales as they are reported in Itochu's databases, and be consistent with the manner in which Commerce calculated Dubai Wire's dumping margin. Pl.'s Br. at 30. Citing to *United States v. Eurodif S.A.,* 555 U.S. 305 (2009), Plaintiff argues that Commerce had an obligation to consider Itochu's economic reality in its market viability analysis. Pl.'s Reply at 12 (citing *Eurodif,* 555 U.S. at 317 ("It is well settled that in reading regulatory and taxation statutes, form should be disregarded for substance and the emphasis should be on economic reality.")).

Defendant responds that Commerce's selection of Canada as the third country market was in accordance with 19 U.S.C. § 1677b(a)(1)(B)(ii)(II), because Dubai Wire's home market did not meet the five percent viability test, and "Dubai Wire's sales of nails to Canada, by quantity or by value, met the five percent threshold required by law." Def's Opp'n at 20. Defendant further explains that Itochu's "third [ ] country market argument includes consideration of non-UAE originating merchandise, and in doing so, fails to comply with the statute" and is contrary to Commerce's practice of including only foreign like product, as defined in 19 U.S.C. § 1677(16), in its viability calculation. *Id; see also id.* at 24 ("Itochu's proposed market viability analysis may inappropriately include merchandise that is produced by parties other than Dubai Wire, outside of the UAE"). Defendant-Intervenor concurs in this argument. Def.-Intervenor's Br. at 16–18.

At Oral Argument, Plaintiff acknowledged that, notwithstanding their legal argument for determining viability consistent with commercial reality, Commerce's factual assertions regarding Dubai Wire's sales based on the data provided by Dubai Wire in its questionnaire responses are correct and that a viability test conducted on the basis of Commerce's legal position would support a finding that Canada is a viable third country market. *See* Transcript of Oral Argument ("Oral Arg. Tr.") at 15–25, 51, ECF No. 59. However, Plaintiff did not concede its legal argument that Commerce should have acted consistent with "commercial reality" and instead used Itochu's aggregate data to find Canadian sales not to be a viable basis for determining normal value. Oral Arg. Tr. at 51–52. Thus, only Plaintiff's legal argument remains, and it is without merit.

Plaintiff claims support for its argument from *Eurodif*, noting the reference therein that "form should be disregarded for substance and the emphasis should be on economic reality." Pl.'s Reply at 12 (quoting *Eurodif*, 555 U.S. at 317–18). A careful reading of *Eurodif*, however, makes plain that Plaintiff seeks to turn that case on its head. The

Eurodif plaintiffs had argued that the provision of low enriched uranium ("LEU") from foreign enrichers to domestic utilities was not subject to the antidumping laws due to the nature of the "SWU contracts" (separative work unit contracts governing enriched uranium transactions) pursuant to which the LEU was sold. The Court affirmed Commerce's ability to treat these "SWU contracts" as contracts for the sale of goods (thus making them subject to the antidumping laws), notwithstanding the claims of the parties to those contracts that they were for the provision of enrichment services.

Itochu's reading of *Eurodif* position would have the court disregard the form of a public law by reinterpreting the meaning of "foreign like product" to suit the nature of Itochu's private transaction. That PrimeSource may commingle nails purchased from sources other than Dubai Wire such that they lose their origin prior to selling them to an unaffiliated customer does not make all the commingled nails foreign like product. "Foreign like product" is statutorily defined as "merchandise produced in the same country and by the same person as the subject merchandise." 19 USC § 1677(16). While Itochu invokes *Eurodif* to bend the statute to its practices, the point of *Eurodif* is that the agency may look beyond the labels attached to a transaction to focus on what is truly relevant under the statute. Just as the Court said that "public law is not constrained by private fiction," *Eurodif*, 555 U.S. at 318, Commerce was not constrained to treat all PrimeSource sales in Canada as foreign like product simply because PrimeSource had commingled nails from various sources. Commerce properly limited the foreign like product to that portion of sales allocated to Dubai Wire.

