U.S. Court of International Trade

Slip Op. 18–129

HAIXING JINGMEI CHEMICAL PRODUCTS SALES CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and ARCH CHEMICALS, INC., Defendant-Intervenor.

Before: Mark A. Barnett, Judge
Court No. 16–00259
PUBLIC VERSION

[Sustaining the U.S. Department of Commerce's Remand Results rescinding the new shipper review of Haixing Jingmei Chemical Products Sales Co., Ltd.]

Dated: September 26, 2018

Gregory S. Menegaz, J. Kevin Horgan, and *Alexandra H. Salzman*, deKieffer & Horgan, PPLC, of Washington, DC, for Plaintiff. With them on the brief was Judith L. Holdsworth.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With him 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 *Jessica DiPietro*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Peggy A. Clarke, Law Offices of Peggy A. Clarke, of Washington, DC, for Defendant-Intervenor.

OPINION

Barnett, Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or the "agency") redetermination upon remand. *See* Final Results of Redetermination Pursuant to Court Remand ("Remand Results"), ECF No. 50. Plaintiff, Haixing Jingmei Chemical Products Sales Co. ("Plaintiff" or "Jingmei"), initiated this action challenging Commerce's final determination to rescind the 2014–2015 new shipper review of the antidumping duty order on calcium hypochlorite from the People's Republic of China ("PRC"). *See Calcium Hypochlorite from the People's Republic of China*, 81 Fed. Reg. 83,804 (Dep't Commerce Nov. 22, 2016) (final decision to rescind the new shipper review of Haixing Jingmei Chemical Products Sales Co., Ltd.) ("*Final Rescission*"), ECF No. 18–4, and the accompanying Issues and Decision Mem., A-570–008 (Nov. 14, 2016) ("I&D Mem."), ECF No. 18–5.[1] Plaintiff argued that Commerce's rescission of the

[1] The administrative record in connection with the *Final Rescission* is divided into a Public Administrative Record ("PR"), ECF No. 18–3, and a Confidential Administrative Record ("CR"), ECF No. 18–2. Parties submitted joint appendices containing record documents

new shipper review due to purportedly insufficient information to conduct a *bona fide* analysis of Plaintiff's sales during the July 25, 2014, through June 30, 2015 period of review ("POR") was unsupported by substantial evidence. *See generally*, Haixing Jingmei Chem. Prods. Sales Co., Ltd Mot. for J. on the Agency R., ECF No. 22, and Confidential Mem. in Supp. of Mot. for J. on the Agency R., ECF No. 23.

On December 5, 2017, the Court remanded the *Final Rescission*, holding that Commerce's rescission due to insufficient information to conduct a *bona fide* analysis of Plaintiff's sales was not supported by substantial evidence in light of the agency's statutory authority to use facts available, with or without an adverse inference, to fill any asserted gaps in the record. *See Haixing Jingmei Chem. Prod. Sales Co., Ltd. v. United States*, 41 CIT ___, 277 F. Supp. 3d 1375, 1382–83 (2017).[2] The court ordered Commerce "to determine whether the sales in question were *bona fide*," so that "the court will be in a better position to evaluate whether that redetermination is supported by substantial evidence and otherwise in accordance with law." *Id.* at 1384.

In its Remand Results, Commerce used facts available with an adverse inference (sometimes referred to as "adverse facts available" or "AFA") to determine whether Jingmei's sales were indicative of *bona fide* transactions. *See* Remand Results at 13–14, 30, 52. Based on the totality of the circumstances, Commerce concluded that Jingmei's sales were not *bona fide* and, therefore, rescission of the new shipper review was appropriate. *See id.* at 1–2. Jingmei now challenges Commerce's Remand Results as unsupported by substantial evidence. *See* Confidential Pl. Haixing Jingmei Chem. Prods. Sales Co., Ltd. Comments in Opp'n to U.S. Dep't of Commerce's Remand Redetermination ("Pl.'s Opp'n Cmts"), ECF No. 52. The United States ("Defendant" or "Government") and Defendant-Intervenor, Arch Chems. Inc., support Commerce's Remand Results. *See* Confidential Def.'s Resp. to Pl.'s Comments on the Dep't of Commerce's Remand Results ("Def.'s Supp. Cmts"), ECF No. 60; Confidential Def-Int. Arch Chems., Inc. Br. in Resp. to Pl.'s Comments on Agency Redetermina-

cited in their United States Court of International Trade Rule 56.2 briefs. *See* Public J.A. ("PJA"), ECF No. 37; Confidential J.A. ("CJA"), ECF No. 36. The administrative record associated with the Remand Results is contained in a Public Remand Record ("PRR"), ECF No. 51–2 at 2, and a Confidential Remand Record ("CRR"), ECF No. 51–2 at 1. Parties further submitted joint appendices containing record documents cited in their Remand briefs. *See* Public J.A. to Remand Proceedings ("PRJA"), ECF No. 63; Confidential J.A. to Remand Proceedings ("CRJA"), ECF No. 62. References are to the confidential versions of the relevant record documents unless stated otherwise.

[2] The court's opinion in *Haixing Jingmei,* 277 F. Supp. 3d at 1375, presents further background information on this case, familiarity with which is presumed.

tion Upon Remand, ECF No. 58 ("Def.-Int.'s Supp. Cmts"). For the following reasons, the court sustains the Remand Results.

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[3] and 28 U.S.C. § 1581(c) (2012). The court will uphold an agency's determination that is supported by substantial evidence on the record and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed for compliance with the court's remand order." *SolarWorld Americas, Inc. v. United States*, 41 CIT ___, ___, 273 F. Supp. 3d 1314, 1317 (2017) (quoting X*injiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT ___, ___, 968 F. Supp. 2d 1255, 1259 (2014) (internal quotation marks omitted).

DISCUSSION

I. Legal Framework

a. New Shipper Reviews

Pursuant to 19 U.S.C. § 1675(a)(2)(B)(i), when Commerce receives a request from a new exporter or producer who did not export merchandise subject to an antidumping duty order to the United States during the period of investigation, and is not affiliated with any exporter or producer that did export, Commerce must conduct a review to establish an individual weighted-average dumping margin for that exporter or producer. Commerce must determine any weighted-average dumping margin solely on the basis of *bona fide* sales to the United States during the period of review. *See* 19 U.S.C. § 1675(a)(2)(B)(iv). Commerce determines whether the sales are *bona fide* by considering, "depending on the circumstances surrounding such sales," the following factors:

> (I) the prices of such sales; (II) whether such sales were made in commercial quantities; (III) the timing of such sales; (IV) the expenses arising from such sales; (V) whether the subject merchandise involved in such sales was resold in the United States

[3] Citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code, 2012 edition. Citations to 19 U.S.C. §§ 1675 and 1677e, however, are to the 2016 U.S. Code edition, which reflects amendments to § 1675 pursuant to the Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114–125, § 433, 130 Stat. 122 (2016), and amendments to § 1677e pursuant to the Trade Preferences Extension Act of 2015, Pub. L. No. 114–27, § 502, 129 Stat. 362, 383–84 (2015).

> at a profit; (VI) whether such sales were made on an arms-length basis; and (VII) any other factor the administering authority determines to be relevant as to whether such sales are, or are not, likely to be typical of those the exporter or producer will make after completion of the review.

19 U.S.C. § 1675(a)(2)(B)(iv).

In the absence of "an entry and sale to an unaffiliated customer in the United States of subject merchandise," Commerce may rescind the review. 19 C.F.R. § 351.214(f)(2)(i). A sale that Commerce "determines not to be a *bona fide* sale is, for purposes of [§ 351.214(f)(2)], not a sale at all." *Shijiazhuang Goodman Trading Co., Ltd. v. United States*, 40 CIT ___, ___, 172 F. Supp. 3d 1363, 1373 (2016). Thus, if Commerce excludes all subject sales as non-*bona fide*, it "necessarily must end the review, as no data will remain on the export price side of Commerce's antidumping duty calculation." *Tianjin Tiancheng Pharm. Co., Ltd. v. United States*, 29 CIT 256, 259, 366 F. Supp. 2d 1246, 1249 (2005).

b. Facts Available with an Adverse Inference

When "necessary information is not available on the record," or an interested party "withholds information" requested by Commerce," "fails to provide" requested information by the submission deadlines, "significantly impedes a proceeding," or provides information that cannot be verified pursuant to 19 U.S.C. § 1677m(i), Commerce "shall . . . use the facts otherwise available." 19 U.S.C. § 1677e(a).[4] Additionally, if Commerce determines that the party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," it "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." *Id.*§ 1677e(b). "Compliance with the 'best of its ability' standard is determined by assessing whether a respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

II. Commerce's Individual Findings in the Remand Results

In the Remand Results, Commerce conducted a *bona fide* analysis of the two sales subject to the new shipper review by evaluating the

[4] Commerce's authority to use the facts otherwise available is subject to 19 U.S.C. § 1677m(d). *See* 19 U.S.C. § 1677e(a).

factors enumerated in 19 U.S.C. § 1675(a)(2)(B)(iv).[5] *See* Remand Results at 12–48. In so doing, the agency "rel[ied], in part, on adverse inferences with respect to [its] interpretation of the facts available and thus, some of the weight [it] put on the record evidence [was] affected by the parties' lack of cooperation and adverse inferences." *Id.* at 13–14; *see also id.* at 30. Commerce specifically found that Jingmei, Company X, and Company Y failed to cooperate by not acting to the best of their ability to comply with Commerce's request for critical information necessary to determine whether the sales were *bona fide*. *See id.* at 6–11, 29, 50.

Commerce explained that, at the onset of the review, it issued a standard new shipper review questionnaire to Plaintiff, requesting information specific to the importer of the subject merchandise, including the importer's history, organization, ownership, and affiliations; sales during the POR; other purchases of subject merchandise; and resale of the merchandise. *Id.* at 6 & n.31 (citing Initial Questionnaire (Aug. 26, 2015), CRJA 4, PRJA 4, PR 9–11, ECF No. 62). The questionnaire directed Plaintiff to answer the questions, or, if Plaintiff was unable to fully respond, to forward the questionnaire to Company X and include Company X's answers in Plaintiff's response. *See id*. at 6–7 & nn.33–34 (citing Initial Questionnaire, App. IX; Section A Resp. (Sep. 16, 2015) ("Sec. A Resp.") at 22, CJRA 5, CR 6–8, PJRA 5, PR 14–15, ECF No. 62). Commerce later requested the same categories of information from Company Y. *See id.* at 7–8. "The purpose of this information [was] to provide Commerce with the facts needed to analyze the statutory factors of [§1675(a)(2)(B)(iv)]." *Id.* at 6.

