U.S. Customs and Border Protection

Slip Op. 14–9

DEACERO S.A.P.I. DE C.V. AND DEACERO USA, INC., Plaintiffs, v. UNITED STATES, Defendant, and ARCELORMITTAL USA LLC, GERDAU AMERISTEEL U.S. INC., EVRAZ ROCKY MOUNTAIN STEEL, AND NUCOR CORPORATION, Defendant-Intervenors.

Before: Richard W. Goldberg, Senior Judge
Court No. 12–00345

[Remanding the Department of Commerce's remand redetermination.]

Dated: August 28, 2014

David E. Bond and *Jay C. Campbell*, White & Case LLP, of Washington, DC, for plaintiffs.

Melissa M. Devine, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *David Richardson*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Paul C. Rosenthal, *Kathleen W. Cannon*, *R. Alan Luberda*, and *David C. Smith*, Kelley Drye & Warren LLP, of Washington, DC, for defendant-intervenors ArcelorMittal USA LLC, Gerdau Ameristeel U.S. Inc., and Evraz Rocky Mountain Steel.

Alan H. Price, *Daniel B. Pickard*, and *Maureen E. Thorson*, Wiley Rein LLP, of Washington, DC, for defendant-intervenor Nucor Corporation.

OPINION AND ORDER

Goldberg, Senior Judge:

This matter returns to the court following a remand of the U.S. Department of Commerce's ("Commerce") final affirmative determination of circumvention of the antidumping duty order on certain wire rod from Mexico ("Wire Rod Order"). *See Carbon and Certain Alloy Steel Wire Rod from Mexico*, 77 Fed. Reg. 59,892 (Dep't Commerce Oct. 1, 2012) (final affirm. circumvention) ("*Final Determination*"). In its remand order, the court instructed Commerce to reconsider its conclusion that Deacero S.A.P.I. de C.V.[1] and Deacero USA,

[1] On December 16, 2013, Deacero S.A. de C.V.'s legal name changed to Deacero S.A.P.I. de C.V. Mot. to Amend Case Caption, ECF No. 84. The court has amended the case caption accordingly. *See* Order, ECF No. 86.

Inc.'s (collectively, "Deacero") wire rod with an actual diameter of 4.75 millimeters ("mm") was a circumventing minor alteration of subject wire rod under 19 U.S.C. § 1677j(c) (2006). *See Deacero S.A. de C.V. v. United States*, 37 CIT __, __, 942 F. Supp. 2d 1321, 1332 (2013) ("*Deacero I*"). On remand, Commerce concluded under protest that Deacero's wire rod was not circumventing the Wire Rod Order. Final Results of Redetermination Pursuant to Ct. Remand 6, ECF No. 87 ("*Remand Results*").

Defendant-Intervenors ArcelorMittal USA LLC, Gerdau Ameristeel U.S. Inc., Evraz Rocky Mountain Steel (collectively, "the Domestic Industry"), and Nucor Corporation ("Nucor") filed comments challenging Commerce's *Remand Results*. ArcelorMittal, Gerdau, and Evraz Cmts. on Remand Redetermination, ECF No. 94 ("Domestic Indus. Cmts."); Nucor Cmts. on Remand Redetermination, ECF No. 95 ("Nucor Cmts."). Both Deacero and the United States ("the Government") request that the court sustain the *Remand Results*. Deacero Cmts. on Remand Redetermination, ECF No. 93; Gov't Cmts. on Remand Redetermination, ECF No. 105 ("Gov't Cmts."). For reasons set forth below, this matter is again remanded so Commerce has an opportunity to explain whether it wishes to revisit its commercial availability finding.

BACKGROUND

Many of the facts relevant to this case were identified in the court's opinion in *Deacero I*. *See* 37 CIT at __, 942 F. Supp. 2d at 1324–25. To briefly summarize, this case concerns a minor alteration inquiry initiated pursuant to 19 U.S.C. § 1677j(c). *See Carbon and Certain Alloy Steel Wire Rod from Mexico*, 76 Fed. Reg. 33,218, 33,219 (Dep't Commerce June 8, 2011) (initiation of circumvention inquiry). The purpose of Commerce's inquiry was to determine whether Deacero's imports of 4.75 mm wire rod were circumventing the Wire Rod Order, which defines subject merchandise as "certain hot-rolled products of carbon steel and alloy steel, in coils, of approximately round cross section, 5.00 mm or more, but less than 19.00 mm, in solid cross-sectional diameter" along with several specific exclusions. *See Carbon and Certain Alloy Steel Wire Rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine*, 67 Fed. Reg. 65,945, 65,946 (Dep't Commerce Oct. 29, 2002) (notice of antidumping duty orders) ("*Order*"). After analyzing five factors set forth in relevant legislative history,[2] Commerce answered that question affirmatively.

[2] 19 U.S.C. § 1677j(c) does not identify a particular analytical framework that Commerce must follow when conducting a minor alterations inquiry. But legislative history pertaining to a time when the minor alteration and later-developed product inquiries were collapsed into a single inquiry counsels that Commerce "should consider such criteria as the overall

See Final Determination, 77 Fed. Reg. at 59,893.

In deciding to conduct a minor alteration inquiry, Commerce declined to initiate a later-developed product circumvention inquiry under § 1677j(d). *See* Initiation Memorandum 14, PD I 24 (May 31, 2011), ECF No. 43 (Dec. 19, 2012) ("*Initiation Mem.*"). Commerce reached that determination upon concluding that small diameter wire rod "was commercially available prior to the issuance of the *Wire Rod Order*." *See id.* Commerce's finding regarding commercial availability was on the record in this case and was not challenged by Deacero. Defendant-Intervenors, the only parties challenging that finding, did not meet the jurisdictional prerequisites for judicial review. *See Target Corp. v. United States*, 609 F.3d 1352, 1363 (Fed. Cir. 2010) (citing 19 U.S.C. § 1516a(a)(2)(A), requiring filing of summons and complaint to gain standing).

The court determined that Commerce's affirmative circumvention determination was not supported by substantial record evidence and did not accord with law. *Deacero I*, 37 CIT at __, 942 F. Supp. 2d at 1332. The court focused on several factors to arrive at this conclusion. Initially, the court deferred to Commerce's finding that 4.75 mm wire rod was commercially available at the Wire Rod Order's inception. *Id.* at 1330 & n.3. Because 4.75 mm wire rod was commercially available, the court concluded that petitioners should have foreseen that a diameter range of "5.00 mm or more, but less than 19.00 mm" would not capture all sizes of wire rod. *See id.*; *Order*, 67 Fed. Reg. at 65,946. Yet petitioners, well-versed in the antidumping duty investigation process, crafted their proposed scope language in a way that made diameter a central feature and that clearly and unambiguously restricted subject merchandise by diameter. *Deacero I*, 37 CIT at __, 942 F. Supp. 2d at 1330. Importantly, this court never made independent factual findings regarding commercial availability or petitioners' actual knowledge of 4.75 mm wire rod's existence during the investigation.[3]

In light of the foregoing, the court rejected Commerce's conclusion that 4.75 mm wire rod was "'so insignificantly changed'" from subject

characteristics of the merchandise, the expectations of ultimate users, the use of the merchandise, the channels of marketing and the cost of any modification relative to the total value of the imported product." S. Rep. No. 100–71, at 100 (1987). This list does not appear to be exhaustive, and Commerce has considered additional factors in practice. *See Deacero I*, 37 CIT at __, 942 F. Supp. 2d at 1326.

[3] Defendant-Intervenors and the Government incorrectly attribute a variety of findings to the court. In addition to those noted above, the Government claims in its brief that "[t]he Court . . . determined . . . that Commerce . . . could not have initiated a later-developed product inquiry . . . ." Gov't Cmts. 5 n.2. It is unclear where the Government finds support for that proposition in *Deacero I*, as no one challenged Commerce's decision to forego a later-developed product inquiry and the court never addressed Commerce's analysis in that regard.

wire rod that it should come within the Wire Rod Order. *Id.* (quoting *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1371 (Fed. Cir. 1998)). Because a minor or insignificant change connotes something unimportant, the plain meaning of those words and the record did not appear to support Commerce's original determination. *See id.* at 1330–31. In the court's assessment, this case did not involve the type of change that Congress contemplated when enacting the minor alterations provision—i.e., a small, unforeseen manipulation of subject merchandise like adding a memory feature to a typewriter that was otherwise covered by an order. *See* S. Rep. No. 100–71, at 101 (1987). Rather, this case involved a distinct product that Commerce found was commercially available during the investigation and that was clearly excluded from the scope description.