For the Final Results, Commerce followed the statute and regulations, found that Dubai Wire and Itochu's sales data were reliable, and on that basis determined both that Dubai Wire's home market was not viable and that Canada was a viable third [ ] country market for comparison purposes. I&D Mem. at 14. Commerce correctly found that "viability should be determined (only) by comparing merchandise produced by the respondent in the subject country" and declined to "conduct [its] viability test based on sales quantities reported which include merchandise produced by companies other than Dubai Wire and in countries other than the UAE." *Id.* at 13. Indeed, Plaintiff concedes that Commerce's factual assertions based on Dubai Wire's questionnaire responses are correct and relies only upon its legal argument that Commerce should have acted consistent with Itochu and Dubai Wire's commercial reality. *See supra* p. 17. Commerce's actions are consistent with the statute and regulations and the court

finds that Commerce acted in accordance with law by relying on Canadian resale prices to calculate Plaintiff's dumping margin.

CONCLUSION

In accordance with the foregoing, the court sustains Commerce's Remand Redetermination on the issue of affiliation between Itochu and Dubai Wire. Further, the court sustains Commerce's final determination on the issue of third country viability.

It is so **ORDERED**. Judgment will enter accordingly.

Dated: February 16, 2017
New York, New York

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

Slip Op. 17–19

AN GIANG FISHERIES IMPORT and EXPORT JOINT STOCK COMPANY et al., Plaintiffs and Consolidated Plaintiff, v. UNITED STATES, Defendant, and CATFISH FARMERS OF AMERICA et al., Defendant-Intervenors and Consolidated Defendant-Intervenors

Before: Claire R. Kelly, Judge
Consol. Court No. 16–00072

[Denying Plaintiff An Giang Fisheries Import and Export Joint Stock Company et al.'s motion to amend an order granting a statutory injunction.]

Dated: February 24, 2017

Matthew Jon McConkey, Mayer Brown LLP, of Washington DC, for plaintiffs.

Andrew Brehm Schroth, Andrew Thomas Schutz, Dharmendra Narain Choudhary, and *Ned Herman Marshak*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of Washington, DC and New York, NY for consolidated plaintiff.

Kara Marie Westercamp, Trial Attorney, Commercial Litigation Branch – Civil Division, U.S. Department of Justice, of Washington DC for Defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel on the brief was *Nanda Srikantaiah*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Nazakhtar Nikakhtar and *Jonathan Mario Zielinski*, Cassidy Levy Kent (USA) LLP, of Washington, DC for defendant-intervenors.

OPINION AND ORDER

Kelly, Judge:

This matter is before the court on the motion of Plaintiffs, An Giang Fisheries Import and Export Joint Stock Company, International Development and Investment Corporation, Thuan An Production Trading and Services Co., Ltd., and Viet Phu Foods and Fish Corpo-

ration (collectively "Movants"), to amend the statutory injunction issued by the court to include entries of subject merchandise that the United States Department of Commerce ("the Department" or "Commerce") ordered to be liquidated and which U.S. Customs and Border Protection ("CBP") actually liquidated prior to the statutory injunction taking effect.[1] *See* Mot. Am. Prelim. Inj., Feb. 1, 2017, ECF No. 34 ("Am. PI Mot.");[2] *see generally* Consent Mot. Prelim. Inj., May 19, 2016, ECF No. 10 ("PI Consent Mot."); Order, May 20, 2016, ECF No. 12 ("Statutory Inj."). Consolidated Plaintiff, Can Tho Import-Export Joint Stock Company, consents to Movants' motion. *Id.* at 2. Defendant and Defendant-Intervenors, Catfish Farmers of America, America's Catch, Alabama Catfish Inc., Heartland Catfish Company, Magnolia Processing, Inc., and Simmons Farm Raised Catfish, Inc., object to Movants' motion, arguing that Movants are not entitled to a preliminary injunction because they have not demonstrated likelihood of success on the merits, irreparable harm, that the balance of the hardships favors granting a preliminary injunction for the entries that have already liquidated, or that the public interest favors granting a preliminary injunction for the entries that have already liquidated. *See* Def.'s Resp. Opp'n Pls.' Mot. Am. Prelim. Inj. 4–11, Feb. 21, 2017, ECF No. 35 ("Def.'s Resp. Br."); Opp'n Pls.' Mot. Am. Prelim. Inj. 1–2, Feb. 21, 2017, ECF No. 36. For the reasons that follow, the court denies Movants' motion to amend the statutory injunction already granted in this case to include entries that have already liquidated or alternatively to grant a preliminary injunction for the entries that have already liquidated.