Both Company X and Company Y failed to provide all the requested information, asserting that the information they withheld was confidential. *See id.* at 7–8 & nn.38–39 (citing Suppl. Section A Questionnaire Resp. (Dec. 28, 2015) ("Suppl. Sec. A Resp.") at 21, CJRA 11, CR 37–40, PJRA 11, PR 38, ECF No. 62; Customer's Suppl. Questionnaire Resp. (Dec. 28, 2015) ("U.S. Customer Resp.") at 3, CJRA 12, CR 41, PJRA 12, PR 39, ECF No. 62). Commerce cited eight other questionnaires requesting those and other categories of information that it deemed necessary to conduct its *bona fide* analysis. *Id.* at 6 n.32 (citations omitted). "In light of the repeated refusals of [Company X] and [Company Y] to provide vital requested information, Commerce

[5] The sales involved Haixing Eno Chemical Co., Ltd. ("Eno"), as producer, and Jingmei as seller. *See* Remand Results at 2. Jingmei sold the calcium hypochlorite to [[ ]], a [[ ]] based wholesaler of swimming pool supplies—denoted here for confidentiality purposes as Company X—who then sold the merchandise to [[ ]], a U.S. customer—denoted here for confidentiality purposes as Company Y. *Id.*

advised Jingmei in a supplemental questionnaire that the requested information [was] necessary for Commerce's analysis[,] and encouraged complete responses to [the agency's] request for information." *Id.* at 8 & n.41 (citing Suppl. Section A, C, and Customer Questionnaire (Mar. 28, 2016) ("Suppl. A, C & Customer Q"), Attach. I, CJRA 15, CR 50, PJRA 15, PR 84, ECF No. 62). The agency further informed Company X and Company Y of the need for the information and that their failure to comply with Commerce's requests may affect the agency's determination as to the *bona fide* nature of the sales. *Id.* at 8 & n.42 (citing Suppl. A, C & Customer Q, Attachs. II and III). To alleviate their confidentiality concerns, Commerce advised the companies that their proprietary information would be protected by an administrative protective order. *Id.* at 8–9 & n.43 (citing Suppl. A, C & Customer Q, Attachs. II and III). In response, both Company X and Company Y either "explicitly refused" to provide certain requested information, or provided "limited responses, limited documentation, or no answers at all" to other requests for information. *See id.* at 9–11.

Commerce provided detailed discussion, with citations to the record, of those refusals and deficiencies. *See id.* at 9–11 & nn.44–56 (citations omitted). Commerce further explained that after receipt of the deficient responses, the agency asked Plaintiff to describe and document its efforts to ensure full cooperation from Company X and Company Y. *See id.* at 11 & n.57 (citing Suppl. Questionnaire Resp. (Apr. 20, 2016) ("April 20 Suppl. Resp.") at 1–2 & Ex. SQ8–1, CJRA 19, CR 60, PJRA 19, PR 94, ECF No. 62). Plaintiff responded, stating that it asked for full cooperation from those companies, "but because these downstream customers are not affiliated with Jingmei, Jingmei has no control over them and only has a business buyer-seller relationship with the companies." *Id.* at 11 & n.58 (quoting April 20 Suppl. Resp. at 1). Plaintiff produced e-mail communications with Company X documenting its efforts to encourage it and Company Y to provide complete responses. *See* April 20 Suppl. Resp., Ex. SQ8–1.[6] Under these circumstances, and in light of the fact that Company X was the importer who purportedly paid the import duties, the agency found that Jingmei, Company X, and Company Y "failed to provide critical information" requested by the agency that was necessary to determine whether the sales subject to the new shipper review were

[6] Commerce summarized the email correspondence as follows:

> In this email correspondence, Jingmei requests that [Company X] and [Company Y] provide all of the documentation requested by Commerce. [Company X] responds to Jingmei stating that they [[ ]]. Jingmei responds to [Company X] stating that it [[ ]].

Id. at 29 & nn.136–138 (citing April 20 Suppl. Resp., Ex. SQ8–1).

bona fide. *See* Remand Results at 6–11, 28–29. Using the available record information and relying, in part, on adverse inferences, Commerce made the following findings.

i. Price and quantity of the sales

Commerce found that the price and quantity factors of § 1675(a)(2)(B)(iv)(I) and (II) weighed against a finding that Jingmei's sales were *bona fide*. *See id.* at 16. In reaching this determination, Commerce relied on facts available because Jingmei and its customers did not provide "sufficient, objective, verifiable evidence" to demonstrate that Jingmei's sales were reflective of its usual commercial practices and indicative of Jingmei's prices and quantities in which it would sell the subject merchandise in the future. *Id.* at 16. The missing evidence to which Commerce referred included: a list of companies from which Company X purchased subject merchandise during the POR, including the date, quantity, and value of each purchase; a list from Company Y of downstream customers to whom it sold the merchandise subject to the review; and documentation from Company Y related to any purchases of subject merchandise it made from Company X subsequent to the purchases covered by the review. *Id.* at 15; *see also id.* at 36–38 (discussing insufficiency of the information that Company X provided). Commerce had requested this information from Company X and Company Y, but neither company supplied it.[7] *Id.* at 15 & nn.70–71 (citing Sec. A Resp. at 26; U.S. Customer Resp. at 3).

The facts available that Commerce considered were Jingmei's reported gross unit prices, which differed in value, for the two sales. *Id.* at 15–16 & n.73 (citing Suppl. Section C Questionnaire Resp. (Dec. 23, 2015) ("Suppl. Sec. C Resp.") at 5, CJRA 10, CR 30–5, PJRA 10, PR 35–36, ECF No. 62). Commerce rejected a contention by Jingmei that its first sale should be understood as a sample sale, explaining that Jingmei's assertion was contradicted by Jingmei's initial questionnaire response and otherwise unsupported by record evidence. *See id.* at 39–40. Furthermore, Jingmei's explanation for the price difference provided one basis for Commerce to question whether the two sales were typical transactions for, or indicative of future sales by, Jingmei.

[7] In response to Commerce's request for price information, Company X stated: "it confirmed that the prices [] from Jingmei were within the normal range of our prices from other suppliers." *Id.* at 15 (citing Sec. A Resp. at 26). Commerce found this statement unsubstantiated by record evidence. *Id.* at 16.

Id. at 16.[8] Based on its findings on a failure to cooperate by all three companies, Commerce used an adverse inference, and concluded that these factors weighed against a finding that the sales were *bona fide*. *See id.* at 16 & n.80 (citing, *inter alia*, 19 U.S.C. § 1677e(b)).

ii. Timing

Commerce next analyzed the timing factor of § 1675(a)(2)(B)(iv)(III) and determined that the timing of payment by Company X to Jingmei for the subject sales suggested that the sales were not *bona fide*. *See id.* at 18–19. Specifically, Commerce examined the payment terms for both sales and noted that Company X's payments were 15 and 75 days late, respectively. *Id.* at 18 & nn.93–96 (citing Jingmei's Corrected Req. for New Shipper Review (July 20, 2015) ("NSR Req.") at Ex. 2, CJRA 2, CR 2, PJRA 2, PR 2, ECF No. 62; Suppl. Sec. C Resp. at 4; Sec. A Resp. at Ex. A-7; Suppl. Sec. A Resp. at Ex. SQ1–6). The record lacked evidence indicating that Jingmei made an attempt to collect the late payments. *Id.* at 19. Commerce explained that although late payment alone may not indicate that a sale is not *bona fide*, the payment variance and the lack of collection efforts from Jingmei indicated that the sales were not *bona fide*. *Id.* at 19; *see also id.* at 40–42.

iii. Expenses Arising from the Sales

Pursuant to § 751(a)(2)(B)(iv)(IV), Commerce considered the expenses related to Jingmei's sales, and whether those expenses were consistent with the terms of sale, to determine whether they conformed to Jingmei's typical sales practice. *Id.* at 19. Commerce explained that, to conduct its analysis, it required documentation supporting the amount and payment of each expense, and documentation linking the expense payment to both the sale and the paying company's books and records. *Id.* Commerce further explained that, despite multiple requests by the agency, Company X and Company Y did not provide necessary information in the form and manner requested. *Id.* Specifically, Commerce lacked "substantial information and documentation necessary to substantiate the purported sales terms," and to demonstrate which party incurred expenses associated with foreign inland freight, brokerage, and handling; international freight;

[8] For the first sale, Jingmei "offered a [[ ]] for marketing purposes," *id.* at 15 & n.74 (citing Suppl. Sec. C Resp. at 5), which indicated to Commerce that "the second [[ ]]," *id.* at 16.

and import duties, among others.[9] *Id.* Accordingly, the agency used facts available, with an adverse inference, to determine whether the sales-related expenses were indicative of *bona fide* transactions. *Id.* at 19–20. Commerce concluded that this factor weighed against a finding that the sales are *bona fide*. *Id.* at 24. Commerce provided detailed analysis of each expense, as follows.

Regarding foreign inland freight, brokerage, and handling expenses, Company X had submitted limited invoices for these expenses, and failed to provide "financial ledgers showing the booked payment for these expenses." *Id.* at 20 & n.103 (citing Suppl. Sec. A&C Resp. at 9 & Ex. SQ7–7).[10] Furthermore, Commerce found that Jingmei's reporting of the sales terms was inconsistent with what was provided in the PRC's customs declaration documents. *See id.* at 20, 24.[11] Commerce further found that Jingmei's explanation for the inconsistencies, which suggested that Jingmei had no other option but to report the sale term inconsistently in the PRC's customs declaration documents, was unsupported by record evidence. *See id.* at 24 & n.119 (citing Suppl. Sec. C Resp. at 8 & Ex. SQ3–7). Therefore, Commerce found that the parties' claims with respect to the sales terms and which party incurred certain expenses were unverifiable and unreliable. *Id.* at 24.

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[9] Another unsubstantiated expense was [[ ]]. *Id.* at 19. Jingmei asserted that, pursuant to the terms of sale, Company Y [[ ]] from a supplier, who then delivered them directly to Eno for packaging the subject merchandise. *Id.* at 21 & n.107 (citing Suppl. Sec. A Resp. at 22–23; Suppl. Section A and C Questionnaire Resp. (Apr. 11, 2016) ("Suppl. Sec A&C Resp.") at 11, CJA 18, CR 54–59, PJA 18, PR 92, ECF No. 36–1). Commerce requested Company Y to provide purchase orders and commercial invoices demonstrating the purchase of the [[ ]], accounting records demonstrating where these purchases were recorded in Company Y's accounting system, and images of the [[ ]], including "clear images of the labels affixed to each." *Id.* at 21 & n.108 (citing Suppl. Sec A&C Resp. at 11). Company Y did not provide a purchase order for the [[ ]] related to the first sale, accounting records as requested by Commerce, or commercial invoices. *See id.* at 22 & n.110 (citing Suppl. Sec A&C Resp. at 11). Company Y provided an image of a [[ ]], which showed the contents to be [[ ]], whereas the product purportedly sold in the [[ ]] was reported to Commerce as [[ ]]. *Id.* at 22 & n.109 (citing, *inter ali* a, Suppl. Sec A&C Resp. at Ex. SQ7–11 (photograph of the packaging)); *see also id.* at 43. Commerce found it unusual that Company Y provided selective information in response to Commerce's requests, and further determined that the lack of financial ledgers to demonstrate payment for the expenses impeded the agency's ability to substantiate them. *Id.* at 22.

[10] Company X submitted [[ ]] of [[ ]] requested invoices. *Id.* at 20. The [[ ]] it provided simply showed that Company X was invoiced for foreign movement services by another company for one of the subject sales. *Id.* at 20 & n.103 (citing Suppl. Sec A&C Resp. at 9, Ex. SQ7–7).

[11] In its questionnaire response, Jingmei reported that the sales to Company X were [[ ]]; in the PRC customs declaration documents, Jingmei reported the sales terms were [[ ]]. *Id.* at 20 & n.101 (citing Suppl. Sec. A Resp. at 3–4); *id.* at 24 & n.118 (citing Suppl. Sec. C Resp. at 8, Ex. SQ3–7).