Commerce changed course on remand and reversed its affirmative circumvention determination under protest. *Remand Results* 6. Commerce noted that its determination was "based on the Court's discussion that petitioners intentionally set the parameters of the scope of the *Order* to expressly exclude wire rod whose actual diameters were less than 5.00 mm and more than 19.00 mm as evidenced by the fact that 4.75 mm wire rod was commercially available and petitioners did not include it in the scope." *Id.*

SUBJECT MATTER JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court must sustain Commerce's remand redetermination if it is supported by substantial record evidence, is otherwise in accordance with law, and is consistent with the court's remand order. *See* 19 U.S.C. § 1516a(b)(1)(B)(i); *Ad Hoc Shrimp Trade Action Comm. v. United States*, 38 CIT __, __, 992 F. Supp. 2d 1285, 1290 (2014).

DISCUSSION

Defendant-Intervenors essentially argue that the court in *Deacero I* made factual findings reserved for Commerce, and those findings were unsupported and based on a misunderstanding of the law governing circumvention inquiries. In particular, Defendant-Intervenors claim that the court (1) rendered minor alteration inquiries superfluous by effectively converting them into later-developed product inquiries; (2) made factual findings by concluding that the Wire Rod Order specifically excluded 4.75 mm wire rod and that diameter was the fundamental focus of the Wire Rod Order; (3) conflated scope and circumvention inquiries; (4) created a conflict with Federal Circuit precedent; and (5) impermissibly prevented Defendant-Intervenors and Commerce from revisiting Commerce's commercial availability

finding. Because Commerce adopted the court's logic under protest, Defendant-Intervenors aver that Commerce abandoned its administrative role and, similar to the court, made findings that were unsupported by substantial evidence and not in accordance with law. As set forth below, the court largely rejects Defendant-Intervenors' arguments but will give Commerce an opportunity to explain whether it wishes to revisit its commercial availability finding.

I. By following the court's reasoning under protest, Commerce did not nullify other parts of the circumvention statute, abdicate its fact-finding role, or conflate circumvention inquiries with scope inquiries

Many of Defendant-Intervenors' arguments are premised on a misunderstanding of the court's decision in *Deacero I*. For instance, the Domestic Industry argues that the minor alterations provision and the later-developed product provision are near equivalents, except that the later-developed product provision contemplates a temporal analysis into when the product became commercially available. Domestic Indus. Cmts. 11. By determining that temporal considerations may also be relevant to a minor alteration analysis, the Domestic Industry asserts that the court rendered the minor alteration provision superfluous. *Id.* But that argument is unpersuasive because the court held only that commercial availability was relevant in this particular case, not that commercial availability was dispositive for all cases. *See Deacero I*, 37 CIT at __, 942 F. Supp. 2d at 1328–29.[4] Indeed, the court's holding was consistent with Commerce's acknowledged practice in other minor alteration inquiries. *See Initiation Mem.* 14 ("[A]lthough not specified in the Act, the Department has also included additional factors in its analysis, such as commercial availability of the product at issue prior to the issuance of the order."). Thus, when Commerce incorporated commercial availability into its analysis on remand, it merely aligned its determination with its prior practice.

The Domestic Industry claims that the natural effect of the court's holding was to impose a "*de facto*" commercial availability bar in every minor alteration inquiry. Domestic Indus. Cmts. 13. However, contrary to the Domestic Industry's assertions, the court did not

[4] In any event, the court does not agree that the minor alterations provision would be superfluous even if commercial availability were also a limiting element under the minor alteration provision. The minor alteration provision is the only circumvention inquiry that does not require consultation with the International Trade Commission. *See* 19 U.S.C. § 1677j(e). Thus, the two provisions would not be equivalent even if both barred the inclusion of commercially available products because only one would permit Commerce to skip a procedural step.

"implicitly assum[e] that any pre-existing product that was not specifically included in the scope must have been specifically and knowingly excluded from the scope." *Id.* at 11. There may well be circumstances where pre-existing, or even commercially available, non-subject merchandise could reasonably come within an order's scope as a circumventing minor alteration of subject merchandise. The court never suggested that petitioners must foresee every possible hypertechnical modification of subject merchandise and account for that possibility when crafting proposed scope language. The very purpose of the minor alterations provision is to remedy these hypertechnical changes, and it is plausible that pre-existing products may be used in an unforeseen way to circumvent an order.

Nevertheless, the minor alterations provision is not a vehicle for companies to expand an order in a way that petitioners avoided at the outset. *See Wheatland*, 161 F.3d at 1371 (noting that § 1677j(c) "does not . . . abrogate the cases prohibiting changing or interpreting orders contrary to their terms"); *Wheatland Tube Co. v. United States*, 21 CIT 808, 826 & n.9, 973 F. Supp. 149, 163 & n.9 (1997). That is precisely what Commerce did in its original *Final Determination* and what it has since corrected in its *Remand Results*.

Defendant-Intervenors have never alleged that petitioners could not have foreseen the commercial production of small-diameter wire rod. Indeed, wire rod was already manufactured in varying sizes during the investigation, and logic suggests that it might also be manufactured in sizes outside of the specified range. Undisputed record evidence demonstrates that small diameter wire rod existed domestically at some point in proximity to the investigation, and Commerce concluded that such wire rod was indeed commercially available prior to the Wire Rod Order's issuance. *See Initiation Mem.* 14; Deacero Case Br. at Ex. 2, PD II 27 (Jan. 13, 2012), ECF No. 43 (Dec. 19, 2012); Deacero Submission at Ex. 9, PD I 10 (Mar. 15, 2011), ECF No. 43 (Dec. 19, 2012) ("*Deacero March 2011 Submission*"). Furthermore, petitioners themselves noted in their petition that 5.5 mm wire rod was the "'smallest cross-sectional diameter that is hot-rolled in *significant* commercial quantities,'" suggesting that smaller sizes may have been manufactured in limited commercial quantities at the time of the investigation. *See Initiation Mem.* 4 (emphasis added) (quoting *Deacero March 2011 Submission* at Ex. 2 at 9). Petitioners were sophisticated companies that could have proposed to define the Wire Rod Order in broader terms or without reference to diameter. But instead petitioners selected diameter as a central

physical characteristic [5] and risked the clearly foreseeable possibility that small diameter wire rod either was or might soon be in commercial production.

It was *in this context* that the court concluded Commerce's scope language "could not be anything less than the specific exclusion of 4.75 mm wire rod." *Deacero I*, 37 CIT at __, 942 F. Supp. 2d at 1331. Thus, the court never found, as the Domestic Industry suggests, that all merchandise outside of an order's scope is specifically excluded. *See* Domestic Indus. Cmts. 19. Such a holding would have indeed nullified the minor alteration provision, which necessarily reaches merchandise outside an order's literal scope. *See Deacero I*, 37 CIT at __, 942 F. Supp. 2d at 1326. Rather, the court limited the reach of the minor alteration provision to avoid a result not contemplated by the statute and precluded by case law. Though circumvention inquiries are an important tool for Commerce, those inquiries cannot change orders to cover distinct products that petitioners could have proposed to include but did not. *Wheatland*, 161 F.3d at 1371.[6]

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[5] The Domestic Industry argues that the court engaged in fact-finding when it declared diameter an essential and fundamental characteristic under the Wire Rod Order. Domestic Indus. Cmts. at 24–36. But the court did not intend to suggest that diameter is more important than every other physical descriptor in the Wire Rod Order. Instead, the court's discussion was meant to reiterate that petitioners chose to elevate certain characteristics—including diameter—above other characteristics when proposing the scope of the Wire Rod Order. Petitioners (and Commerce, by accepting petitioners' scope language) thus deemed those characteristics fundamental and essential, and Commerce could not reasonably dismiss the very same characteristics as meaningless. *Cf. Carbon and Certain Alloy Steel Wire Rod from Mexico*, 76 Fed. Reg. 78,882, 78,884 (Dep't Commerce Dec. 20, 2011) (affirm. prelim. determination) (finding "wire rod with an actual diameter between 4.75 mm and 5.0 mm and subject wire rod are indistinguishable in any meaningful sense in terms of overall physical characteristics").

Although the Domestic Industry faults the court for displacing the results of the five-factor analysis that Commerce performed to reach an affirmative circumvention determination, the court disagrees that the result of that analysis controls the outcome here. *See* Domestic Indus. Cmts. 35–36. An example illustrates this point. Assume, for instance, that domestic producers of blue shirts petitioned for the imposition of an antidumping duty order on "blue shirts from Mexico." Petitioners crafted their proposed scope language knowing that red shirts were commercially available but failed to *specifically* exclude red shirts. Commerce could later initiate a minor alteration inquiry and, applying its five-factor analysis, determine that the two products are virtually identical except with regard to color. Yet this analysis would ignore that color is the very same characteristic that petitioners intentionally selected to distinguish subject merchandise from non-subject merchandise.