BACKGROUND

On March 21, 2016, Commerce issued its final results in the eleventh administrative review of the antidumping duty order concerning certain frozen fish fillets from the Socialist Republic of Vietnam ("Vietnam"), covering fish fillets from Vietnam entered during the period August 1, 2013 through July 31, 2014. *See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam*, 81 Fed. Reg. 17,435 (Dep't Commerce Mar. 29, 2016) (final results and partial rescission of the antidumping duty administrative review; 2013–2014) ("*Final Re-*

[1] Although Movants label their motion as a motion to amend a previously issued injunction, Plaintiffs are in effect asking the court to issue a preliminary injunction to prevent the liquidation of entries that have in fact already liquidated. *See* Mot. Am. Prelim. Inj. 2, Feb. 1, 2017, ECF No. 34. Movants argue in support of their motion as if it were a motion for a preliminary injunction and Defendant and Defendant-Intervenors respond to it as such. *Id.* at 3–6.

[2] Plaintiffs C.P. Vietnam Corporation, GODACO Seafood Joint Stock Company, and Seafood Joint Stock Company No. 4 – Branch Dong Tam Fisheries Processing Company appear to take no position on the motion. *See* Am. PI Mot. 2.

sults"). Those results were published on March 29, 2016. *See id.* In its final results, Commerce informed all interested parties that "[it] intends to issue appropriate assessment instructions directly to [U.S. Customs & Border Protection ("CBP")] 15 days after the publication of the final results of this administrative review." *Id.* at 17,436. On April 15, 2016, Commerce issued liquidation instructions directing CBP to assess antidumping duties, consistent with its *Final Results*, on all subject entries entered or withdrawn from warehouse for consumption during the period of August 1, 2013 through July 31, 2014. *See* Commerce Message No. 6106301, *available at* http://adcvd.cbp.dhs.gov/adcvdweb/ad_cvd_msgs/21174.pdf?tabindex=0 (last visited Feb. 24, 2017) ("Liquidation Instructions").

Plaintiffs commenced this action on April 28, 2016 challenging various aspects of Commerce's final determination in the eleventh administrative review of the antidumping duty order concerning certain frozen fish fillets from Vietnam. *See* Summons, Apr. 28, 2016, ECF No. 1. On May 19, 2016, Plaintiffs filed a complaint in this action. *See* Compl., May 19, 2016, ECF No. 9 ("Compl."). The same day, Plaintiffs filed a consent motion seeking to enjoin CBP from liquidating entries that remain unliquidated as of 5:00 p.m. on the date the order is entered. *See* Consent Mot. Prelim. Inj. Proposed Order at 2, May 19, 2016, ECF No. 10 ("PI Consent Mot."); Order, May 20, 2016, ECF No. 12 ("PI Consent Mot.").

On May 20, 2016, the court granted Plaintiffs' consent motion and issued a statutory injunction.[3] *See* Statutory Inj. The court ordered that "Defendant, together with its delegates and all other officers, agents, servants and employees of Commerce and CBP are enjoined from liquidating or causing or permitting liquidation of any and all unliquidated entries" of subject merchandise exported by Movants that were entered or withdrawn from warehouse for consumption on or after August 1, 2013 through July 31, 2014 and remain unliquidated as of 5:00 p.m. on May 20, 2016. *Id.* No party contests that certain entries exported by Movants were liquidated by CBP prior to Plaintiffs filing their complaint and obtaining an injunction against liquidation. Am. PI Mot. 2; Def.'s Resp. Br. 2.