With respect to international freight, Company X had reported to Commerce that Company Y was responsible for this expense for both sales. *Id.* at 20 & n.104 (citing Suppl. Sec. A Resp. at 22).[12] Commerce instructed Company Y to "provide a narrative description of all freight expenses paid," and to provide supporting accounting documentation showing that payment of these expenses was recorded in Company Y's accounting system. *Id.* at 21 & n.105 (citing Suppl. Sec. A&C Resp. at 12). In response, Company Y stated that it "paid the ocean freight" for one of the sales, and submitted an ocean freight invoice, which, Commerce found, lacked sufficient information to establish that the invoice was associated with the merchandise subject to the review. *Id.* at 21 & n.106 (citing Suppl. Sec. A&C Resp. at 12 & Ex. SQ7–12). Specifically, although the invoice contained a bill of lading number that matched the ocean bill of lading and the U.S. Customs and Border Protection ("CBP") Form Entry Summary, the weight of the merchandise as listed in those documents did not correspond to the weight listed in Jingmei's commercial invoice for this sale. *Id.* at 42 & n.208 (citing NSR Req., Ex. 2). Moreover, Commerce was unable to substantiate the payment for international freight expenses because Company Y "did not provide financial ledgers showing the booked payment for these expenses." *Id.* at 21.

With respect to import duties, Company X had purportedly paid those expenses for both sales. *Id.* at 22 & n.111 (citing Suppl. Sec. A&C Resp. at 9). Commerce instructed Company X to submit documentation demonstrating payment of import duties, including broker invoices, accounting vouchers, and expense ledgers. *Id.* at 22 & n.112 (citing Suppl. Sec. A&C Resp. at 9). The information that Company X provided—namely, broker invoices and what Commerce deemed insufficient payment documentation—merely showed that "[Company X] was invoiced for import duties." *Id.* at 23. The payment documentation was insufficient because it comprised of "two partial screenshots from a banking website" that "[did] not identify the remitter and [did] not appear to be a final transaction confirmation." *Id.* at 22–23 & n.113 (citing Suppl. Sec. A&C Resp., Ex. SQ7–8); *see also id.* at 44. Because Commerce was missing financial ledgers showing the payment of the import duties, it could not substantiate payment of this expense. *Id.* at 23. Furthermore, Commerce found it unusual that "Company X's purported payments of import duties alone [were]

[12] Company X reported that it sold to Company Y on [[ ]], and that Company Y was responsible for [[ ]] associated with the first sale, and [[ ]] for the second sale. *Id.* at 20 & n.104 (citing Suppl. Sec. A Resp. at 22).

significantly greater than the total value of the sales." *Id.* at 23; *see also id.* at 24 & nn.116–117 (citing Sec. A Resp., Ex. 7; Suppl. Sec. A Resp., Ex. SQ-6; Suppl. Sec. A&C Resp., Ex. SQ7–8).[13]

iv. Whether the Merchandise was Resold at a Profit

The agency explained that when conducting new shipper reviews, it "requires parties to provide detailed information on the importer's purchases and ongoing commercial operations to analyze whether the subject merchandise was resold at a profit." *Id.* at 25 & n.120 (citing *Foshan Nanhai Jiujiang Quan Li Spring Hardware Factory v. United States*, 37 CIT ___, ___, 920 F. Supp. 2d 1350, 1359–60 (2013)). Because the record also lacked sufficient documentation supporting the sales-related expenses, which would affect the profit analysis, Commerce considered facts available with an adverse inference. *See id.* at 25. With respect to Company Y's disposition of the merchandise in the United States, Commerce had requested documentation demonstrating resale of the subject merchandise, but Company Y provided only two sample resale invoices and payment documentation associated with those invoices. *See id.* at 26 & n.122 (citing Suppl. Sec. A&C Resp. at 12 & Ex. SQ7–13). Commerce thus determined that the record lacked "objective evidence to substantiate whether the subject merchandise was resold in the United States at a profit," which weighed against a finding that the sales were *bona fide*. *Id.* at 26;[14] *see also id.* at 44–45.

v. Whether the Sales Were Made on an Arms-Length Basis

In conducting its analysis pursuant to § 1675(a)(2)(B)(iv)(VI), Commerce stated that it considered the relationship between Jingmei, Company X, and Company Y; evidence of price negotiations; the terms of sale, and other circumstances surrounding the sales. *See id.* at 26. Commerce found that there was a lack of necessary information on the record to substantiate the parties' claims that they are unaffiliated, indicating that "Jingmei has not demonstrated that the sales were made at arm's length." *Id.*

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[13] For the first sale, Company X paid Jingmei [[ ]] and purportedly paid [[ ]] in import duties, and received payment in the amount of [[ ]] from Company Y. *Id.* at 23–24 & nn.116–117 (citing Sec. A Resp., Ex. 7; Suppl. Sec. A Resp., Ex. SQ1–6; Suppl. Sec. A&C Resp., Ex. SQ7–8). For the second sale, Company X paid Jingmei [[ ]] and purportedly paid [[ ]] in import duties, while it only received [[ ]] from Company Y. *Id.* at 24 & n.117 (citing same).

[14] Commerce noted that Company Y's "failure to provide all resale invoices for at least the [[ ]] is not a consequence of that merchandise remaining in inventory, [because Company Y] had stated that such merchandise was sold out." *Id.* at 26 & n.123 (citing Suppl. Sec. A&C Resp. at 11–12).

vi. Additional Factors

In addition to the foregoing, Commerce cited additional factors—the discrepancy in packaging labels, gross weight discrepancies in shipping documents, and the deficient questionnaire responses notwithstanding the potential financial incentive for establishing the *bona fide* nature of the sales—as suggestive that the sales were not *bona fide*. *See id.* at 27–29; *see also id.* at 45–48.

III. Commerce's Remand Results Are Sustained

The court ordered Commerce, on remand, "to determine whether the sales in question were *bona fide*," so that "the court will be in a better position to evaluate whether that redetermination is supported by substantial evidence and otherwise in accordance with law." *Haixing Jingmei,* 277 F. Supp. 3d at 1384. On remand, Commerce conducted its *bona fide* analysis by evaluating the statutory factors pursuant to 19 U.S.C. § 1675(a)(2)(B)(iv), and has therefore complied with the court's remand order. As noted, Commerce applied, in part, an adverse inference in filling gaps in the record. Plaintiff now challenges the legality of Commerce's action and the supportability of the agency's individual findings.

Overall, the court has little difficulty finding that substantial evidence supports Commerce's use of adverse inferences in evaluating certain record evidence and concluding that the sales in question were not *bona fide*. With respect to the statutory criteria, the record did not contain complete information in response to the agency's request for documentation supporting an affirmative *bona fide* sale conclusion. Most notably, while there are various, sometimes inconsistent claims as to which party paid certain expenses, there is no proof of payment by any party for many of those expenses. Proper allocation of the expenses is critical for the agency to determine the profitability of the resale, the likelihood of the transaction being representative of future transactions, and if the review had gone forward, the correct calculation of the dumping margin. As discussed further below, Jingmei's inability to secure and provide this information, whether directly or indirectly, and failure to demonstrate any effort to obtain this necessary information beyond a single email communication to one of the two downstream customers adequately supports Commerce's decision to use adverse inferences when filling the gaps in the record.

Plaintiff asserts that, in applying an adverse inference, Commerce "create[d] a fiction that Jingmei is somehow related to its customers," and violated 19 U.S.C. § 1677e(b) by attributing the failure of Company X and Company Y to Jingmei, rather than finding that Jingmei

itself failed to cooperate by not acting to the best of its ability to comply with Commerce's requests for information. Pl.'s Opp'n Cmts at 2–3. According to Plaintiff, the record does not support the existence of an affiliation between Jingmei and its downstream customers to warrant the application of adverse inferences against Jingmei based on its customers' conduct. *See id.* at 3–10, 13. Plaintiff advocates that the agency "cannot punish [a] cooperating part[y]," such as Jingmei, who documented its efforts to urge full cooperation from its customer and downstream customers, but lacked any control over them to secure full compliance. *See id.* at 11–12 (citing *Shantou Red Garden Foodstuff Co. v. United States*, 36 CIT ___, ___, 815 F. Supp. 2d 1311, 1323 (2012); *SKF USA Inc. v. United States*, 33 CIT 1866, 1875–1877, 675 F. Supp. 2d 1264, 1274–1275 (2009)).

Throughout these arguments, Jingmei mischaracterizes Commerce's adverse facts available determination as premised on a finding of affiliation between Jingmei, Company X, and Company Y. To the contrary, Commerce explained, on multiple occasions, that it based its non-*bona fide* sales determination on a finding that Jingmei, its customer, and the downstream customer failed to cooperate to the best of their abilities, including by failing to establish that the transactions in question occurred at arm's length. *See* Remand Results at 6–11, 13, 29, 50. Record evidence upon which Commerce relied supports the agency's finding. *See supra* pp. 7–9; *see also* Remand Results at 7–11. When confronted with multiple deficient responses, Commerce communicated to each company the agency's need for the requested information and the availability of an administrative protective order by which the companies could maintain the confidentiality of any business proprietary information; it also warned that the companies' failure to provide the information may adversely affect the new shipper review. *See* Suppl. A, C & Customer Q, Attach. I at 6; *id.*, Attach. II at 7; *id.*, Attach. III at 9. At the same time, Commerce instructed Jingmei to "ensure that the intended parties provide the requested information. . . . If we do not receive complete responses to our requests for information or we determine that your efforts to obtain the information was not sufficient we may use adverse facts available." Suppl. A, C & Customer Q, Attach. I at 6. Nevertheless, Company X and Company Y provided incomplete information—including limited invoices, purchase orders, sales listings, accounting vouchers, and expense ledgers—and expressly refused to provide other documentation. *See* Remand Results at 9–11 & nn.44–56 (discussing Suppl. Sec. A&C Resp. at 8–9, 11–13 & Exs. SQ7–6, SQ7–7, SQ7–8, SQ7–11, SQ7–13, SQ7–14). "To the extent that information

responsive to Commerce's request was business proprietary, [these companies] could have supplied a public summary or included it as confidential business proprietary information." *Shanghai Sunbeauty Trading Co., Ltd. v. United States*, 42 CIT __, Slip Op. 18–111 at 30 (Sept. 6, 2018) (citing 19 C.F.R. § 351.304(c)(1)).

Although Plaintiff attempted to persuade the agency that it undertook efforts to ensure full cooperation from its customer and the downstream customer, its efforts were not enough. *See* Remand Results at 29. Plaintiff's e-mail communication showed that Jingmei contacted Company X to request cooperation from both Company X and its downstream customer, Company X explained its reasons for declining to do so, and Jingmei did not inquire further. *See* April 20 Suppl. Resp., Ex. SQ8–1.[15] Jingmei's efforts here do not constitute the "maximum effort" that the "best of its ability" standard requires. *See Nippon Steel*, 337 F.3d at 1382. In light of Commerce's warning to all parties that failure to provide requested information may affect Commerce's determination as to the *bona fide* nature of the sales subject to this review, and the lack of further efforts on Jingmei's part to secure full cooperation, Commerce reasonably concluded that Jingmei, in addition to Company X and Company Y, failed to act to the best of its ability.

Plaintiff's reliance on *Shantou Red Garden*, 815 F. Supp. 2d at 1323, and *SKF USA Inc.*, 33 CIT at 1875–1877, 675 F. Supp. 2d at 1274–1275, to challenge the agency's reasonable determination is misplaced. *See* Pl.'s Opp'n Cmts at 11–12. In *Shantou*, Commerce used an adverse inference based on a finding that the respondent failed to act to the best of its ability to comply with an information request, which the court determined was never communicated to the respondent. *See* 815 F. Supp. 2d at 1316–1319. Therefore, the respondent's failure to take actions that the agency never requested did not support a finding of a lack of cooperation pursuant to § 1677e(b). *See id.* at 1319. Unlike in *Shantou*, Commerce communicated its requests to Jingmei and made the affirmative finding that Jingmei failed to cooperate to the best of its ability to comply with those requests. *SKF USA Inc.* is likewise distinguishable. In *SKF USA Inc.*, Commerce used an unaffiliated supplier's failure to cooperate to affect adversely the dumping margin of a respondent "about whom Commerce did not make a finding of non-cooperation." *Id.* at 1878 (emphasis omitted); *see also id.* 1876–78. Commerce specifically selected a rate that was, and was intended to be, adverse to that respondent. *See id.* at 1877.