[6] The Domestic Industry cites a series of cases and administrative proceedings in support of the argument that the diameter restriction at issue here was not a specific exclusion from the Wire Rod Order. Domestic Indus. Cmts. 20–24. But as in *Deacero I*, the court continues to conclude that the cited cases are distinguishable. *See* 37 CIT at__, 942 F. Supp. 2d at 1331 n.5. The court also disagrees that Commerce's prior administrative proceedings compel a different result. One of the cited proceedings was a scope ruling, not a circumvention inquiry, and involved scope language with greater flexibility—namely, pasta "'sold . . . in

As the court noted in *Deacero I*, any other conclusion would risk "'frustrat[ing] the purpose of the antidumping laws' by 'allow[ing] Commerce to assess antidumping duties on products intentionally omitted from the ITC's injury investigation.'" 37 CIT at __, 942 F. Supp. 2d at 1332 n.6 (quoting *Wheatland* 161 F.3d at 1371). A contrary holding would also encourage gamesmanship from petitioners, who might narrowly frame proposed scope language to assure an affirmative injury determination and later use circumvention inquiries to cover non-subject merchandise that might have originally prompted a negative injury determination. *See id.*

In sum, the minor alterations provision must be applied carefully to reach only truly insignificant changes to subject merchandise. The court concluded that Commerce's *Final Determination* interpreted the Wire Rod Order contrary to its carefully-crafted terms and was neither supported by substantial evidence nor in accordance with law. *Id.* at 1332. Commerce has since corrected that erroneous determination under protest, and, except as noted below, the *Remand Results* are adequately supported.

II. Commerce's *Remand Results* did not conflict with the Federal Circuit's decision in *Nippon Steel Corporation v. United States*

Nucor additionally argues that Commerce's *Remand Results* conflict with the Federal Circuit's opinion in *Nippon Steel Corp. v. United States*, 219 F.3d 1348 (Fed. Cir. 2000), but Nucor's argument is premised on an overbroad interpretation of that case. *See* Nucor Cmts. 11– 12; Nucor Draft Cmts. 12–13, PRD 4 (Dec. 16, 2013), ECF No. 89 (Feb. 21, 2014). In *Nippon*, the order at issue covered certain carbon steel products, which the petition in turn defined to exclude "other alloy steel." 219 F.3d at 1350. Petitioners defined "other alloy steel" by reference to fifteen elements combined with specified percentages. *Id.* One of the fifteen elements was boron, and a product was considered "other alloy steel" if it contained 0.0008% or more of boron. *Id.* Certain Japanese manufacturers subsequently began exporting what would have otherwise been subject merchandise with small amounts of boron added above 0.0008%. *Id.* The addition of this element transformed the Japanese merchandise into "other alloy steel" that fell outside the order's scope. *See id.*

packages *typically* of five pounds or less.'" *See* Domestic Indus. Cmts. 21 (emphasis added) (quoting scope language). Lastly, the Domestic Industry cites a minor alteration inquiry where Commerce found that 17-inch diameter electrodes were circumventing an order on small diameter graphite electrodes of 16 inches or less in diameter. *See id.* The court is not familiar with the circumstances of that proceeding and declines to speculate on the reasonableness of Commerce's analysis there.

When Commerce initiated a minor alteration inquiry at the petitioners' request, a judge on this Court preliminarily enjoined Commerce's inquiry. Citing the Federal Circuit's opinion in *Wheatland*, the court concluded that the boron-altered steel products were unambiguously excluded from the order and that Commerce's inquiry was thus "'ultra vires.'" *See id.* at 1355 (quoting lower court decision). The Federal Circuit reversed the grant of injunctive relief on the basis that it was "most inappropriate for a court to 'interfere with' the ongoing administrative proceedings until Commerce 'has completed its action.'" *Id.* (quoting *McKart v. United States*, 395 U.S. 185, 194 (1969)). The Federal Circuit then distinguished *Wheatland* on procedural and substantive grounds. *Id.* at 1356. Specifically, the court noted that unlike *Nippon*, *Wheatland* involved review of final agency action and a decision *not* to initiate a minor alteration inquiry. *Id.* The court also noted that *Wheatland* involved a distinct product that was "unequivocally excluded from the order" and that was "well known when the order was issued." *Id.*

At no point in *Nippon* did the Federal Circuit state that it would have sustained an affirmative circumvention determination; the court held only that Commerce should have an opportunity to reach that determination in the first instance. *See id.* Nor did the Federal Circuit hold that all products that are not demonstrably well known to the parties during the investigation may later come within an order as a minor alteration of subject merchandise. The court thus rejects Nucor's effort to draw broader principles from *Nippon* where none exist, especially in this factually distinct case.

III. Commerce's *Remand Results* cannot be sustained on the basis provided because they are premised on the incorrect conclusion that Commerce was bound by its prior commercial availability finding

Although Commerce ultimately reached a supportable result in its *Remand Results*, demand is nonetheless necessary because Commerce arrived at that result by misinterpreting *Deacero I*. Specifically, Commerce incorrectly found that it was precluded from reconsidering its commercial availability finding on remand. *See Remand Results* 19 (recasting commercial availability as a factual finding by the court binding on Commerce); Gov't Cmts. 14 (arguing that the court "held that Commerce was bound as a matter of law by its previous commercial availability finding"). The court determined only that Defendant-Intervenors could not contest the validity of a finding when they had not satisfied the jurisdictional prerequisites for judicial review and their purpose in the litigation was to support Com-

merce's determination. *See Deacero I*, 37 CIT at __, 942 F. Supp. 2d at 1330 & n.3. In other words, the court concluded that it could not order Commerce to reconsider its commercial availability finding when Deacero did not contest that finding. The court never held that Commerce was bound by its prior finding.

Commerce's *Remand Results* are premised on a mistaken interpretation of *Deacero I*, and the court cannot sustain on the basis that Commerce has provided. Nonetheless, the court declines to order a full remand without knowing whether Commerce would have reconsidered its commercial availability finding but for its incorrect reading of *Deacero I*. Instead, the court has decided to elicit an explanation from Commerce regarding whether it seeks the court's leave to revisit the issue of commercial availability. If Commerce answers that question affirmatively, Commerce must inform the court how long it requests to conduct its inquiry and whether it plans to reopen the record. The court will then take the issue under advisement and consider whether to remand for additional proceedings.

Though the court wants to ensure that the parties are heard on the issue of commercial availability, undisputed record evidence suggests that small diameter wire rod existed in the United States and Japan at some point relatively near to the Wire Rod Order's issuance. Moreover, as discussed above, the current record does not appear to support a conclusion that the commercial production of wire rod outside of the scope boundaries was unforeseeable. Thus, even if Commerce were to reconsider and ultimately reverse its commercial availability finding, the court would likely still have concerns about the reasonableness of an affirmative circumvention determination in this case. But again, the purpose of this limited remand is solely to seek clarification from Commerce regarding its desire to reconsider its prior finding.

CONCLUSION AND ORDER

For the foregoing reasons, this matter is remanded so Commerce may consider whether it wishes to revisit or elaborate on its finding that small diameter wire rod was commercially available prior to issuance of the Wire Rod Order. Accordingly, upon consideration of all papers and proceedings in this case and upon due deliberation, it is hereby

ORDERED that the *Remand Results* are remanded to Commerce for reconsideration and redetermination in accordance with this Opinion and Order; it is further

ORDERED that Commerce shall file its response to this Opinion and Order within thirty (30) days of the date of this Opinion and Order; it is further

ORDERED that Commerce's response must articulate whether Commerce wishes to reconsider its commercial availability finding; and it is further

ORDERED that if Commerce wishes to reconsider its commercial availability finding, Commerce's response must also specify the amount of time requested to complete that inquiry and whether Commerce intends to reopen the record.

Dated: August 28, 2014
New York, New York

/s/ Richard W. Goldberg
RICHARD W. GOLDBERG
SENIOR JUDGE

Slip Op. 14–10

UNITED STATES, Plaintiff, v. TENACIOUS HOLDINGS, INC. FORMERLY KNOWN AS ERGODYNE CORP., Defendant.

Before: Gregory W. Carman, Judge
Court No. 12–00173

[Defendant's motion for referral to court-annexed mediation will be granted.]

Dated: September 2, 2014

Joshua A. Mandlebaum, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Plaintiff. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White*, Assistant Director. Of counsel on the brief was *Philip J. Hiscock*, Staff Attorney, Office of Associate Chief Counsel, U.S. Customs and Border Protection, of Chicago, IL.

John M. Peterson, *Maria E. Celis*, *Richard F. O'Neill*, and *Russell A. Semmel*, Neville Peterson LLP, of New York, NY, for Defendant.

OPINION

Carman, Judge:

Before the Court is the Motion for Referral to Court-Annexed Mediation ("Mot.") filed by Defendant Tenacious Holdings, Inc. ("Tenacious"), ECF No. 31. Plaintiff United States ("United States" or "Government") opposes the motion. *See* Pl.'s Resp. to Def.'s Mot. for an Order Referring This Matter to Mediation ("Opp."), ECF No. 32. For the reasons that follow, the Court will grant the motion and an Order of Referral to Court-Annexed Mediation will issued separately.

BACKGROUND

The United States brought this penalty case against Tenacious seeking penalties for negligent misclassification of work gloves. Compl., ECF No. 2. Prior to the initiation of this action, Tenacious had already brought an action challenging the proper classification of the same work gloves at issue in this case. *See Ergodyne Corp. v. United States*, Court No. 10–00200 ("*Ergodyne*"). *Ergodyne* is also pending before the Court.