[3] Plaintiffs' May 20, 2016 motion requested a "preliminary injunction." *See* PI Consent Mot. 2–3. Parties frequently use the term "preliminary injunction" to refer to a motion to prevent liquidation for the purposes of preserving judicial review. Plaintiffs' motion explicitly referenced this statutory justification as supporting its motion for a preliminary injunction. *See id.* at 2. The statute permits the Court to grant an injunction to preserve the parties' claims challenging Commerce's antidumping duty determinations. *See* Section 516A(c)(2) of the Tariff Act of 1930, as amended 19 U.S.C. § 1516a(c)(2). Because this is an injunction that is contemplated by statute, the court called its order a "statutory injunction" to distinguish it from a preliminary injunction granted under the court's equitable powers.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to Section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[4] and 28 U.S.C. § 1581(c) (2012), which together grant the Court authority to review actions contesting the final determination in an administrative review of an antidumping duty order. *See* 19 U.S.C. § 1516a(a)(2)(B)(iii); 28 U.S.C. § 1581(c) (2012).

USCIT Rule 65 permits the court to issue a preliminary injunction on notice to the adverse party. USCIT R. 65(a). To obtain the extraordinary relief of a preliminary injunction, the Plaintiff must establish that (1) it is likely to suffer irreparable harm without a preliminary injunction, (2) it is likely to succeed on the merits, (3) the balance of the equities favors the Plaintiff, and (4) the injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed-.Cir. 1983). In reviewing these factors, "no one factor, taken individually," is dispositive. *Ugine & ALZ Belg. v. United States*, 452 F.3d 1289, 1292 (Fed. Cir. 2006) (internal citations omitted); *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed.Cir.1993). However, each factor need not be given equal weight. *See Ugine & ALZ Belg.*, 452 F.3d at 1293; *Nken v. Holder*, 556 U.S. 418, 434 (2009). Likelihood of success on the merits and irreparable harm are generally considered the most significant factors in evaluating a motion for injunctive relief. *See Nken v. Holder*, 556 U.S. at 434; *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1350 (Fed. Cir. 2001).

DISCUSSION

I. Likelihood of Success on the Merits

Movants do not actually provide any legal basis to obtain relief from liquidation. Rather, Movants ask the court to "exercise its discretion and modify the preliminary injunction" to give it retroactive effect. Am. PI Mot. 4. Movants concede that liquidation ordinarily moots a party's claims pertaining to liquidated entries in an action brought pursuant to 19 U.S.C. § 1516a. *See id.* However, they argue that amending the preliminary injunction is warranted to allow the preliminary injunction to accomplish the intended goal of the parties. *Id.* Defendant counters that Movants cannot succeed on the merits because the liquidated entries are moot with respect to the duty rate to be applied to them. Def.'s Resp. Br. 5. Defendant further argues that Movants' only further recourse is to protest liquidation and challenge

[4] 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.

any potential denied protest, which cannot be challenged through an action brought under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c) (2012). *Id.*

During an administrative review, liquidation of entries under review is suspended. *See* 19 U.S.C. § 1673b(d). After the publication of the final results, the statute provides that entries of merchandise covered by an antidumping duty order shall be liquidated in accordance with Commerce's final determination if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication of a notice of a decision in the Federal Register unless such liquidation is enjoined by the Court pursuant to 19 U.S.C. § 1516a(c)(2). 19 U.S.C. § 1516a(c)(1); *Int'l Trading Co. v. United States*, 281 F.3d 1268, 1272 (2002). The Court of Appeals for the Federal Circuit has held that, in the absence of such an injunction, liquidation of entries subject to antidumping duties renders judicial review of the antidumping duties due on those entries unavailable. *See Zenith Radio*, 710 F.2d at 810. In *Zenith Radio*, the Court of Appeals for the Federal Circuit inferred that judicial review is unavailable for liquidated entries in part from the absence of any statutory provision allowing for reliquidation if a challenge to the antidumping duty rate is successful. *See id.; see also Agro Dutch Indus. Ltd., v. United States*, 589 F.3d 1187, 1190 (2009) (characterizing *Zenith*'s holding as inferred from the absence of any statutory provision allowing subsequent reliquidation if a challenge is successful).