[15] Instead of undertaking further efforts to ensure cooperation, Jingmei responded to Company X that it [[ ]]. *See* April 20 Suppl. Resp., Ex. SQ8–1.

In contrast to *SKF USA Inc.*, here, Commerce found that Jingmei itself failed to cooperate to the best of its ability. *See, e.g.*, Remand Results at 51. Commerce applied the adverse inference in weighing the available evidence concerning the price, quantity, and expenses of the sales and in determining whether the sales were resold at a profit. *See* Remand Results at 13–14, 16 & n.80, 19–20, 25.

Subsequent to *SKF USA Inc.*, the U.S. Court of Appeals for the Federal Circuit held that Commerce is not barred, under appropriate circumstances, "from drawing adverse inferences against a non-cooperating party that have collateral consequences for a cooperating party." *Mueller Comercial de Mexico, S. de R.L. de C.V. v. United States*, 753 F.3d 1227, 1236 (Fed. Cir. 2014). Therein, the court held that Commerce may rely on inducement or deterrence considerations in determining a weighted-average dumping margin for a cooperating party "as long as the application of those policies is reasonable on the particular facts and the predominant interest in accuracy is properly taken into account." *Id.* at 1233. There were no cooperating parties in this case and Commerce did not articulate that it was relying on an inducement rationale to reach its AFA determination. As stated above, however, Commerce noted Company X's status as the importer purportedly responsible for paying the import duties, Jingmei's lack of further efforts to induce cooperation from Company X and Company Y, and the agency's need for accurate information in making its *bona fide* determinations. *See* Remand Results at 3, 22–24, 29, 44. Thus, Commerce was guided by some of the principles articulated in *Mueller*, and that case further undermines Plaintiff's argument that Commerce was not permitted to rely on adverse inferences in interpreting the available information on the record.

Furthermore, the present case concerns a new shipper review, and the relevant statute requires Commerce to examine the companies on both sides of the transaction to ensure that the sales in question are *bona fide*. The statutory requirement that the U.S. sales must be *bona fide* was a response to concerns about the reported abuse of a previous provision in the statute permitting an importer to post a bond, in lieu of cash deposits, to serve as security for the future payment of anti-dumping duties until the completion of the new shipper review. *Haixing Jingmei*, 277 F. Supp. 3d at 1381–82 & n.7. Thus, the law's requirement that Commerce conduct the *bona fide* analysis is intended to ensure that companies are legitimate business entities, and on the importer end, not simply chosen to "enter into a scheme to structure a few sales to show little or no dumping," only to disappear or become nonresponsive after conclusion of the review. *Id.* at 1381

n.7; *See also* 19 U.S.C. § 1675(a)(2)(B)(iv)(V) (directing Commerce to inquire whether the subject merchandise involved in the new shipper review sales was resold in the United States at a profit). To that end, Commerce reasonably requested information from Company X and Company Y to complete its *bona fide* analysis.

Plaintiff next contends that Commerce unjustifiably requested accounting records from Company X and Company Y, *see* Pl.'s Opp'n Cmts at 14, and that the record contained "an extraordinary amount of information" that was sufficient to enable the agency to determine whether Jingmei's sales were *bona fide, id.* at 16. Commerce properly explained, however, that "each *bona fide* analysis is dependent on the facts specific to each case." Remand Results at 48; *see also* 19 U.S.C. § 1675(a)(2)(B)(iv) (stating that Commerce, in its *bona fide* analysis, "shall consider, depending on the circumstances surrounding such sales," the statutory factors). Thus, "Commerce designs its questionnaires to elicit information that it has determined it requires to perform its *bona fides* analysis, and [interested parties have] the burden to respond with the requested information to create an adequate record." *Shanghai Sunbeauty Trading Co.*, 42 CIT __, Slip Op. 18–111 at 30 (citing *Nan Ya Plastics Corp., Ltd. v. United States*, 810 F.3d 1333, 1337–38 (Fed. Cir. 2016)). Under the particular facts of this case, Commerce deemed it necessary to request accounting documentation to either obtain information missing from the record or substantiate the purported terms of sales, the expenses incurred, and confirm payment of those expenses by a particular party. *See* Remand Results at 46–47 (discussing the "unusual circumstances" of Jingmei's sales, the need for accounting records to obtain the price and quantity of the sales because of Jingmei's insufficient reporting, and to substantiate the payment of expenses related to the sales); *see also id.* at 14–16, 19–24, 37–38.[16]

[16] Plaintiff takes issue with the authority upon which Commerce relied for the proposition that the agency sometimes requests supporting accounting documentation from the respondent's customers or downstream customers when conducting the *bona fide* analysis in a new shipper review. *See* Pl.'s Opp'n Cmts at 17; *see also* Remand Results at 48 & n.225 (citing to *Zhengzhou Huachao Indus. Co., Ltd. v. United States*, Slip Op. 13–61, 2013 WL 3215181 (CIT May 14, 2013)). Plaintiff seems to suggest that Commerce's reliance on *Zhengzhou* is misplaced because the present case does not contain the identical set of facts as existed in *Zhengzhou*. *See* Pl.'s Opp'n Cmts at 14, 17–19 (distinguishing *Zhengzhou* based on the court's assessment of the questionnaire response deficiencies in that case). Plaintiff also points to the agency's final determination in which the agency cited two past new shipper reviews for that proposition. *See* Pl.'s Opp'n Cmts at 18; I&D Mem. at 8 (citing *Certain Warmwater Shrimp From the People's Republic of China*, 72 Fed. Reg. 52,049 (Dep't Commerce Sept. 12, 2007) (notice of final results and rescission, in part, of 2004/2006 antidumping duty admin. and new shipper reviews) ("*Shrimp NSR*"), and accompanying Issues and Decision Mem., A-570–893 (Sept. 5, 2007); *Honey From the People's Republic of China,* 72 Fed. Reg. 37,715 (Dep't Commerce July 11, 2007) (final results and final rescission, in part, of antidumping duty admin. review) ("*Honey NSR*"), and accompanying Issues

Plaintiff's argument that the agency had sufficient information to determine whether Jingmei's sales were *bona fide* is belied by the record itself and the agency's well-reasoned explanation of the deficiencies in the same exhibits that Plaintiff cites to support its argument. *See* Pl.'s Opp'n Cmts at 16–17. For example, Plaintiff points to Company X's brokerage and handling invoices, Suppl. Sec. A&C Resp., Ex. SQ7–7; Company X's payment documentation of import duties, Suppl. Sec. A&C Resp., Ex. SQ7–8; Company Y's resale invoices, Suppl. Sec. A&C Resp., Ex. SQ7–13; Company Y's summary containing country of origin, purchase quantity, and purchase price of its purchases of subject merchandise during the POR, Suppl. Sec. A&C Resp., Ex. SQ7–14; and Company Y's photographs of the packaging material, Suppl. Sec. A&C Resp., Ex. SQ7–11. *See id.* With respect to the cited evidence, Commerce reasonably found that: Company X did not provide all of the requested invoices and payment for the purported expenses was unsubstantiated due to lack of financial ledgers, *see* Remand Results at 10 & n.49, 20 & n.103; Company X's documentation regarding payment of import duties was insufficient, *see id.* at 22–23 & n.113; Company Y's sample resale invoices did not account for the resale of all the merchandise under review, *see id.* at 26 & nn.122–123, 44–45 & n.214; and Company Y's summary of the origin, quality, and price of its purchases of subject merchandise was incomplete in that it omitted the invoice date, invoice number, supplier name and address, and terms of sale, *see id.* at 10–11 & n.55. Commerce also reasonably questioned whether the photographs of the packaging material depicted the subject merchandise. *See id.* at 43 & n.210; *supra* note 9.

Plaintiff's remaining arguments challenge Commerce's individual findings with respect to the price and quantity of the sales, timing of

and Decision Mem., A-570–863 (July 2, 2007)). Before the court, as it did before the agency on remand, Plaintiff attempts to distinguish *Honey NSR* and *Shrimp NSR* on their facts and avers that neither administrative decision gives any indication that the agency requested accounting documentation from importers or downstream customers. See Pl.'s Opp'n Cmts at 19–20; Remand Results at 34 n.167, 48 (responding to Plaintiff's draft comments). Plaintiff overlooks that Commerce cited *Zhengzhou* and discussed *Shrimp NSR* and *Honey NSR* for the general proposition that Commerce "has authority to conduct a full examination of companies on both sides of the transaction in a *bona fide* sales analysis." Remand Results at 48; *see also Zhengzhou*, 2013 WL 3215181, at *21–22; *Shrimp NSR* at Comment 16 ("[T]he [agency] examines the companies on both sides of the transaction"); *cf. Honey NSR* at Comment 4 ("[I]t remains evident to the [agency] that in the instant review, *the importer of record* provided full responses to the [agency's] questions in both [initial and supplemental] questionnaires") (emphasis added). Here, not only was such information relevant to determining the profitability of the resale, but it was also critical to documenting which party paid which expense and in what amount. Because Jingmei made these sales pursuant to terms allegedly requiring other parties to pay certain significant expenses associated with the sales, it was critical for Jingmei to be able to document the payment of those expenses by the other parties.

payment, and expenses and profit. *See* Pl.'s Opp'n Cmts at 20–30. With respect to timing, Plaintiff objects to Commerce's finding that the delay in Company X's payment and the lack of collection effort by Jingmei suggested a departure from normal commercial practice. *Id.* at 26. Relying on *Huzhou Muyun Wood Co. v. United States*, 41 CIT ___, ___, 279 F. Supp. 3d 1215, 1231 (2017), Plaintiff suggests that Company X's late payments by 15 and 75 days for the first and second sale, respectively, amounted to short delays, which are not atypical in international business. *Id.* at 26. Plaintiff, however, makes no arguments, and fails to point to any evidence, suggesting that receiving late payments was normal business practice for Jingmei. In *Huzhou Muyun Wood*, "the invoice did not specify a due date and the payment was allegedly only nine days late." 279 F. Supp. 3d at 1231. The court also noted that case law suggests "that Commerce must look at the degree of lateness associated with payments and the extent to which other factors suggest the sale was atypical." *Id.* at 1231–32 (citing *Tianjin*, 29 CIT at 271–72, 366 F. Supp. 2d at 1260–61). Here, Commerce examined the payment terms, the variance in late payments, and the lack of collection efforts on Jingmei's part, and reasonably concluded that the combination of these factors indicated that the sales were not *bona fide*. *See* Remand Results at 18–19, 40–42.

Plaintiff's other arguments largely amount to mere disagreement with Commerce's weighing of the evidence. *See* Pl.'s Opp'n Cmts at 20–21, 23–30. That approach mistakes the function of the court, which is to determine whether the Remand Results are supported by substantial evidence, *see* 19 U.S.C. § 1516a(b)(1)(B)(i), not to "reweigh the evidence or . . . reconsider questions of fact anew." *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1377 (Fed. Cir. 2015) (internal quotation marks and citation omitted). That there is a possibility of drawing two inconsistent conclusions from the evidence does not preclude the agency's finding from being supported by substantial evidence. *Matsushita Elec. Indus. Co. v. United States,* 750 F.2d 927, 933 (Fed. Cir. 1984) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20 (1966)). The record evidence upon which Commerce relied supports Commerce's findings with respect to price and quantity of the sales, timing of payment, and expenses and profit. *See supra* Discussion Section II.i-II.iv; *see also* Remand Results at 14–26. Moreover, the record as a whole supports the agency's conclusion that the totality of circumstances indicates that Jingemi's sales were not *bona fide*.