The current schedule for this case was set by a consent amended scheduling order. Order of March 5, 2014, ECF No. 30. The current deadline for discovery is September 29, 2014, with dispositive motions to be filed on or before November 10, 2014. *Id.*

Besides the present motion for referral to mediation, the parties have filed several other motions. Three of these motions seek to resolve discovery conflicts between the parties. *See* Pl.'s Mot. to Compel Discovery Resps. and to Deem Unanswered Reqs. for Admission to be Admitted, ECF No. 33 (June 16, 2014); Def.'s Opp'n to Pl.'s Mot. to Compel, and Cross-Mot. for a Protective Order, ECF No. 34 (July 7, 2014); and Pl's Mot. for Leave to File a Reply to Def.'s Resp. to Pl.'s Mot. to Compel Discovery Resps. and to Deem Unanswered Reqs. for Admission to be Admitted, ECF No. 35 (July 11, 2014). Plaintiff and Defendant have also filed cross-motions for partial judgment seeking a resolution to the threshold legal question of the proper tariff classification of the goods at issue in this case. *See* Pl.'s Mot. for Partial Summary J., ECF No. 39 (August 5, 2014); Def.'s Cross-Mot. for Partial Summary J., ECF No. 42 (August 25, 2014).

Because the Court finds the potential benefits of mediation outweigh the risks, the motion will be granted.

DISCUSSION

Tenacious claims referral to mediation is appropriate here for six reasons. First, Tenacious claims that penalty actions are inherently suited to mediation because they often settle, given that the Court has wide latitude over the central issue of whether the defendant importer exercised reasonable care in classifying the goods at entry. Mot. at 3. Second, Tenacious notes that the approximately $50,000 amount sought by the government in penalties and unpaid duties could be exceeded by litigation expenses, giving the parties an incentive for early resolution. *Id.* at 3–4. Third, Tenacious claims that the relevant provision of the tariff schedule is so ambiguous as to make it unlikely that the negligence penalty would be found appropriate. *Id.* at 4–5. Fourth, Defendant notes that the classification provision at issue expired in 2009, so the parties have no interest in a court

judgment to guide its future application. *Id.* at 5. Fifth, Tenacious contends that the confidential forum of mediation may permit resolution without the waiver of attorney-client privilege that would be necessary if Tenacious were to invoke an advice-of-counsel defense to the negligent misclassification charge. *Id.* at 5–9. While Tenacious states that it has not yet asserted an advice-of-counsel defense, it recognizes that it may eventually have to do so. *Id.* at 8–9. Tenacious states that it "would prefer to seek a mediated resolution to this claim, if possible, so that a waiver will not become necessary," and suggests that such a waiver could impact the *Ergodyne* litigation as well. *Id.* at 8. Tenacious notes that "referral to mediation may likely enhance communication between the parties because there will be no risk that evidentiary privileges will be waived in the process" given the strict confidentiality of mediation discussions. *Id* at 8 n.4. Finally, Tenacious contends that referral to mediation will promote the goal of "just, speedy, and inexpensive" resolution embodied in the Court's rules. *Id.* at 9–10 (quoting USCIT R. 1).

The United States opposes mediation. Opp. at 1. Noting that Tenacious' motion was filed the same day that Tenacious was due to produce certain discovery materials, the government claims that "Tenacious filed the present motion in hopes of avoiding its obligation to answer the Government's outstanding discovery requests." *Id.* The government argues that it would be "a waste of time" to enter mediation before Tenacious produces discovery. *Id.* at 2. From the government's perspective, the merits of the case cannot be properly weighed in mediation without full discovery. *Id.* at 4. The government states that it is "not interested in a mediation in which Tenacious would provide a hand-picked sample of its attorney-client communications" related to a potential advice-of-counsel defense, since that would allow Tenacious to "reveal favorable advice while withholding unfavorable advice" as well as "the information that its attorneys considered before providing advice." *Id.* The government also views the case "very seriously," disagreeing with Tenacious' view that the case's relatively small dollar value and lack of precedential value for future imports make it unimportant. *Id.* at 2.

Court-annexed mediation in the Court of International Trade is governed by USCIT Rule 16.1 ("Rule 16.1") and the Guidelines for Court Annexed Mediation ("Guidelines") incorporated therein by reference. Neither the consent of the parties nor a motion is required for referral to mediation; instead, CIT judges have broad authority to make a mediation referral "[a]t any time during the pendency of an action." USCIT R. 16.1. The Guidelines provide that a CIT judge may refer a case to mediation "in response to a consent motion," "in

response to a motion from one or more parties," or "*sua sponte* by the assigned judge." Guidelines at 1. A motion by a party must be filed "not less than 30 days prior to the scheduled date for the filing of: a motion for summary judgment; a motion pursuant to USCIT Rules 56.1 or 56.2; or trial (whichever occurs first)." USCIT R. 16.1. At the time Tenacious filed its motion, the scheduled deadline for dispositive motions was November 10, 2014, making the present motion timely under Rule 16.1.[1]

The parties have not provided authority regarding the manner in which the Court should decide a contested motion for referral to mediation. The basis for determining such a motion is not mentioned in Chapter 169 of Title 28 of the United States Code (containing statutes that govern CIT procedure), the USCIT Rules, or previously-published CIT cases or decisions on appeals therefrom. It has been held, however, that a United States district court may compel mediation pursuant to its authority under local court rule, statute, the Federal Rules of Civil Procedure, or the court's inherent powers. *In re Atlantic Pipe Corp.*, 304 F.3d 135, 140 (1st Cir. 2002) ("*Atlantic Pipe*"); *see also* 1 Sarah R. Cole et al., Mediation: Law, Policy and Practice § 9:2 (2011–12 ed.) (identifying the sources of authority to order mandatory nonbinding mediation as "statutes, court rules and the court's inherent power").

Here, the Court's power to order mediation is grounded in Rule 16.1 and the Guidelines, which do not establish any express limitations on that authority. The matter is left to the Court's discretion, limited by the bounds of its inherent powers. In deciding how to exercise that discretion, it seems wise to accept guidance from the Court of Appeals for the First Circuit, which identified four limits to a district court's exercise of its inherent power to order mediation in *Atlantic Pipe*: (1) "inherent powers must be used in a way reasonably suited to the enhancement of the court's processes, including the orderly and expeditious disposition of pending cases"; (2) "inherent powers cannot be exercised in a manner that contradicts an applicable statute or rule"; (3) "the use of inherent powers must comport with procedural fairness"; and (4) "inherent powers must be exercised with restraint and discretion." *Atlantic Pipe*, 304 F.3d at 143 (internal quotations and citations omitted).

In evaluating whether mediation may assist in the orderly and expeditious disposition of this case, the Court has given careful consideration to the objections of the government. Although the govern-

[1] The Court notes that, after this motion became ripe and almost three months prior to the November 10, 2014 motion deadline, the government filed a motion for partial summary judgment. *See* Pl.'s Mot. for Partial Summary J., ECF No. 39 (August 5, 2014).

ment is opposed to the idea that mediation may be successful, the Court is mindful that "the results of mandatory mediation resemble those achieved in voluntary mediation in terms of settlement rates and party satisfaction." Cole et al., *supra*, § 9.2. Tenacious is correct that mediation is more likely to be successful given that the amount in dispute here is relatively low and the tariff provision at issue is no longer in effect and therefore resolution of this case is unlikely to impact future cases. Noting these practical factors does not suggest that the case is unimportant, merely that it may be amenable to early resolution. Ordering mediation is consistent with Rule 16.1 and the Guidelines. Since there are no fees for court-annexed mediation in the CIT, the financial concerns that sometimes arise with mediation referrals are inapplicable. Referral to mediation will not cause any procedural unfairness, since the discovery issues at the core of the government's concerns will be fully addressable by order of the Court should mediation be unsuccessful. Although the Court acknowledges the government's concerns about mediating without the robust information that it would have after the completion of discovery, the Court does not agree that mediation is bound to fail at this stage. Many cases are resolved in mediation prior to the production of all discovery, and Rule 16.1 and the Guidelines clearly contemplate referrals to mediation prior to the completion of discovery. The government cannot accurately prejudge what information Tenacious may produce in the confidential setting of mediation; if the government approaches the process with good faith, as the Court expects it to do, it may be surprised to find that the case is more amenable to disposition than the government fears.

CONCLUSION

For the foregoing reasons, Defendant's motion will be granted. An Order of Referral to Court-Annexed mediation will issue separately.

Dated: September 2, 2014
New York, NY

/s/Gregory W. Carman
GREGORY W. CARMAN, JUDGE

Slip Op. 14–102

PAPIERFABRIK AUGUST KOEHLER SE, Plaintiff v. UNITED STATES, Defendant, and APPLETON PAPERS INC., Defendant-Intervenor.