Here, Movants do not argue that Commerce exceeded its statutory authority to order liquidation of the entries in question either because liquidation was suspended pursuant to statute or because insufficient time had elapsed after publication of the *Final Results*. *See* Am. PI Mot. 4. Approximately 51 days passed between the date that Commerce published its final results and the date that Plaintiffs filed their consent motion for a preliminary injunction. *See Final Results*, 81 Fed. Reg. 17,435; PI Consent Mot. Given that the entries in question have liquidated, Movants' claims as to the dumping margin assessed on the liquidated entries are mooted, and there is no case or controversy concerning the duty rate assessed on those entries. *See Zenith Radio*, 710 F.2d at 810. Moreover, Plaintiffs' consent motion specifically requested that liquidation be enjoined only on entries entering after 5:00 p.m. on the day the preliminary injunction is entered. *See id.* at 5. Movants concede that the entries in question were liquidated well before 5:00 p.m. on May 20, 2016, which is the date the statutory injunction took effect. *See* Am. PI Mot. 2; Statutory Inj. 2.

Movants suggest that the court should exercise its discretion to amend the injunction to reach entries that have already liquidated because it is necessary to accomplish the intended goal of the injunctive orders. Am. PI Mot. 4 (citing *Agro Dutch Indus.*, 589 F.3d at 1192; *Clearon Corp. v. United States*, 34 CIT 970, 972, 717 F. Supp. 2d 1366, 1368 (2010)). Further, Movants imply that the requested preliminary injunction here was intended by the court and the parties to prevent liquidation of all subject entries that were entered or withdrawn from warehouse, for consumption during the period of review. *See id*.

Movants' claim that the intended goal of the preliminary injunction was to prevent liquidation of all subject entries within the period of review is belied by the request in Plaintiffs' motion, which sought a preliminary injunction only for entries that remain unliquidated as of 5:00 p.m. on the date the statutory injunction is entered, and by the terms of the court's statutory injunction order itself reflecting those terms. *See* PI Consent Mot. 5; Statutory Inj. Movants cite no authority for the court to retroactively apply a statutory injunction where there is no evidence that the parties meant for the injunction to cover the entries in question or where the court had no such intent.[5] Likewise, Movants cite no authority for applying a statutory injunction for entries that were not covered by the injunction and were liquidated before the statutory injunction took effect.[6]

II. Irreparable Harm

Movants rely upon the notion that liquidation of their entries would render judicial review of the antidumping duties assessed on those entries moot to support their claim that failure to amend the statutory injunction issued by the court would cause them to suffer irrepa-

[5] In *Agro Dutch Indus.*, 589 F.3d at 1192–93, the Court of Appeals for the Federal Circuit held that the Court could exercise its discretion to order reliquidation of entries that were liquidated during the five-day grace period given by the court to prevent contempt against government officials for inadvertent liquidation. *Agro Dutch Indus.*, 589 F.3d at 1192–93. The court reasoned that the injunction's grace period was "not intended to give the government free rein to liquidate the subject entries before the injunction took effect." *Id.* at 1193. Here, Movants do not allege that the entries were liquidated during the grace period they requested in Plaintiffs' consent motion, nor do they provide any other basis to support their suggestion that the parties or the court intended for the statutory injunction to apply to entries liquidated prior to the date the injunction took effect. *See* Am. PI Mot. 4.

[6] In *Clearon*, the court used its equitable powers to reliquidate entries where deemed liquidation took place after the injunction took effect because plaintiffs had inadvertently failed to serve the injunction on the correct party, which resulted in liquidation of those entries. *Clearon*, 34 CIT at 978, 717 F. Supp. 2d at 1372. Here, Movants do not allege that liquidation occurred on entries after the statutory injunction took effect. The logic of *Clearon* does not empower the court to reliquidate entries that liquidated prior to the entry of the statutory injunction and that were not covered by the terms of that injunction.

rable harm. *See* Am. PI Mot. 4–5. Defendant's respond that Movants are not irreparably harmed by the liquidation of their entries because the liquidation of the entries can be challenged under 28 U.S.C. § 1581(a). Def.'s Resp. Br. 9.