Lastly, Plaintiff suggests Commerce failed to address evidence not on the record. With respect to price and quantity, Plaintiff argues that, in recent practice, Commerce has not considered customers' and

downstream customers' accounting books and records to determine whether the price of the subject sale is indicative of the new shipper's future behavior. Pl.'s Opp'n Cmts at 22. Plaintiff notes that in a recent new shipper review concerning the antidumping duty order on multilayered wood flooring from the PRC, Commerce compared the prices of the new shipper with the prices of most similar merchandise sold by mandatory respondents in the most recently completed administrative review. *Id.* at 22–23 (citing *Multilayered Wood Flooring From the People's Republic of China*, 82 Fed. Reg. 25,773 (Dep't Commerce June 5, 2017) (final results and partial rescission of antidumping duty new shipper review; 2014–2015), and accompanying Issues and Decision Mem., A-570–970 (June 5, 2017) at Comment 4). Plaintiff also notes that Commerce has in the past compared prices to CBP data when analyzing the commercial reasonableness of the new shipper's sales. *Id.* at 23. Plaintiff, however, does not cite to any such evidence in the record of this new shipper review that Commerce neglected to consider. Based on this record, the court cannot conclude that the agency erred in failing to consider data or information that did not exist.

CONCLUSION

For the foregoing reasons, the court finds that substantial evidence supports Commerce's finding that Jingmei's sales are not *bona fide*, and, therefore, rescission of the new shipper review was appropriate. Judgment will enter accordingly.

Dated: September 26, 2018
New York, New York

/*s*/ *Mark A. Barnett*
JUDGE

Slip Op. 18–134

THE STANLEY WORKS (LANGFANG) FASTENING SYSTEMS CO., LTD. and THE STANLEY WORKS/STANLEY FASTENING SYSTEMS, LP, Plaintiffs, MID CONTINENT NAIL CORP., Consolidated Plaintiff v. UNITED STATES, Defendant. MID CONTINENT NAIL CORP., ITOCHU BUILDING CORP., INC., CERTIFIED PRODUCTS INTERNATIONAL INC., CHIIEH YUNG METAL IND. CORP., HUANGHUA JINHAI HARDWARE PRODUCTS CO., LTD., TIANJIN JINGHAI COUNTY HONGLI INDUSTRY & BUSINESS CO., LTD., TIANJIN JINCHI METAL PRODUCTS CO., LTD., SHANDONG DINGLONG IMPORT & EXPORT CO., LTD., TIANJIN ZHONGLIAN METALS WARE CO., LTD., HENGSHUI MINGYAO HARDWARE & MESH PRODUCTS CO., LTD., HUANGHUA XIONGHUA HARDWARE PRODUCTS CO., LTD., WINTIME IMPORT & EXPORT CORPORATION LIMITED OF ZHONGSHAN, SHANGHAI JADE SHUTTLE HARDWARE TOOLS CO., LTD., ROMP (TIANJIN) HARDWARE CO., LTD., CHINA STAPLE ENTERPRISE (TIANJIN) CO., LTD., and QIDONG LIANG CHYUAN METAL INDUSTRY CO., LTD. Defendant-Intervenors.

Before: Jane A. Restani, Judge
Consol. Court No. 11–00102

[Commerce's final determinations on remand in its administrative review of an antidumping duty covering steel nails from China are sustained.]

Dated: October 5, 2018

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OPINION

Restani, Judge:

Before the court are the U.S. Department of Commerce ("Commerce")'s *Final Results of Redetermination Pursuant to Court Remand Order in The Stanley Works (Langfang) Fastening Systems Co.*

v. United States, Ct. No. 11–102, Doc. No. 108 (Mar. 5, 2014) ("*Stanley Remand Results*"), Commerce's *Final Results of Redetermination Pursuant to Partial Remand Order in The Stanley Works (Langfang) Fastening Systems Co. v. United States*, Ct. No. 11–102, Doc. No. 151 ("*Partial Remand Results*") (Apr. 16, 2015), and *Redetermination Pursuant to Court Order Granting Defendant's Motion for Voluntary Remand in Mid Continent Nail Corporation v. United States*, Ct. No. 11–119, Doc. No. 158 (Nov. 13, 2015) ("*Second Mid Continent Remand Results*")[1] concerning the first administrative review, as amended, for the period January 23, 2008, through July 31, 2009 ("POR"), of the antidumping ("AD")[2] order on certain steel nails from the People's Republic of China ("PRC").[3] *See also Certain Steel Nails from the People's Republic of China: Final Results of the First Antidumping Duty Administrative Review*, 76 Fed. Reg. 16,379 (Mar. 23, 2011) ("*Final Results*"); *Certain Steel Nails from the People's Republic of China: Amended Final Results of the First Antidumping Duty Administrative Review*, 76 Fed. Reg. 23,279 (Apr. 26, 2011) ("*Amended Final Results*").[4] For the reasons stated below, Commerce's final remand results are sustained.

BACKGROUND

The court assumes that all parties are familiar with the facts of this consolidated action as discussed in two previous court opinions issued prior to remand. *The Stanley Works (Langfang) Fastening Systems Co. v. United States*, 964 F. Supp. 2d 1311 (CIT Sept. 3, 2013) ("*Stanley I*"); *Mid Continent Nail Corp. v. United States*, 949 F. Supp. 2d 1247 (CIT Aug. 30, 2013) ("*Mid Continent I*"); *see also* Order of Remand, Doc. No. 156 (Sept. 30, 2015). For the sake of convenience, the

[1] Commerce's *Second Mid Continent Remand Results* corrected an error from an earlier redetermination. *See Final Results of Redetermination Pursuant to Mid Continent Nail Corporation v. United States*, Ct. No. 11–119, Doc. No. 109 (March 5, 2014) ("*First Mid Continent Remand Results*").

[2] Dumping is defined as the sale of goods at less than fair value, calculated by a fair comparison between the export price or constructed export price for the U.S. market and normal value in the home market. *See* 19 U.S.C. §§ 1677(34), 1677b(a).

[3] This matter was transferred to the current judge on September 4, 2018. Order of Reassignment, Doc. No. 190 (Sept. 4, 2018). A telephone conference was held on September 13, 2018, to clarify which issues remained *sub judice*.

[4] The *Amended Final Results* corrected two ministerial errors. Commerce miscalculated the surrogate financial ratios of Nasco Steels Private Ltd. ("Nasco"), which were used in Stanley's margin calculations. It also miscalculated the net change in inventory. The changes affected the margin calculations for Stanley, changing them from 13.90 percent to 10.63 percent, which in turn affected the margin for the separate-rate companies. *See* 76 Fed. Reg. at 23,280.

facts relevant to the remaining consolidated issues arising from Commerce's multiple remand results are summarized here.[5]

To calculate the final dumping margin, Commerce elected to use financial data from three surrogate companies, Bansidhar Granites Private Limited ("Bansidhar"), J&K Wire & Steel Industries ("J&K"), and Nasco Steels Private Ltd. ("Nasco"), because those companies produced steel nails, an "identical" product, rather than products comparable to the subject merchandise. *See Certain Steel Nails from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the First Antidumping Duty Administrative Review*, A-570–909, POR 01/23/08–07/31/09, at cmt. 2 (Dep't Commerce Mar. 14, 2011) ("*I&D Memo*"). By contrast, Commerce did not use financial statements from Sundram Fasteners Ltd. ("Sundram") because it found that Sundram did not manufacture steel nails or products comparable to the subject merchandise. *See id.* In its determination, Commerce emphasized that Bansidhar, J&K, and Nasco invested in equipment required to produce nails and consume steel wire rod ("SWR") as their main input. *Id.* at cmt. 3. Accordingly, using the data from these three companies, Commerce determined that the weighted average dumping margin was 10.63 percent. *See* 76 Fed. Reg. at 23,280.

Commerce, however, in the second administrative review for the period August 1, 2009, through July 31, 2010, of the AD order on certain steel nails from the PRC, refined its practice for determining whether a company is reasonably considered a producer of "identical" or "comparable" merchandise. *See Certain Steel Nails from the People's Republic of China: Final Results and Final Partial Rescission of the Second Antidumping Duty Administrative Review*, 77 Fed. Reg. 12,556 (Dep't Commerce Mar.1, 2012) ("*AR2 Final Results*"); *Certain Steel Nails from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the Second Antidumping Duty Administrative Review*, A-570–909, POR 08/01/09–07/31/10, at cmt. 2 (Dep't Commerce Mar. 1, 2012) ("*AR2 I&D Memo*"). Commerce determined that, where "detailed evidence is available in the record of the proceeding," it will analyze a company's "product mix," drawing a "link between the amount of identical merchandise and the resulting

[5] On September 16, 2011, the court partially consolidated counts II through IV and counts VII through X of Mid Continent's complaint in *Mid Continent Nail Corporation v. United States*, Ct. No. 11–00119 (the "Mid Continent litigation") into the Stanley litigation. *See* Order of Partial Consolidation, Doc. No. 33 (Sept. 16, 2011). The court has now fully consolidated the two actions for the purpose of issuing one judgment affecting the final administrative review.

ratios." *AR2 I&D Memo* at cmt. 2. In the light of Commerce's refined practice, the court granted the Government's remand request for Commerce to reevaluate its determination concerning surrogate financial ratios. *See Stanley I*, 964 F. Supp. 2d at 1342.

On March 5, 2014, Commerce issued the *Stanley Remand Results*. Commerce applied its "refined practice" and reclassified Nasco and Bansidhar as producers of comparable merchandise. *Stanley Remand Results* at 3. It also found Sundram a producer of comparable merchandise but excluded J&K as a producer of non-comparable merchandise. *Id.* at 4, 5. Accordingly, Commerce revised the margin for Stanley, the sole mandatory respondent, and that of the separate rate companies from 10.63 percent to 15.43 percent. *See id.* at 14. Commerce also found that all four companies showed no receipt of countervailable subsidies, that the differences in the companies' scale of production did not render the use of the data unreasonable, that the consumption of SWR is not determinative where a company is a producer of comparable merchandise, and that Sundram's financial ratios were not aberrational. *Id.* at 3–5, 13.

The Stanley Works (Langfang) Fastening Systems Co., Ltd. and The Stanley Works/Stanley Fastening Systems, LP. (collectively "Stanley") challenge Commerce's inclusion of Sundram's financial statements in calculating surrogate financial ratios. Plaintiffs' Comments on First Final Results of Redetermination, Doc. No. 115, at 5–37 ("Pl. Cmts."). Stanley first argues that Commerce improperly found no reason to believe or suspect that Sundram may have received countervailable subsidies because record evidence established that Sundram received subsidies through interest free sales tax loans from the state government of Tamil Nadu,[6] deferred government grants, a plant location in a Special Economic Zone (SEZ), and a deduction through Section 35(2AB) of India's Income Tax Act. Pl. Cmts. at 11–23. Stanley claims that Commerce incorrectly applied the "reason to believe or suspect standard" and that "generally available information," including a determination by the European Union ("EU"), demonstrated that Sundram received subsidies. Pl. Cmts. at 6–11, 19–23. Stanley then argues that Sundram's manufacturing overhead ratio is aberrational and distortive because its ratio is seven times higher than that of the other surrogate companies. Plaintiffs' Comments on the Final Results of Redetermination Pursuant to Partial Remand Order, Doc. No. 154, at 8–15 ("Pl. Opp. Cmts."). Finally, Stanley challenges Commerce's exclusion of J&K as unreasonable and unsupported by substantial evidence because J&K manufactured nails using SWR and had invested in equipment nec-

[6] Tamil Nadu is a state in Southern India.

essary to produce nails, while Sundram produced no nails. Pl. Cmts. at 37–40. Stanley requests a third remand to address these issues. Pl. Opp. Cmts. at 18.