Before: Nicholas Tsoucalas
Senior Judge
Court No.: 13–00163
PUBLIC VERSION

[Plaintiff's motion for judgment on the agency record is denied.]

Dated: September 3, 2014

F. Amanda DeBusk, Matthew R. Nicely, John F. Wood, Eric S. Parnes, Lynn G. Kamarck, and *Alexandra B. Hess*, Hughes Hubbard & Reed LLP, of Washington, DC, for plaintiff.

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 *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Jessica M. Forton*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Daniel L. Schneiderman and *Gilbert B. Kaplan*, King & Spalding LLP, of Washington, DC, for defendant-intervenor.

OPINION

Tsoucalas, Senior Judge

Plaintiff Papierfabrik August Koehler SE ("Koehler") moves for judgment on the agency record contesting the determination of the U.S. Department of Commerce ("Commerce") in *Lightweight Thermal Paper From Germany: Final Results of Antidumping Duty Administrative Review; 2010–2011*, 78 Fed. Reg. 23,220 (Apr. 18, 2013) ("*Final Results*"). Commerce and defendant-intervenor Appvion, Inc. ("Appvion"),[1] oppose Koehler's motion. For the following reasons, Koehler's motion is denied.

BACKGROUND

Commerce initiated the third administrative review ("AR3") of lightweight thermal paper ("LWTP") from Germany in December 2011. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 76 Fed. Reg. 82,268, 82,269 (Dec. 30, 2011). At the onset, Commerce requested

[1] In May 2013, Appleton Papers Inc. changed its name to Appvion, Inc. *See* Letter to Clerk of the Court, ECF No. 25 (June 21, 2013).

data on Koehler's home market sales, U.S. sales, and costs. Sales Questionnaire (Jan. 6, 2012), Public Rec. [2] 9–12.

Koehler provided timely responses to Commerce's questionnaire and certified to the accuracy and completeness of its responses. *See* Koehler Resp. § A Questionnaire (Feb. 21, 2012), CR 2–4; Koehler Resp. §§ B&C Questionnaire (Feb. 27, 2012), CR 5–14. On May 16, 2012, Commerce issued a supplemental questionnaire requesting that Koehler clarify certain responses. *See* First Supplemental Questionnaire (May 16, 2012), CR 47.

On May 18, 2012, the last day to submit new factual information, Appvion submitted an affidavit from a confidential source regarding Koehler's home market sales. *See* Submission of New Factual Information at 2–3 & Exh. 1 (May 18, 2012), CR 49 ("May 18th Letter"). Although Appvion withheld certain information from disclosure, it provided a public summary in which it alleged that Koehler "engaged in a scheme to defraud [Commerce] by intentionally concealing certain otherwise reportable home market transactions." *Id.* at 2. Specifically, Appvion claimed that Koehler was "selling 48 gram thermal paper that it knows is destined for consumption in Germany through various intermediaries in third-countries." *Id.* at 2–3. Appvion further alleged that Koehler undertook this transshipment scheme "to artificially manipulate prices attributable to those sales of 48 gram paper shipped directly to its German customers." *Id.* at 3.

Koehler initially denied the allegations, and objected to Appvion's bracketing[3] of certain information in its submission. *See* Objections of Koehler to Over-Bracketing of Petitioner's May 18 New Fictional Information Letter at 1–8 (May 23, 2012), PR 92. Commerce requested that Appvion provide further justification for its bracketing of certain information, *see* Letter to Appvion re: Submission of New Factual Information at 1 (June 1, 2012), PR 98, but did not require disclosure. Koehler also requested an extension of time to submit its supplemental questionnaire response ("SQR") and respond to Appvion's allegations, Request for Add'l Extension of Deadline for Submission of First SQR at 1–2 (June 4, 2012), PR 99, which Commerce granted in part. *See* Second Request for Extension of SQR at 1 (June 5, 2012), PR 100.

In its SQR, Koehler admitted that "certain sales of 48 gram [LWTP], which were shipped to a third country, were ultimately

[2] Hereinafter, documents in the public record will be designated "PR" and documents in the confidential record will be designated "CR" without further specification except where relevant.

[3] Single-bracketed information is confidential information that is disclosed in accordance with an administrative protective order. Double-bracketed information is confidential information that is exempt from disclosure under an administrative protective order.

delivered to customers in the German market, and should have been reported by Koehler as home market transactions."[4] SQR at 1 (June 27, 2012), CR 66. It described the nature of the transshipment arrangements: Koehler shipped merchandise to intermediaries outside of Germany [[

]]; the intermediaries [[

]] shipped it directly to the customer in Germany. *Id.* at 2–3. According to Koehler, "[t]he impact of this shipping arrangement was to [[

]]." *Id.* at 2. It further explained that it made these arrangements in order to make home market sales "[[

]]." *Id.* at 3. Despite this admission, Koehler claimed that "these acts and omissions were undertaken without the authority or knowledge of the Chief Executive Officer, the Chief Financial Officer, the in-house counsel, or the Board of Directors of Koehler." *Id.* at 1.

Koehler also submitted new home market sales data including the transshipped sales it omitted from its initial questionnaire response. *Id*., Exh. S1–27. Commerce rejected this data as "untimely filed factual information that was not solicited" in the supplemental questionnaire. Rejection of Factual Information Submission Filed by Koehler at 1 (July 5, 2012), PR 108. Koehler subsequently refiled its SQR without the transshipped sales data. Resubmission of Portion of SQR (Aug. 2, 2012), CR 90.

Commerce issued its preliminary determination in December 2012. *LWTP From Germany; Preliminary Results of Antidumping Duty Administrative Review; 2010–2011*, 77 Fed. Reg. 73,615 (Dec. 11, 2012) ("*Preliminary Results*"). Because Koehler transshipped certain home market sales and then omitted those sales from its initial questionnaire responses, Commerce preliminarily applied total adverse facts available ("AFA"). *See* Preliminary Results of Antidumping Duty Administrative Review: Application of Total AFA to Koehler at 1, 11–16 (Dec. 3, 2012), CR 99. It selected the petition rate of 75.36% as the AFA rate. *Id.* at 17. In its final determination, Commerce upheld the *Preliminary Results* in their entirety. *See Issues and Decision Memorandum for the Final Results of the 2010–2011 Administrative Review on LWTP from Germany* at 1 (Apr. 11, 2013), PR 176.

[4] Although Koehler initially bracketed the majority of its admission as confidential information, certain statements were discussed publicly during AR3 and in the briefs.

JURISDICTION and STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012) and section 516A(a)(2)(B)(iii) of the Tariff Act of 1930,[5] as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012).

The Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). 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

Koehler contests several aspects of the *Final Results*, including: Commerce's decision to reject its corrected sales data and apply AFA; Commerce's decision to apply total AFA; and Commerce's selection of the petition rate as Koehler's AFA rate. *See* Pl.'s Mem. Supp. R. 56.2 Mot. J. Agency R. at 12–15 ("Pl.'s Mem."). Because the *Final Results* were supported by substantial evidence and consistent with law, Koehler's motion must be denied.

I. Legal Framework for Application of AFA

Commerce may rely on facts otherwise available where "necessary information is not available on the record" or a party "withholds information that has been requested by [Commerce]," "fails to provide such information by the deadlines for submission of the information or in the form and manner requested," "significantly impedes a proceeding," or provides information that "cannot be verified." 19 U.S.C. § 1677e(a).

Where a submission is deficient, Commerce "shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits." *Id.* § 1677m(d). If the response is unsatisfactory or untimely, Commerce may "disregard all or part of the original and subsequent responses." *Id.*

Notwithstanding a partial deficiency, Commerce "shall not decline to consider" necessary information if (1) "the information is submitted by the deadline established for its submission," (2) "the information can be verified," (3) "the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination," (4) "the interested party has demonstrated that it acted to

[5] Further citations to the Tariff Act of 1930 are to the relevant portions of Title 19 of the U.S. Code, 2012 edition.

the best of its ability in providing the information and meeting the requirements established by [Commerce] with respect to the information," and (5) "the information can be used without undue difficulties." *Id.* § 1677m(e). The submission must satisfy all five conditions. *Id.*

Commerce may make an adverse inference in selecting from amongst the facts available if the respondent "fail[s] to cooperate by not acting to the best of its ability to comply with a request for information." *Id.* § 1677e(b). Commerce may use information from the petition, the investigation, a prior administrative review, or other information on the record. *Id.* When relying on secondary information, Commerce "shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." *Id.* § 1677e(c).

II. Commerce's decision to apply AFA was supported by substantial evidence and consistent with law.

Commerce applied AFA because Koehler failed to cooperate to the best of its ability with its request for complete and accurate home market sales data. *See* CR 99 at 13–16. Koehler argues that Commerce's decision to apply AFA was erroneous because Commerce ignored certain "key facts" demonstrating that it cooperated with the review and because Commerce improperly rejected the corrected home market sales data that would have enabled Commerce to calculate an accurate dumping margin. *See* Pl.'s Mem. at 16–37. Because Commerce's decision to apply AFA was reasonable, the court rejects both of these arguments.