Among the criteria a plaintiff seeking a preliminary injunction must establish is that it is likely to suffer irreparable harm in the absence of preliminary relief. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). An injunction is improper in these circumstances because it is not necessary to prevent irreparable harm. The irreparable harm occurred already as a result of Movants' failure to seek a statutory injunction to prevent liquidation. There is no other harm to prevent. Liquidation renders a challenge to the antidumping duty rate assessed on those entries moot, as already discussed. *See Zenith Radio*, 710 F.2d at 810.

III. Balance of the Hardships

Movants argue that failure to amend the statutory injunction would cause significant harm by denying them the right to pursue their challenge to the antidumping duties assessed on already liquidated entries. *See* Am. PI Mot. 3–4; *see also* PI Consent Mot. 4–5. Defendant does not argue that reliquidating Movants' entries would itself cause harm, but rather claims that Commerce lacks authority to reliquidate those entries. Def.'s Resp. Br. 10–11.

Balancing the hardships requires the court to balance the equities. *Winter*, 555 U.S. at 20. Here, it was within Movants' power to avoid the risks they now face. Where, as here, a party fails to act in a timely fashion to prevent liquidation of certain entries during a time that it could have prevented liquidation, the balance of the equities cannot tip in favor of amending the preliminary injunction.

IV. Public Interest

Movants contend that the public interest is served by ensuring that Commerce follows the applicable law and regulations in a manner that allows it to conduct fair and impartial administrative reviews. *See* Am. PI Mot. 3–4; PI Consent Mot. 4. Defendant responds that the uniform and fair enforcement of the trade laws favors allowing Movants to pursue their remedy through the administrative and statutory procedures in place by protesting liquidation and challenging its denied protest in the event that CBP denies such protest. *See* Def.'s Resp. Br. 10.

Here, the uniform and fair enforcement of the trade laws favors denying Movants' request to amend the statutory injunction because the statute lays out clear paths to ensure judicial review of entries

subject to an administrative review. During an administrative review, parties are protected from liquidation of entries because liquidation is suspended during the review. *See* 19 U.S.C. § 1673b(d). After the publication of the final results, the statute provides that:

> [u]nless such liquidation is enjoined by the [C]ourt [pursuant to 19 U.S.C. § 1516a(c)(2)], entries of merchandise of the character covered by a determination of [Commerce] contested under [the section permitting review of Commerce's antidumping duty determinations] shall be liquidated in accordance with [Commerce's] determination . . . if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication of a notice of a decision in the Federal Register by the [Court] or by the United States Court of Appeals for the Federal Circuit, not in harmony with Commerce's determination.

19 U.S.C. § 1516a(c)(1); *see also Int'l Trading Co.*, 281 F.3d at 1272. Absent extraordinary circumstances, parties should be required to follow reasonable procedures and policies that ensure fair and uniform enforcement of the antidumping laws. To allow otherwise would arbitrarily favor some parties and cause confusion about when and whether a party must move for a statutory injunction following the publication of final results in an antidumping duty administrative review.

Movants also argue that amending the injunction would serve the interests of judicial economy by avoiding "unnecessary litigation . . . on an issue that an amended preliminary injunction order can readily address now." Am. PI Mot. 5. However, this litigation, which is for judicial review under 28 U.S.C. § 1581(c) (2012), reviews Commerce's antidumping duty determination, not the propriety of CBP's determination to liquidate pursuant to Commerce's instructions or Commerce's decision to issue the instructions. *See* Compl. ¶¶ 19–36. Those determinations frequently stem from different facts and have different legal justifications. Whether or not it is the most efficient use of judicial resources, Congress has set out distinct statutory bases for reviewing these two types of determinations as well as distinct jurisdictional grounds for judicial review of such determinations. *See* 19 U.S.C. §§ 1514, 1516a; 28 U.S.C. §§ 1581(a),(c) (2012).

CONCLUSION

Movants fail to make a sufficient showing on any of the factors to warrant granting their motion to amend the statutory injunction previously granted or grant a preliminary injunction with respect to entries already liquidated.

Therefore, upon consideration of Movants' amended motion for a preliminary injunction, Defendant's response thereto, and all other papers and proceedings in this action, and upon due deliberation, it is hereby

ORDERED that Movants' motion for an amended preliminary injunction is denied.

Dated: February 24, 2017
New York, New York

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