Mid Continent Nail Corporation ("Mid Continent") and the Government argue that Commerce properly applied its refined practice and reasonably included Sundram's financial statements while excluding J&K's. Comment of Defendant United States on First Final Results of Redetermination, Doc. No. 118, at 16–19 ("Def. Cmts."); Comments of Defendant-Intervenor Mid Continent Nails Corporation on First Final Results of Redetermination, Doc. No. 125, at 5–12 ("Def.-Int. Cmts."). The Government and Mid Continent argue that, given the limited number of available surrogate financial data, the overhead ratio figures reflect a reasonable variation that cannot be characterized as aberrational. Comment of Defendant United States on Second Final Results of Redetermination, Doc. No. 156, at 8–10 ("Def. Resp."); Def.-Int. Cmts. at 8–11. They also argue that the "reason to believe or suspect" standard was properly applied and the finding that Sundram did not receive countervailable subsidies was permissible given the information available on the record. Def. Cmts. 7–16; Def.-Int. Cmts. 12–23.

In the Mid Continent action, the court twice remanded the matter for Commerce to address Commerce's liquidation rate determination for various entries that received Certified Products International, Inc. ("CPI")'s combination rates. *See Mid Continent I*, 949 F. Supp. 2d at 1287; Remand Order, Doc. No. 156 (September 30, 2015). On remand, Commerce applied the revised 15.43 percent rate determined in the *Stanley Remand Results* to the open entries with CPI combination rates. *Second Mid Continent Remand Results* at 7. After Commerce's second redetermination on remand, there was no further challenge as to which entries would receive the CPI combination rates. *See id.* at 2. Thus, the court will not address the issue further.

Itochu Building Products Co., Inc., Certified Products International Inc., and certain Chinese producers (collectively "Itochu") argue that the revised rate calculated in the *Stanley Remand Results* cannot apply to the separate rate respondents with CPI combination rates because they were not subject to the injunction of liquidation in the Stanley litigation. Comments of Defendant-Intervenor Itochu Building Products on Final Results of Redetermination, Doc. No. 117, at 1–20 ("Itochu Cmts.").

Accordingly, two issues remain before the court: whether Commerce reasonably included Sundram's financial ratios in the calculation of

Stanley's dumping margin and whether Commerce's decision to apply the revised 15.43 percent rate to the entries not associated with Stanley was contrary to law.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court upholds Commerce's final results in an antidumping duty review 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. Commerce Reasonably Selected Sundram's Surrogate Financial Statements

Commerce acted reasonably in using Sundram's financial statements in its calculation of surrogate values because the record evidence did not provide it with a reason to believe or suspect that Sundram may have received countervailable subsidies and Sundram's overhead ratios are not aberrational or distortive. Moreover, Commerce acted reasonably in excluding J&K's financial statements because it found, in accordance with its refined practice, that J&K was not a producer of comparable merchandise.

A. Countervailing Duties

In nonmarket economy antidumping duty cases, Commerce determines "the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise." 19 U.S.C. § 1677b(c)(1)(B). In calculating normal value, "the valuation of the factors of production [is] based on the best available information regarding the values of such factors in a [surrogate] market economy." *Id.* In valuing such factors of production, Commerce derives surrogate financial ratios from publicly available financial statements of producers of identical or comparable merchandise in market economies. *See* 19 C.F.R. § 351.408(c). Congress, however, has instructed Commerce to "avoid using any prices which it has reason to believe or suspect may be dumped or subsidized" and to base its decision on "information generally available to it at that time," without conducting a formal investigation. *See* Omnibus Trade and Competitiveness Act of 1988, H.R. REP. No. 100–576, at 590–91 (1988) (Conf. Rep.).

Generally, Commerce must demonstrate by "particular, specific, and objective evidence" that "(1) subsidies of industry in question existed in supplier country during period of investigation[]; (2) sup-

plier in question was member of subsidized industry or otherwise could have taken advantage of any available subsidies; and (3) it would have been unnatural for supplier to not have taken advantage of such subsidies." *China Nat'l Mach. Imp. & Exp. Corp. v. United States*, 264 F. Supp. 2d 1229, 1243 (CIT 2003); *Fuyao Glass Indus. Group Co. v. United States*, 29 CIT 109, 114 (2005) ("*Fuyao II*"). Moreover, normally, Commerce excludes a financial statement from consideration if a line item "contains a reference to a specific subsidy program found to be countervailable in a formal CVD determination," and includes it if it "contains only a mere mention that a subsidy was received, and for which there is no additional information as to the specific nature of the subsidy." *Clearon Corp. v. United States*, 800 F. Supp. 2d 1355, 1359 (CIT 2011). For example, Commerce excluded a financial statement that referenced three types of "Capital Subsidy/ Government Grants," which Commerce found countervailable in a prior administrative proceeding, in line items indicating that it received multiple forms of government aid. *See Clearon*, 800 F. Supp. 2d at 1358–61 (citing *Chlorinated Isocyanurates from the People's Republic of China*, 75 Fed. Reg. 70,212 (Dep't Commerce Nov. 17, 2010)). By contrast, Commerce included a financial statement where an accounting note indicated that a benefit would be recorded "as and when" it is received, but where no benefit attributed to the scheme was recorded. *DuPont Teijin Films v. United States*, 896 F. Supp. 2d 1302, 1311 (CIT 2013); *see also Catfish Farmers of Am. v. United States*, 641 F. Supp. 2d 1362, 1380 (CIT 2009) (affirming Commerce's determination of no subsidy when petitioners identified a subsidy "without additional substantiating evidence of countervailability").

Stanley argues that Commerce had a reason to believe or suspect that Sundram may have received countervailable subsidies from two government programs: Interest Free Sales Tax Loans from the Government of Tamil Nadu and Deferred Government Grants. Stanley largely rests its argument on Commerce's previous finding that the tax loans and government grants were countervailable. Pl. Cmts. at 12–18 (citing *Certain Helical Spring Lock Washers from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 75 Fed. Reg. 29,720 (Dept. Commerce May 27, 2010) ("*Lock Washers*")). First, Commerce found that *Lock Washers* incorrectly stated that a prior administrative review found "Interest Free Sales Tax Loans from the Government of Tamil Nadu" countervailable. *Stanley Remand Results* at 10. The review, however, determined that "Interest Free Tax Loans from the Government of *Maharashtra*" were countervailable. *Id.* (emphasis added). Thus, Commerce did not conclude that the tax loans at issue were countervailable. Second,

although *Lock Washers* found that "Deferred Governments Grants" *may* be countervailable, Commerce asserts that this finding deviated from Commerce's general practice of requiring more than a notation of a subsidy received in a set of financial statements to exclude it from consideration. *Id.* at 11. Commerce is not bound by its previous administrative reviews and reasonably chose not to rely on *Lock Washers*. Given that Sundram's financial statement plainly states that it "has not received any grant from the Government," Commerce's decision is supported by substantial evidence. *See* Mid Continent Surrogate Value ("SV") Submission at 932, PD 301 (Oct. 5, 2010).

Stanley also asserts that Sundram's location in a Special Economic Zone provides a compelling reason to believe or suspect that Sundram received countervailable subsidies. Pl. Cmts. at 22. As the court recently stated, the mere location of Sundram's factories in a SEZ does not suggest receipt of a specific subsidy. *Itochu Building Products Co., Inc. v. United States*, Slip Op. 18–24, 2018 WL 1445676, at *6 (CIT Mar. 22, 2018) ("*Itochu II*"); *Stanley Remand Results* at 11. Indeed, benefits from Indian's SEZ program "are not provided automatically" and, in some instances, companies within the SEZ must "apply and qualify for the benefits of the [program]." *Stanley Remand Results* at 11. The record does not contain particular, specific, and objective evidence to suggest that Sundram has taken advantage of any available subsidies. Commerce's decision as to the SEZ, therefore, was supported by substantial evidence.

Similarly, Stanley contends that Sundram's citation to its eligibility for a weighted deduction under Section 35(2AB) of the Income Tax Act in its financial statement provides a reason to believe or suspect that Sundram received countervailable subsidies. Pl. Cmts. at 19–23. Moreover, Stanley states that Commerce failed to consider an EU determination that found Section 35(2AB) to be a countervailable subsidy, arguing the determination was generally available information that should have been considered. Pl. Cmts. at 19–23 (citing Council Regulation (EC) 1176/2008 of November 27, 2008, amending Council Regulation (EC) No 713/2005 imposing a definitive countervailing duty on imports of certain broad spectrum antibiotics originating in India, 2008 O.J. (L 319) 10–13 ("EU Determination")). While cited by Stanley in its comments to the first remand results, the EU Determination itself is not in the record.[7] *See Stanley Remand*

[7] Stanley requests that Commerce reopen the record on remand and accept submission of the EU Determination, putting it in an awkward position of arguing that Commerce did not rely on evidence that Stanley failed to introduce into the record. *See* Pl. Cmts. at 21 n.10; *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (finding "no suggestion that the [relevant] report was not publicly available . . . when Commerce invited . . .

Results at 8; 19 U.S.C. § 1516a(b)(1)(B)(i) (limiting the scope of judicial review to the administrative record). Further, citation alone to an EU Determination does not render it "generally available information" adequate for Commerce to make a finding without conducting an investigation. Therefore, the EU Determination was not in the record and Commerce reasonably did not consider it.

Regardless, Commerce's conclusion does not rest on a finding that Section 35(2AB) was not countervailable. *Compare Itochu Buildings Products Co. v. United States*, Slip Op. 17–66, 2017 WL 2438835, at *4 (CIT June 5, 2017) (remanding to Commerce following Commerce's erroneous statement that the EU did not review Section 25(2AB)) *with Itochu II*, at *7 (finding that, even in the light of the EU decision, Commerce properly continued to include Sundram's statement when averaging the surrogate values). Rather, Commerce concluded that Sundram's financial statement showed no indication that the company "actually [had] been approved and used this program," even if their projects were "eligible" for it. *Stanley Remand Results* at 12. The financial statement states only that certain R&D projects are "eligible for weighted deduction under Section 35(2AB)." *See* Mid Continent SV Submission at 896, 995. Thus, Commerce found nothing more than a mere mention of a subsidy without any further substantiating reference to the nature of the subsidy.

Although Stanley does not provide evidence that Sundram received a subsidy, it asks the court to infer that "it would have been unnatural" for Sundram to include its program's eligibility status in its annual report without taking advantage of it. Pl. Cmts. at 22–23 (citing *Fuyao II* at 264 F. Supp. at 1243). Yet Commerce, in accordance with its practice, could reasonably refuse to speculate, without particular, specific, and objective evidence that Sundram was approved to benefit from the program or that it actually received such benefits during the relevant POR.

In sum, Stanley's argument fails because it asks the court to choose between two reasonable interpretations of the financial statements. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) ("[D]rawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."). Stanley's claim that certain programs provide Commerce with substantial evidence to support a reason to believe or suspect that Sundram may have received countervailable subsidies is not without force. But Commerce's conclusion that it did not have

interested parties to submit relevant factual information for valuing factors of production"). Similarly, here, the burden of creating an adequate record lies with interested parties and not with Commerce. The court will not take judicial notice of the contents of the EU Determination.

sufficient reason to believe or suspect that Sundram's prices were subsidized is supported by substantial evidence. Thus, Commerce's refusal to arrive at Stanley's proposed interpretation is reasonable based on the administrative record, which contained only mere mentions of subsidies in a financial statement without additional substantiating evidence of countervailability.