A. Koehler did not cooperate to the best of its ability with Commerce's request for home market sales data.

As noted above, Commerce may apply AFA where "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b). "Compliance with the 'best of its ability' standard is determined by assessing whether the respondent has put forth its maximum effort to provide Commerce with full and complete answers" to a request for information. *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

Here, Koehler's admissions provided Commerce with evidence of its failure to cooperate. Koehler concealed the German destination of certain sales by transshipping merchandise through intermediaries outside of Germany. *See* SQR at 1–4. It arranged the transshipments so as to make home market sales at prices that would have resulted

in the dumping of its U.S. sales. *See id.* at 3. And, when Commerce requested that Koehler provide complete and accurate home market sales data, Koehler omitted these sales from its response. *Id.* at 1. Koehler did not attempt to provide a full reporting of its home market sales until Appvion produced evidence of the transshipments. *See* CR 49; SQR, Exh. S1–27. At a minimum, this evidence demonstrates that Koehler did not "put forth its maximum effort to provide Commerce with full and complete answers" to a request for information. *Nippon*, 337 F.3d at 1382.

Despite its admissions, Koehler contends that Commerce's conclusion was erroneous. *See* Pl.'s Mem. at 16–22, 36–37. According to Koehler, "rogue employees" arranged the transshipments without the knowledge or consent of their "supervisors" or Koehler's "senior management." *Id.* at 17. Insisting that its "senior management" did not discover the transshipments until after the May 18th Letter, Koehler essentially claims that its omissions were inadvertent. *Id.* at 18–19. Koehler argues that it fully cooperated after this discovery, investigating its home market sales reporting, disciplining responsible employees, safeguarding against future misconduct, and submitting complete home market sales data. Id. at 19–21. Koehler claims that Commerce disregarded this evidence and thus erroneously imposed AFA. *Id.* at 22. Koehler also argues that, at the very least, Commerce should have considered these facts as mitigating evidence, as other government agencies might in their proceedings. *See id.* at 19 n.3, 22. This alternative interpretation of the record, however, is neither legally nor factually sufficient to warrant overturning Commerce's decision.

First, Koehler's argument that "supervisors" and "senior management" were unaware of the transshipments is not supported by the record. The sole basis for this argument is Koehler's own statement that its Chief Executive Officer, Chief Financial Officer, in-house counsel, and directors were unaware of the transshipments. *See* SQR at 1. However, Koehler did not provide Commerce with any evidence supporting this claim during the review, and its attempt to extend this claim to the vaguely-titled "supervisors" and "senior management" is similarly undocumented. *Id.* In fact, Koehler admitted that [[

]]. *See id.* at 4–5 ("[[

]].").

Regardless, the "best of its ability" standard "does not condone inattentiveness, carelessness, or inadequate record keeping." *Nippon*,

337 F.3d at 1382. Koehler was an "interested party" to the review. *See* 19 U.S.C. § 1677(9) (defining an interested party as "a foreign manufacturer, producer, or exporter . . . of subject merchandise . . . ."). As such, Koehler was required to "have familiarity with all of the records it maintains" and "conduct prompt, careful, and comprehensive investigations of all relevant records." *Nippon,* 337 F.3d at 1382. Accordingly, Commerce reasonably concluded that "Koehler [was] responsible for the actions of its entire company, especially any actions that may have an effect on its reporting to [Commerce]." CR 99 at 14.

Furthermore, Koehler's remedial efforts did not reestablish its cooperation with the review. As Commerce noted, Koehler began these efforts only *after* it was confronted with allegations of misconduct. *Id.* at 15. Commerce reasonably concluded that these efforts failed to "restore [its] confidence in the reliability of [Koehler's] home market sales data." *Id.* at 16; *see Tianjin Magnesium Int'l Co. v. United States,* 36 CIT __, __, 844 F. Supp. 2d 1342, 1348 (2012) (Tsoucalas, J.) (Commerce's argument that, "other than the established fabrications," the respondent fully cooperated was inconsistent with the purpose of AFA). And, Koehler fails to identify any authority requiring Commerce to consider these actions as a mitigating factor in its determination.[6] In light of Koehler's conduct, Commerce reasonably determined that Koehler failed to cooperate to the best of its ability. *See* Nippon Steel, 337 F.3d at 1382.

B. Commerce's decision to reject Koehler's untimely submission of the previously unreported home market sales data was proper.

Koehler also argues that Commerce's decision to apply AFA was wrongful because it provided Commerce with the initially unreported data. Pl.'s Mem. at 22–23. According to Koehler, Commerce was required to accept and utilize this data, and its decision to reject the data violated 19 U.S.C. § 1677m(d) and (e). *See id.* at 23–35. Koehler also argues that this decision was arbitrary and an abuse of discretion. Id. at 25, 26–29.

Koehler submitted the corrected data along with its SQR on June 27, 2012, well after the deadlines for home market sales information and new factual information expired. *See* SQR, Exh. S1–27 (June 27, 2012). Although Koehler claims that Commerce indicated that it would accept this data when granting Koehler's extension request,

[6] Commerce insists that the court should not address this argument because Koehler did not raise it at the administrative level. *See* Def.'s Mem. Opp'n Pl.'s R. 56.2 Mot. J. Agency R. at 37. Because there is no authority supporting Koehler's argument, the court does not need to address this exhaustion claim.

Commerce did not make any such representation. *See* PR 100 at 1 (partially granting Koehler's request for an extension of time to reply to the supplemental questionnaire). Koehler's submission of its home market sales data was untimely because, as noted above, it failed to cooperate with Commerce's initial request for that data. Although Koehler claims that Commerce's sole reason for rejecting the data was timeliness, Commerce found that Koehler did not cooperate during the review. *See* CR 99 at 11; PR 176 at 12. Because Koehler's submission did not satisfy all five conditions of section 1677m(e), Commerce was not obligated to accept it.[7] *See* 19 U.S.C. § 1677m(e).

For similar reasons, Commerce was not required to accept Koehler's submission under 19 U.S.C. § 1677m(d). This Court has held that the "remedial provisions" of section 1677m(d) "are not triggered unless the respondent has met *all* of the five enumerated criteria" of section 1677m(e). *Tung Mung Dev. Co. v. United States,* 25 CIT 752, 789 (2001). Regardless, Commerce provided Koehler with an opportunity to explain the omissions from its initial questionnaire responses. *See* SQR at 1–5; 19 U.S.C. § 1677m(d) (directing Commerce to provide a party "with an opportunity to remedy or explain the deficiency"). As noted above, this explanation served as the basis for Commerce's AFA decision.

And, Commerce's decision was not an abuse of discretion, as Koehler claims. Citing *NTN Bearing Corp. v. United States,* and *Timken U.S. Corp. v. United States,* Koehler argues that Commerce abused its discretion because it had ample time to analyze and use the correct data during the review. *See* Pl.'s Mem. at 27. "Commerce has broad discretion to establish its own rules governing administrative procedures, including the establishment and enforcement of time limits." *Yantai Timken Co. v. United States*, 31 CIT 1741, 1755, 521 F. Supp. 2d 1356, 1370 (2007). Although the cases Koehler cites limit Commerce's discretion to reject untimely corrective submissions prior to the final results stage, they are inapplicable here because they do not involve a failure to cooperate. *Timken U.S.,* 434 F.3d 1345, 1352–54 (Fed. Cir. 2006); *NTN Bearing,* 74 F.3d 1204, 1207–08 (Fed. Cir. 1995). Commerce's decision here was proper given Koehler's failure to cooperate. *Yantai Timken,* 31 CIT at 1755, 521 F. Supp. 2d at 1370.

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[7] Koehler argues that Commerce erroneously determined that its sales data was unverifiable because Commerce subsequently verified Koehler's sales data, including transshipped sales, during the fourth administrative review ("AR4"). *See* Notice of Supplemental Authority at 1–2 (July 9, 2014), ECF No. 113. However, because Koehler cooperated during AR4, providing Commerce with timely and complete home market sales data, the facts of AR4 differ from the instant case. *See Issues and Decision Memorandum for the 2011–2012 Final Results of the Administrative Review on LWTP from* Germany at 15 (June 11, 2014). Regardless, Koehler's submission did not satisfy section 1677m(e).

Finally, Koehler insists that Commerce arbitrarily enforced the deadline for new factual information because it subsequently accepted Appvion's July 9, 2012 submission. Pl.'s Mem. at 25. This is simply incorrect. An interested party may "submit factual information to rebut, clarify, or correct factual information" in a supplemental questionnaire response within ten days of that response. 19 C.F.R. § 351.301(c)(1)(v) (2012). Appvion's submission was a timely rebuttal of the SQR, therefore Commerce properly accepted that information. *Id.*

Ultimately, the court finds no reason to overturn Commerce's decision to apply AFA.