B. Exclusion of J&K data

On remand, Commerce looked at each producer's "product mix" to determine whether it is reasonably considered a producer of "comparable" or "identical" merchandise. Commerce found that Bansidhar "produced bolts, nails, and wire, representing 57.22, 15.70, and 27.08 percent of production, respectively" and that Nasco produced "hinges, nails, and blades, representing 68.83, 12.61, and 18.56 percent of production, respectively." *Stanley Remand Results* at 3–4. By contrast, Commerce found that, although J&K produced nails, representing 16.69 percent of its sales, its activities related primarily to the production and sale of wire, a non-comparable merchandise, representing 83.31 percent of sales. *Id.* at 4–5. Therefore, it concluded that J&K was not a suitable surrogate financial company. *Id.* at 5. Commerce continued to find that Sundram produced comparable merchandise, where data showed that 42.61 percent of its income was tied to fasteners. *Id.* at 4. Because Commerce found that bolts, hinges and fasteners are comparable merchandise, it averaged Bansidhar, Nasco, and Sundram's financial statements for surrogate value calculations.[8] *Id.* at 5.

It is within Commerce's expertise and discretion to update its methodology for both increased accuracy and ease of use. *See SKF USA Inc. v. United States*, 491 F. Supp. 2d 1354, 1362 (CIT 2007). Commerce's updated methodology considers whether a company's main line of business is in "identical" or "comparable" merchandise. Here, on remand, Commerce reasonably applied the practice developed in the second administrative review.

C. Overhead Ratios

On remand, Commerce mistakenly used Nasco's overhead ratio calculated in the *Final Results* (29.29 percent), rather than that used in the *Amended Final Results* (3.68 percent), when comparing its ratio with Sundram's to explain why Sundram's overhead ratios were

[8] Although in the *Final Results* Commerce found that Sundram did not produce merchandise comparable to nails, that decision largely focused on its determination that Sundram does not consume SWR. Indeed *Stanley I* found that Commerce did not "carefully consider[] all relevant evidence on the record" or address Mid Continent's argument that "both nails and screws/fasteners are produced from steel wire and [SWR]." 964 F. Supp. 2d at 1335.

not aberrational. *See Stanley Remand Results*, at 13 (stating that Nasco's overhead ratio is seven times higher than Bansidhar's). Recognizing its error, Commerce requested a partial remand limited to the reexamination of the manufacturing overhead ratios. Remand Scheduling Order, Doc. No. 148, at 2 (Feb. 18, 2015). On February 18, 2015, the court granted Commerce's request. *Id.* On partial remand, Commerce continued to find Sundram's overhead ratio appropriate. *See Partial Remand Results* at 3–4. Finding no "extraordinary" items within Sundram's financial statement, Commerce decided that inherent variations in overhead ratios derived from a limited number of available financial statements from producers of comparable merchandise with different product mixes cannot provide a basis for finding one company's ratio aberrationally high or the other companies' aberrationally low. *Id* at 3–4, 7.

In response to the *Partial Remand Results*, Stanley argues that Commerce's determination is unlawful and unsupported by substantial evidence. Pl. Opp. Cmts. at 8. Stanley contends that selecting a company whose overhead ratio is seven times higher than other surrogates "falls outside the limits of permissible approximation." *Id.* at 10 (quoting *Sigma Corp. v. United States*, 117 F.3d 1401, 1408 (Fed. Cir. 1997)). Stanley essentially claims that manufacturing nails in India typically requires an overhead of about four percent based on Nasco's and Bansidhar's overhead ratios. Stanley, however, fails to establish that those overhead ratios represent that of a typical nail producer. Pl. Opp. Cmts. at 12–14. For its part, Commerce determined that the overhead ratios of those two producers, who primarily produce goods other than nails, are not a sufficient evidentiary basis to state definitely what a "typical" nail producer requires. *Partial Remand Results* at 7.

The court agrees. Given that Commerce reasonably concluded that Sundram, Nasco, and Bansidhar are producers of comparable merchandise, the differences between their overhead ratios, alone, cannot provide evidence of aberration. If that were the case, it would be as reasonable to conclude that Nasco and Basidhar's ratios are aberrationally low. Commerce's policy is to use as many financial ratios of producers of comparable merchandise as possible, so "as to normalize any inherent variations therein." *Partial Remand Results* at 4. Accordingly, Commerce's finding that Sundram's overhead ratios were not aberrational or distortive of the surrogate financial data is supported by substantial evidence, and could be included in the averaging of financial data for surrogate value purposes.

II. Commerce's Recalculated Dumping Margin Applies to the Separate Rate Respondents

In the Mid Continent Remand, Commerce applied the revised 15.43 percent dumping margin calculated from the *Stanley Remand Results* to the separate rate companies. *Second Mid Continent Remand Results* at 7. Itochu contends that the rate for the separate companies ("SRC") in the *Mid Continent* action should have remained at 10.63 percent, the amount calculated in the *Amended Final Results*. Itochu argues that the outcome of the *Stanley Remand Results* should not affect the SRC liquidation rates because the liquidation of their entries was not enjoined in the Stanley litigation, pointing to the fact that Stanley was removed from the Mid Continent injunction post-consolidation and a letter stating that issues currently before the court "are Stanley-specific and do not affect [them]." Itochu Cmts. at 7–8, 17.[9]

Itochu's claims are without merit. The two actions arise out of the same administrative review, where Stanley is the sole mandatory respondent. *See I&D Memo* at 1. It is Commerce's normal practice "to assign non-investigated separate rate respondents a rate based on the average of the margins calculated for those companies selected for individual review." *First Mid Continent Remand Results* at 34 (citing *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 76 Fed. Reg. 56,158 (Sept. 12, 2011)). Accordingly, in *Sigma Corp.*, the court rejected Commerce's use of a mandatory respondent's invalidated dumping margin as the "best information available" in its determination of the all-others rate. 117 F.3d at 1411–12. The court held that the other exporter's rate "stood or fell with [the mandatory respondent's] rate." *Id.* at 1411. Here, because Stanley was the sole company selected for review, Commerce's revisions to Stanley's rate would be expected to affect all open entries. That the liquidation of entries was enjoined in one action or another does not bear on this practice.

Itochu's argument that the dumping rate applied in the *Mid Continent* action was "borrowed from a wholly separate proceeding" is also unavailing. *See* Itochu Cmts. at 13. First, Itochu should not have assumed that matters affecting Stanley's dumping margin would not affect the separate rate companies. Indeed, Mid Continent specifically alleged several claims as to the calculation of the sole mandatory respondent's dumping margin that were only later consolidated into the Stanley action. *See* Mid Continent Complaint, Doc. No. 11, at 4 (May 11, 2011). Liquidation of entries of concern to Itochu were

[9] Parties requiring a court ruling need to file motions. One-sided views stated in letters are of no legal moment.

enjoined in the *Mid Continent* action and Itochu intervened therein. All parties should have understood that Commerce was relying on Stanley's rate as the best information available to be applied against the separate rate companies. To protect the rate that applied to the separate rate companies, Itochu could have participated more fully in the Stanley litigation and defended Stanley's previous rate.

Second, because Stanley began an action of its own, with a separate preliminary injunction, it would have been redundant to have Stanley covered by the Mid Continent injunction. *See* Preliminary Injunction Order, Doc. No. 13, at 2 (May 20, 2011). It was therefore appropriate to remove Stanley from the Mid Continent injunction, given the small possibility that conflicting injunctions with differing liquidation instructions could arise if two separate injunctions applied to Stanley. *See* 19 U.S.C. § 1516a(e)(2) (liquidation in accordance with the final court decision if liquidation is enjoined). Likewise, the parties were not required to add the separate rate companies to the Stanley injunction. Crucially, the separate rate respondents were not removed from the Mid Continent injunction, and their rates could not be divorced from the calculated rate for the mandatory respondent. Therefore, Commerce's decision to apply the assessment rate of 15.43 percent to the separate rate companies was not contrary to law.

CONCLUSION

For the foregoing reasons, the court sustains Commerce's determinations in all challenged respects. All entries enjoined under 19 U.S.C. § 1516a(c)(2) are to be liquidated in accordance with the final disposition in this action as provided for in 19 U.S.C. § 1516a(e).

Dated: October 5, 2018
New York, New York

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

Slip Op. 18–135

THE STANLEY WORKS (LANGFANG) FASTENING SYSTEMS CO., LTD. and STANLEY BLACK & DECKER, INC. Plaintiffs, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Court No. 16–00053

[The United States Department of Commerce's Final Results are sustained.]

Dated: October 10, 2018

Lawrence J. Bogard, Neville Peterson LLP of Washington, DC, argued for plaintiff. With him on the brief was *Peter J. Bogard*.

Sosun Bae, 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 Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Zachary Simmons*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Eaton, Judge:

Before the court is The Stanley Works (Langfang) Fastening Systems Co., Ltd. and Stanley Black & Decker, Inc.'s (collectively, "Stanley" or "plaintiff") motion for judgment on the administrative record challenging the final results of the United States Department of Commerce ("Commerce" or the "Department") in *Certain Steel Nails From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013–2014*, 81 Fed. Reg. 14,092 (Dep't Commerce Mar. 16, 2016) ("Final Results"). This case is a complement to *Stanley Works (Langfang) Fastening Sys. Co. v. United States*, 42 CIT __, Slip Op. 18–99 (Aug. 13, 2018) ("*Stanley I*"), by which were decided each of the substantive issues raised here. In *Stanley I*, the Court had the benefit of, and cited to, some of the scholarly materials Stanley seeks to have introduced on the record here.[1]

Stanley objects to the Final Results generally as not conforming to the statute or Commerce's regulations. Stanley also claims that Com-

[1] The materials plaintiff seeks to include here are: Robert Coe, "It's the Effect Size, Stupid: What Effect Size Is and Why it Is Important"; Jacob Cohen, "The Earth Is Round (p,0.05)"; Jacob Cohen, Statistical Power Analysis for the Behavioral Sciences, second edition; Jacob Cohen, Statistical Power for the Behavioral Sciences, Revised Ed.; Jacob Cohen "Things I Have Learned (So Far)"; Effect Size FAQs; Heinz Kohler, Statistics for Business and Economics; Paul W. Vogt, Dictionary of Statistics and Methodology: A Nontechnical Guide for the Social Sciences; Webster's New World Dictionary of American Language. *See generally*, Rejected and Retained Case Br., C.R. 203.

merce unlawfully rejected portions of its original case brief. *See* Pl.'s Br. 18–49. Defendant, the United States (the "government" or "defendant"), on behalf of Commerce, argues that (1) Commerce lawfully rejected Stanley's original case brief; (2) that 19 C.F.R. § 351.414(f) (2007) does not apply to administrative reviews; and (3) Commerce reasonably interpreted the relevant statute and regulations when conducting its "differential pricing" analysis to conclude that Stanley had engaged in targeted dumping. Def.'s Br. 4–6.

This court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012). For the reasons set forth below, Commerce's Final Results are sustained.

BACKGROUND

In August 2008, Commerce issued an antidumping duty order covering certain steel nails from the People's Republic of China. *See Certain Steel Nails From the People's Republic of China*, 73 Fed. Reg. 44,961 (Dep't Commerce Aug. 1, 2008) (order). On September 30, 2014, Commerce initiated the sixth administrative review of the order, which covered the period August 1, 2013 to July 31, 2014. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 79 Fed. Reg. 58,729 (Dep't Commerce Sept. 30, 2014). Stanley was named as one of two mandatory respondents for individual review. P.R. Doc 27.