III. Commerce reasonably applied total AFA.

Next, Koehler argues that even if AFA was appropriate, application of total AFA was not. *See* Pl.'s Mem at 37. Koehler contends that its conduct affected only a discrete amount of sales and Commerce erroneously ignored the home market sales, U.S. sales, and costs data that Koehler properly submitted. *See id.* at 39–40. According to Koehler, Commerce had no basis to apply total AFA because it could still calculate an accurate margin. *Id.* It insists that Commerce could have used the properly submitted data to calculate the dumping margin, while using sales data for products similar to the transshipped merchandise to fill the gap in the record. *Id.* at 42. Koehler adds that in prior cases where fraudulent conduct justified the application of total AFA, the respondent's conduct was far more egregious than its own. *See* Pl.'s Reply Br. at 5–8.

The term total AFA is not defined by statute. Commerce uses the term "total AFA" to refer to the "application of [AFA] not only to the facts pertaining to specific sales for which information was not provided, but to the facts respecting all of respondents' sales encompassed by the relevant antidumping duty order." *Shandong Huarong Mach. Co. v. United States,* 30 CIT 1269, 1271 n.2, 435 F. Supp. 2d 1261, 1265 n.2 (2006). Accordingly, total AFA is appropriate "where none of the reported data is reliable or usable." *Zhejiang Dunan Hetian Metal Co. v. United States,* 652 F.3d 1333, 1348 (Fed. Cir. 2011). Additionally, the Court has found Commerce's reliance upon total AFA proper where missing information was "core, not tangential." *Since Hardware (Guangzhou) Co. v. United States,* 34 CIT __, __, Slip Op. 10–108 at 21 (Sept. 27, 2010) (citing *Shanghai Taoen Int'l Trading Co. v. United States*, 29 CIT 189, 199 n.13, 360 F. Supp. 2d. 1339, 1348 n.13 (2005)). In contrast, Commerce properly relies on partial AFA where the deficiency is only "with respect to a discrete

category of information." *Foshan Shunde Yongjian Housewares & Hardware Co. v. United States,* 35 CIT __, __, Slip Op. 11–123 at 33 (Oct. 12, 2011).

As noted above, Commerce may not discard information if it satisfies the five enumerated conditions of section 1677m(e). *See* 19 U.S.C. § 1677m(e). However, this Court previously found it reasonable for Commerce to interpret the term "information" in section 1677m(e) to encompass "all the information submitted by an interested party." *Steel Auth. of India v. United States,* 25 CIT 482, 486, 149 F. Supp. 2d 921, 928 (2001); *see Mukand, Ltd. v. United States,* 38 CIT __, __, Slip Op. 13–41 at 13 (Mar. 25, 2013) (acknowledging that Commerce's interpretation of "information" is reasonable). The Court recognized that "if [Commerce] were forced to use the partial information submitted by respondents, interested parties would be able to manipulate the process by submitting only beneficial information." *Steel Auth.*, 25 CIT at 487, 149 F. Supp. 2d at 928. And, as a result, "[r]espondents, not [Commerce], would have the ultimate control to determine what information would be used for the margin calculation[,]" which would be "in direct contradiction to the policy behind the use of facts available." *Id.*, 149 F. Supp. 2d at 928.

Here, Commerce applied total AFA because Koehler's conduct "undermin[ed] the credibility and reliability of Koehler's data overall," and "significantly imped[ed] [Commerce]'s ability to conduct the instant review." CR 99 at 12. It found that Koehler's failure to report the transshipped sales was a "material omission" that prevented Commerce from "rely[ing] upon any of Koehler's submitted information to calculate an accurate dumping margin." *Id.* Without reliable sales data, Commerce determined that it could not calculate the normal value and was "unable to perform any comparisons to U.S. prices." *Id.* at 13. Accordingly, Commerce concluded that total AFA, rather than partial AFA, was appropriate. *Id.*

Commerce's decision to apply total AFA was reasonable. This was not, as Koehler suggests, a case where the respondent's conduct affected only a discrete category of information. *Cf. Gerber Food (Yunnan) Co. v. United States,* 29 CIT 753, 764–67, 387 F. Supp. 2d 1270, 1281–83 (2005) (total AFA was inappropriate where respondent's failure to disclose its export agency arrangement did not affect the data necessary to calculate the dumping margin). Koehler views its conduct too narrowly. Here, Koehler manipulated its sales data by concealing certain home market sales detrimental to its dumping margin. *See* SQR at 1–4. The effects of this conduct extended beyond the omitted sales because Commerce could not make the comparisons between the normal value and U.S. prices necessary for calculating

the dumping margin. *See Steel Auth.,* 25 CIT at 486, 149 F. Supp. 2d at 927 (recognizing that accurate home market sales, U.S. sales, costs, and constructed value data are "necessary" to the dumping margin calculation). Because Koehler's sales data was incomplete and unreliable, Commerce reasonably concluded that it could not calculate the dumping margin using this data. *See Mukand,* 37 CIT at __, Slip Op. 13–41 at 14 (the respondent's "persistent failure to report size-based costs made the remaining information so incomplete that it could not 'serve as a reliable basis for reaching a final determination'"); *Steel Auth.,* 25 CIT at 487, 149 F. Supp. 2d at 928 (total AFA was appropriate where respondent provided "flawed and unverifiable" data necessary to calculate the dumping margin).

Koehler's insistence that Commerce could have simply applied partial AFA by plugging in Koehler's home market sales data for products other than 48-gram LWTP in place of the transshipped sales is unconvincing. As noted above, Commerce controls the dumping margin calculation, not the respondent. *See Steel Auth.,* 25 CIT at 487, 149 F. Supp. 2d at 928. Commerce could not determine the dumping margin without complete and reliable sales data and, therefore, reasonably declined to use the selectively submitted information of an uncooperative respondent. *Id.*, 149 F. Supp. 2d at 928.

And, contrary to Koehler's claims, the relative egregiousness of Koehler's conduct does not distinguish this case. Koehler insists that Commerce erroneously compared the instant case to those in which parties destroyed, hid, and forged documents, or repeatedly submitted false documents. *See* Pl.'s Reply Br. at 5–8. Koehler contends that, in contrast to those cases, it "engaged in consistent efforts to provide accurate information to Commerce." *Id.* at 8. But this argument is unavailing because it does not alter the fact that Koehler concealed sales information from Commerce that was essential to calculating the dumping margin. SQR at 1–4. That other companies engaged in conduct that was possibly more egregious does not undermine Commerce's decision. Commerce determined that it could not calculate the dumping margin based on Koehler's data and, therefore, reasonably applied total AFA. *Steel Auth.*, 25 CIT at 487, 149 F. Supp. 2d at 928.

IV. Commerce properly selected and corroborated the AFA rate.

The final issue before the court concerns Commerce's selection of the petition rate as the AFA rate. A margin based upon AFA must be "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance." *F.Lli de Cecco di Filippo Fara S. Martino S.p.A. v. United States,* 216 F.3d 1027, 1032 (Fed. Cir. 2000). "[A]lthough a

higher AFA rate creates a stronger deterrent, Commerce may not select unreasonably high rates having no relationship to the respondent's actual dumping margin." *Gallant Ocean (Thai.) Co. v. United States,* 602 F.3d 1319, 1323 (Fed. Cir. 2010) (citing *de Cecco*, 216 F.3d at 1032). "Commerce must select secondary information that has some grounding in commercial reality." *Id.* at 1324.

These standards grow out of 19 U.S.C. § 1677e(c), which provides that when Commerce relies on secondary information, it "shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." 19 U.S.C. § 1677e(c). To corroborate secondary information, Commerce must find that it has "probative value." *KYD, Inc. v. United States,* 607 F.3d 760, 765 (Fed. Cir. 2010). Secondary information has "probative value" if it is both reliable and relevant to the respondent. *Mittal Steel Galati S.A. v. United* States, 31 CIT 730, 734, 491 F. Supp. 2d 1273, 1278 (2007).

First, Koehler challenges Commerce's use of the petition rate. *See* Pl.'s Mem. at 44–47. Koehler insists that petition rates are "inherently unreliable," and that the 75.36% figure has been "discredited" by individual rates Commerce assigned Koehler during the investigation and subsequent reviews. *Id.* at 44–45. Koehler adds that the petition rate does not reflect commercial reality because it was over eleven times higher than Koehler's previous highest margin, based on another company's information, and derived from a constructed value methodology. *Id.* at 45–47. These arguments are unavailing, however, because Commerce is expressly permitted by statute to rely on secondary information such as the petition rate when applying AFA. *See* 19 U.S.C. § 1677e(b); *Hubscher Ribbon Corp. v. United States,* 38 CIT __, __, 979 F. Supp. 2d 1360, 1369 (2014) ("Although courts are generally suspicious of petition rates, . . . Congress has not foreclosed their use."). Commerce's reliance on the petition rate is proper insofar as it establishes the commercial reality of that rate with adequate corroboration. 19 U.S.C. § 1677e(c).