Commerce published notice of the Preliminary Results on September 4, 2015. *See Certain Steel Nails From the People's Republic of China*, 80 Fed. Reg. 53,490 (Dep't Commerce Sept. 4, 2015) P.D. 216, and accompanying Preliminary Decision Memorandum, P.D. 217 ("Preliminary Results"). In its Preliminary Results, Commerce, using its differential pricing analysis,[2] found that 76.8 percent of Stanley's U.S. sales passed Commerce's Cohen's *d* test, and therefore, concluded that there was a pattern of export prices for comparable merchandise that differed significantly among purchasers, regions, or periods of time. Preliminary I&D Memo at 32–35.

Moreover, Commerce preliminarily found that a comparison of the weighted-average of an exporter's normal values to the weighted-average of its export prices for comparable merchandise (the "A-A" method) could not account for the price difference because Stanley's weighted-average dumping margin crossed the *de minimus* threshold when calculated under an "alternative" comparison method (i.e., the

[2] For a detailed discussion of Commerce's differential pricing analysis and its relation to the targeted dumping statute (19 U.S.C. § 1677f-1(d)(1)(B)), see this Court's opinion in *Stanley I*, 42 CIT at __, Slip Op. 18–99 at 3–12.

A-T method). *See* Preliminary Results Analysis Mem., P.R. 218 at 13–14. Thus, because the total value of Stanley's "passing" sales represented 66 percent or more of the total value of its total U.S. sales, Commerce compared the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions (the "A-T" method), and, applying the A-T method to all of Stanley's sales, preliminarily calculated a weighted-average dumping margin of 12.51 percent for Stanley.

On October 30, 2015, following the issuance of the Preliminary Results, Stanley submitted its case brief to Commerce, largely disputing the legality of Commerce's differential pricing analysis. *See* Rejected and Retained Case Br., C.R. 203. Stanley supported these arguments with, among other things, citations to various academic sources. On November 18, 2015, Commerce rejected Stanley's brief because "it reference[d] new factual information," which, "[p]ursuant to 19 CFR 351.301(c)(5)" was due "no later than July 29, 2015, 30 days before the preliminary results of th[e] review." As a result, Commerce instructed Stanley to re-file the brief without the rejected material. On November 20, 2015, Stanley resubmitted a redacted case brief. *See* Redacted Case Brief, P.R. 205.

On March 16, 2016, Commerce published its final results. *See* Final Results, 81 Fed. Reg. at 14,092. On April 4, 2016, Commerce published a notice to correct certain errors in the Final Results margin chart. 81 Fed. Reg. 19,136 (Dep't Commerce Apr. 4, 2016). In the Final Results, Commerce, again using its differential pricing analysis, found that 76.8 percent of Stanley's sales passed the Cohen's *d* test, and, using the A-T method, calculated a weighted-average dumping margin of 11.95 percent. *See* Corrections Notice, 81 Fed. Reg. at 19,136; *see also* Final Results Analysis Memo at 2, C.R. 210. Had Commerce used the A-A method, Stanley's margin would have been zero.

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) (2012). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

DISCUSSION

I. Commerce's Rejection of Stanley's Case Brief

As a procedural matter, Stanley first argues that Commerce unlawfully rejected its original case brief. Pls.' Br. 10. Stanley maintains that when Commerce rejects factual information pursuant to its regulations, it must "provide written notice stating the reasons for rejection," and that Commerce failed to do so here. Pls.' Br. 10 ("Commerce did not explain its basis for rejecting Stanley's Case Brief. [Commerce] did not articulate any standard for determining that the authorities were 'factual information.'" (citing 19 C.F.R. § 351.301(c)(5)(i)[3])). Thus, for plaintiff, Commerce's "unsubstantiated assertion" that the rejected material constituted "factual information" fails the regulation's requirement, and was therefore unlawful. Pls.' Br. 10.

Next, plaintiff argues that, even if the court accepts Commerce's rejection notice as lawful, the rejected authorities themselves do not meet any definition of "factual information" under the regulations. Pls.' Br. 10 (citing 19 C.F.R. § 351.102(b)(21)). Plaintiff claims that the intended definition of "factual information" is "information of a

[3] 19 C.F.R. § 351.301(c)(5) provides that

> [Commerce] will reject information filed under paragraph (c)(5) that satisfies the definition of information described in § 351.102(b)(21)(i)-(iv) and that was not filed within the deadlines specified above. All submissions of factual information under this subsection are required to clearly explain why the information contained therein does not meet the definition of factual information described in § 351.102(b)(21)(i)-(iv), and must provide a detailed narrative of exactly what information is contained in the submission and why it should be considered. The deadline for filing such information will be 30 days before the scheduled date of the preliminary determination in an investigation, or 14 days before verification, whichever is earlier, and 30 days before the scheduled date of the preliminary results in an administrative review, or 14 days before verification, whichever is earlier.

19 C.F.R. § 351.301(c)(5). In addition, 19 C.F.R. § 351.301(c)(5)(i) provides that Commerce "will issue a memorandum accepting or rejecting the information and, to the extent practicable, will provide written notice stating the reasons for rejection."

Under 19 C.F.R. § 351.102(b)(21), factual information is defined as:

(i) Evidence, including statements of fact, documents, and data submitted either in response to initial and supplemental questionnaires, or, to rebut, clarify, or correct such evidence submitted by any other interested party;

(ii) Evidence, including statements of fact, documents, and data submitted either in support of allegations, or, to rebut, clarify, or correct such evidence submitted by any other interested party;

(iii) Publicly available information submitted to value factors under § 351.408(c) or to measure the adequacy of remuneration under § 351.511(a)(2), or, to rebut, clarify, or correct such publicly available information submitted by any other interested party;

(iv) Evidence, including statements of fact, documents and data placed on the record by the Department, or, evidence submitted by any interested party to rebut, clarify, or correct such evidence placed on the record by the Department; and

(v) Evidence, including statements of fact, documents, and data, other than factual information described in paragraphs (b)(21)(i)–(iv) of this section, in addition to evidence submitted by any other interested party to rebut, clarify, or correct such evidence.

respondent-specific nature," as evidenced by the 2013 promulgation of the current regulation. Pls.' Reply Br. 5 ("[The regulatory] deadline reflects Commerce's interest in ensuring that it has sufficient time to confirm the accuracy of the information submitted, *i.e.*, information of a respondent-specific nature." (citing *Definition of Factual Information and Time Limits for Submission of Factual Information,* 78 Fed. Reg. 21,246, 21,247 (Dep't Commerce April 10, 2013)). Thus, for plaintiff, because the rejected sources are not respondent-specific, they should be treated like administrative determinations or judicial decisions (*i.e.*, "matter[s] of public record and publically available") and be accepted without physical copies on the record. Pls.' Br. 11; *see also* Pls.' Reply Br. 5.

Finally, plaintiff claims that Commerce's rejection here conflicts with its own past practice. Pls.' Br. 11 ("Commerce has relied on and/or responded to the bulk of these authorities in other proceedings without physical copies being present on the administrative record." (citing *Certain Steel Nails From the People's Republic of China: Final Results of Fourth Antidumping Administrative Review*, 79 Fed. Reg. 19,316 (Dep't Commerce Apr. 8, 2014) ("Fourth Review"); *Certain Steel Nails From the People's Republic of China; Final Results of Antidumping Administrative Review* 2012–2013, 80 Fed. Reg. 18,816 (Dep't Commerce Apr. 8, 2015) ("Fifth Review"))).[4]

For the court, the materials Stanley hoped to put on the record were closer to being part of its legal argument than factual information as defined in 19 C.F.R. § 351.102(b)(2). That is, these articles are referenced by Stanley to support its argument that Commerce's differential pricing analysis did not conform to the statute. Nonetheless, because of the recent decision in *Stanley I*, the court need not determine the lawfulness of Commerce's rejection letter and its finding that the rejected sources constitute "factual information" under the regulations. *Stanley I* involved the same arguments with respect to Commerce's differential pricing analysis as those presented here. Unlike here, however, plaintiff timely submitted physical copies of the academic articles used to support its argument—the same

[4] Specifically, Stanley argues that Commerce "has repeatedly cited the Coe article as an authority supporting the [Cohen's *d* test] without a physical copy on the record," that Stanley had cited to the dictionary definition in its Case Brief in both the Fourth and the Fifth "Nails from China Reviews," and that of the remaining authorities, Stanley had cited to four of them in both the Fourth and Fifth Nails reviews, to a fifth only in the Fourth Review, and a six only in the Fifth Review. Pls.' Br. 11. Stanley claims that in those cases, Commerce accepted the authorities without requiring physical copies on the record. Pls.' Br. 11. Indeed, Stanley notes that even the Final Results cited one of the rejected publications to support Commerce's use of the Cohen's *d* test "even though a copy [was] not on the record." Pls.' Br. 12.

sources rejected in this review. *See id.*, 42 CIT at __, Slip Op. 18–99 at 22 n.19. Taking those submissions into account, the Court found that Commerce's differential pricing analysis was a reasonable interpretation of the statute. *See id.*, 42 CIT at __, Slip Op. 18–99 at 49 ("Accordingly, the court finds that Commerce's differential pricing analysis is a reasonable interpretation of 19 U.S.C. § 1677f–1(d)(1)(B)."). Therefore, even if Commerce were to have committed a procedural error in this review by not accepting the materials, it cannot be said that this error resulted in substantial prejudice to Stanley. *See, e.g.*, *Dixon Ticonderoga Co. v. United States*, 468 F.3d 1353, 1355 (Fed. Cir. 2006). Accordingly, the court will not remand this case with instructions that Commerce accept Stanley's original case brief.

II. Commerce's Use of the Differential Pricing Analysis is in Accordance with Law

Next, Stanley makes several arguments contesting Commerce's differential pricing analysis as applied in the Final Results. In particular, plaintiff argues that (1) the Final Results contravene the "allegation" and "appropriate statistical techniques" requirements of 19 C.F.R. § 351.414(f) (2007); (2) Commerce's Cohen's *d* test is not reasonably used to evaluate targeted dumping; (3) Commerce incorrectly calculated the Cohen's *d*, resulting in a bias toward finding prices that differ significantly among purchasers, regions or periods of time; (4) differential pricing contravenes 19 U.S.C. § 1677f-1(d)(1)(B) because Commerce's ratio test does not describe a pattern and the meaningful difference test fails to explain why the A-A method cannot account for the pattern of price differences identified by the Cohen's *d* test; (5) differential pricing contravenes congressional intent as expressed in the legislative history; and (6) Commerce's implementation of differential pricing is not reasonable because Commerce includes sales that "pass" the Cohen's *d* test in the base groups for other test groups and the Cohen's *d* test fails to account for circumstances of sale. *See* Pl.'s Br. 18–49.

These same arguments were made by plaintiff in *Stanley I*, and found to be without merit. *See generally*, *Stanley I*, 42 CIT at __, Slip Op. 18–99 at 52 ("[T]he court finds that Commerce's method is a reasonable one for determining if targeted dumping may be occurring . . . ."). The court has carefully reviewed the *Stanley I* opinion and concludes that it was correctly decided. Therefore, because plaintiff brings no substantive claims in addition to those resolved by *Stanley I*, the court finds no reason to depart from its holding in that case. *See generally*, *id.* Accordingly, for the reasons stated in *Stanley I*, the court finds that Stanley's arguments disputing Commerce's differen-

tial pricing analysis are without merit, and plaintiff's motion for judgment on the agency record is denied.

CONCLUSION

Therefore, the court denies plaintiff's motion for judgment on the agency record and Commerce's Final Results are sustained. Judgment shall be entered accordingly.

Dated: October 10, 2018
New York, New York

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