Furthermore, Koehler's previous margins are not indicative of its commercial reality during AR3 and are, in fact, inadequate for the purpose of establishing Koehler's AFA rate. Koehler cooperated during the investigation and the first review, but during AR3 Koehler concealed sales that would have resulted in a higher normal value and, accordingly, a higher dumping margin. SQR at 1–4. Accordingly, it was reasonable for Commerce to reject the established rates and instead select a rate which accounted for this conduct along with a "built-in increase" for deterrence purposes. *See de Cecco*, 216 F.3d at 1032.

Turning to Commerce's corroboration exercise, Commerce relied upon transaction-specific margins for Koehler's sales during the second administrative review ("AR2"). *See* PR 99 at 18. Although it noted that sources of corroboration were limited, Commerce found that the transaction-specific margins reflected commercial reality because they were based upon Koehler's actual sales data from the previous period of review. *See* PR 176 at 18–19. And, because the petition rate "fell within the range" of these transaction-specific margins, which stretched as high as 144.625%, Commerce found that the petition rate was probative of Koehler's commercial reality. *Id.* at 19. Commerce acknowledged that the 144.625% margin was the only margin above the petition rate, but continued to rely on the data because: (1) the petition rate was significantly lower than the 144.625% margin; (2) the transaction-specific margins did not account for the sales Koehler transshipped during AR2, which would have increased the margins; and (3) the CAFC found that Commerce may rely on a respondent's transaction-specific margins as corroboration even if only a small percentage exceed the AFA rate. *See id.* at 19–20.

Koehler insists that this was inadequate because Commerce solely relied on the single transaction-specific margin above the petition rate out of the [[ ]] observations during AR2, roughly [[ ]]% of all observations. Pl.'s Mem. at 49–50. It compares this case to *Gallant Ocean,* noting that corroboration was improper there "because Commerce did not identify any relationship between the small number of unusually high dumping transactions with Gallant's actual rate." *Id.* at 52 (citing *Gallant Ocean,* 602 F.3d at 1324). Koehler also argues that Commerce's reliance on the 144.625% margin was unreasonable because the sale was actually an "error," as demonstrated by the low quantity and price.[8] *Id.* at 51.

The court finds that Commerce adequately corroborated the petition rate. Here, Commerce tied the petition rate to Koehler's commercial reality using Koehler's actual sales data. CR 99 at 19; *cf. Gallant Ocean,* 602 F.3d at 1324 (Commerce failed to connect Gallant's commercial reality to a small amount of data sourced from

[8] Koehler also argues that Commerce cannot rely on Koehler's AR2data because it found that data to be unreliable and applied total AFA during the remand of AR2. Notice of Supplemental Authority at1–3 (July 2, 2014), ECF No. 109. According to Koehler, "Commerce cannot have it both ways," the data cannot be both reliable and unreliable. *Id.* at 3. However, the remand results of AR2 are not on the record of AR3. *See QVD Food Co. v. United States*, 658 F.3d1318, 1324–25 (Fed. Cir. 2011) ("Judicial review of antidumping duty administrative proceedings is normally limited to the record before the agency in the particular review proceeding at issue and does not extend to subsequent proceedings."). Moreover, that Commerce found Koehler's data to be unreliable for the purpose of calculating a weighted average dumping margin does not affect its use of transaction-specific margins from that data for the separate purpose of corroborating an AFA rate.

other respondents during a different proceeding). Although only one sale from AR2 produced a margin above the petition rate, that sale established an upper-limit for the range of transaction-specific margins in which the petition rate fell. *See PAM, S.p.A. v. United States,* 582 F.3d 1336, 1340 (Fed. Cir. 2009) (finding that Commerce's corroboration analysis was reasonable even though only 0.5% of the transactions produced margins exceeding the AFA rate). Courts have questioned Commerce's ability to establish a respondent's commercial reality with a small amount of data, *see Dongguan Sunrise Furniture Co. v. United States,* 37 CIT __, __, 931 F. Supp. 2d 1346, 1356 (2013) (finding that "Commerce's reliance on minuscule percentages of sales to determine the partial AFA rates" was unreasonable); *but see PAM,* 582 F.3d at 1340, but the facts of this case substantially support Commerce's reliance on the transaction-specific margins.

First, as a result of Koehler's conduct, the record lacked data essential to establishing Koehler's commercial reality. This Court has recognized that corroboration may be "less than ideal" where the sole respondent in a proceeding fails to cooperate "because the uncooperative acts of the respondent has deprived Commerce of the very information that it needs to link an AFA rate to [respondent's] commercial reality." *Hubscher,* 38 CIT at __, 979 F. Supp. 2d at 1369 (quoting *Qingdao Taifa Group Co. v. United States,* 35 CIT __, __, 780 F. Supp. 2d 1342, 1349 (2011)). This was certainly the case here: Koehler was the sole respondent and omitted sales data necessary to determine its commercial reality. SQR at 1–4. In contrast, Commerce had established rates for "over a dozen" mandatory respondents in *Gallant Ocean. See Gallant Ocean*, 602 F.3d at 1324.

Furthermore, the AR2 margins are artificially low. As Koehler admitted, it began transshipping merchandise during the review period of AR2. *See* SQR at 1–2. Accordingly, the normal value Commerce used to calculate the transaction-specific margins did not include some of the highest-priced home market sales. PR 176 at 19–20. Although the extent to which these sales would have raised the margins is unclear, it was reasonable for Commerce to conclude that the actual AR2 margins exceeded those which Commerce calculated using the data Koehler provided. *Id.* at 20.

Moreover, there is no evidence that Commerce simply "cherry-picked" the highest margin, as Koehler insists. Commerce did not select the 144.625% margin as Koehler's actual AFA rate, but instead used it to establish an upper boundary for a range of transactions that reflected Koehler's commercial reality. *See* PR 176 at 19. And, in fact, the petition rate was well below the 144.625% margin. *See id.*

Koehler's argument that the 144.625% margin was aberrational is also unpersuasive. Koehler claims that there is evidence to demonstrate this fact, but it did not request that Commerce reopen the record for this evidence until its case brief. *See* Koehler's Case Brief at 49 (Jan. 17, 2013), CR 101. Despite its claim that it did not have an opportunity to present any evidence against the AR2 data until this stage, *see* Pl.'s Mem. at 51, the record indicates that Appvion placed the AR2 data onto the record of AR3 in May 2012, *see* May 18th Letter, Exh. 35, CR 55, and requested that Commerce use the 144.625% margin as the AFA rate in July 2012. *See* Response to Koehler's July 16, 2012 Letter at 10–11 (July 24, 2012), CR 88. Thus, Koehler was aware that Commerce might use the AR2 data and had an opportunity to respond to Appvion's arguments earlier in the review, but failed to act.

Without any explanatory evidence concerning the sale at issue, Koehler simply argues that Commerce cannot rely on the sale because it had a lower quantity and lower price than the other U.S. sales. *See* Pl.'s Mem. at 49–51. However, Commerce reasonably determined that the numerical differences alone were insufficient to undermine the reliability of the 144.625% margin. *See PSC VSMPO -AVISMA Corp. v. United States,* 35 CIT __, __, 755 F. Supp. 2d 1330, 1338 & n.10 (2011), *aff'd* 498 Fed. App'x 995 (Fed. Cir. 2013) (the fact that a sale had the highest transaction-specific margin "by a wide margin" was insufficient to show that the sale was "irregular" or "aberrational"); *U.S. Steel Corp. v. United States,* 34 CIT __, __, 712 F. Supp. 2d 1330, 1342 (2010) (rejecting Plaintiff's "attempts to prove distortion simply by pointing to contrasting figures"). Accordingly, Commerce reasonably concluded that the sale was part of Koehler's commercial experience.

Ultimately, Commerce properly determined that the petition rate was a reasonably accurate estimate of Koehler's commercial reality with a "built-in increase" for deterrence purposes. *See de Cecco*, 216 F.3d at 1032. Although the petition rate exceeded Koehler's previous margins,[9] it was not punitive because it was properly corroborated.

[9] Koehler also compared the petition rate to a 2.71% margin it calculated using the data it submitted, including the rejected home market sales data. Pl.'s Reply Br. at 32–33. Koehler claims this data was on the record, but Commerce retained the submissions" solely for the purposes of establishing and documenting the basis for its decision for rejecting the documents." PR 108 at 2; 19 C.F.R. § 351.104(a)(2)(ii). Because this data was not part of the record for the *Final Results*, the court declines to consider the 2.71% rate. *See QVD*, 658 F.3d at 1324–25.

See KYD, 607 F.3d at 768 ("[A]n AFA dumping margin determined in accordance with the statutory requirements is not a punitive measure."). Accordingly, Commerce properly selected the AFA rate. 19 U.S.C. § 1677e(c).

CONCLUSION

In accordance with the foregoing, the court finds that the *Final Results* were supported by substantial evidence and in accordance with law in their entirety. Plaintiff's motion is denied in full. Judgment will be entered accordingly.

Dated: September 3, 2014
New York, New York

/s/ Nicholas Tsoucalas
NICHOLAS TSOUCALAS
SENIOR JUDGE