

## Slip Op 11–2

KING SUPPLY COMPANY LLC, D/B/A KING ARCHITECTURAL METALS, Plaintiff, v. UNITED STATES, Defendant, and WELDBEND CORP., TUBE FORGINGS OF AMERICA INC., AND HACKNEY LADISH, INC., Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge  
Court No. 09–00477

[Redetermination of pipe fittings from China used in structural applications as outside scope of antidumping duty order remanded to International Trade Administration, U.S. Department of Commerce.]

Dated: January 6, 2011

*Barnes, Richardson & Colburn (Thomas V. Vakerics, Stephen W. Brophy, Cortney O'Toole Morgan, Jeffrey S. Neeley, Matthew T. McGrath, and Michael S. Holton), for the plaintiff.*

*Tony West, Assistant Attorney General, Civil Division, United States Department of Justice, Jeanne E. Davidson, Director, Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (Michael D. Panzera); Office of the Chief Counsel for Import Administration, United States Department of Commerce (Natasha Robinson Coates), of counsel, for the defendant.*

*Mayor Brown LLP (Simeon M. Kriesberg and Jeffrey C. Lowe), for the defendant-intervenor Weldbend Corporation.*

*Neville Peterson LLP (Lawrence J. Bogard and Casey Kernan Richter), for the defendant-intervenor Tube Forgings of America, Inc.*

*Saul Ewing, LLP (John Burt Totaro, Jr.) for the defendant-intervenor Hackney Ladish, Inc.*

## OPINION

### Musgrave, Senior Judge:

Presuming familiarity with Slip Op. 10–111 (Sep. 30, 2010) (“Opinion”), remanding to the International Trade Administration, U.S. Department of Commerce (“Commerce”) the administrative ruling on the scope inquiry of plaintiff King Supply Co. LLC (“King”) with respect to a certain antidumping duty order on carbon steel butt-weld pipe fittings (“BWPF”),<sup>1</sup> this opinion considers Commerce’s results of remand (“Remand Determination”) that now, under protest, exclude from the ambit of the Order BWPF imported and used by King only

---

<sup>1</sup> See *Antidumping Duty Order and Amendment to the Final Determination of Sales at Less Than Fair Value: Certain Carbon Steel Butt-Weld Pipe Fittings from the People’s Republic of China*, 57 Fed. Reg. 29702 (Dep’t Comm. July 6, 1992) (“Order”).

in architectural or structural applications. Weldbend Corporation and the government urge sustaining the Remand Determination, while Tube Forgings of America, Inc. (“TFA”) and King argue for further remand.

## I

King requests further remand with instruction to Commerce to identify the specific language in the Remand Determination that constitutes the scope ruling. *See* Comments of Plaintiff on Final Results of Redetermination by the Department of Commerce, dated December 1, 2010 (“King’s Comments”), at 2–3. There is no need, because the Remand Determination is clear: “[i]n accordance with the Court’s instructions, this redetermination pursuant to remand construes the scope of the order as excluding pipe fittings used only in structural applications, such as King’s fittings used for structural applications, from the *Order*.”<sup>2</sup> Remand Determination at 1.

In addition, King argues the Remand Determination is internally inconsistent. Specifically, King requests deletion of “only” therefrom because it “may mistakenly be read to the effect that ‘dual use’ pipe fittings are not excluded from the [*Order*] as dual use pipe fittings are not limited in use to structural applications.” King’s Comments at 3. King also requests deletion of “used by King” to ensure that pipe fittings imported by King ostensibly for resale and eventual use in structural applications are excluded from the *Order*. *Id.* at 3–4.

These requests appear to emanate from examination of page 4 of the Remand Determination, which explains Commerce’s finding that pipe fittings “imported by King and used by King in structural applications” are excluded from the antidumping duty order, as compared with page 5 of the redetermination, which generally explains that pipe fittings used in structural applications are excluded from the order without regard to the identity of the importer (or user). *Cf.* Remand Determination at 4–5 *with* King’s Comments at 1–4. The government’s detailed response, with which the court concurs, needs little elaboration:

Consistent with the Court’s order, Commerce excluded pipe fittings used in structural applications from the order without regard to the identity of the importer. This fact is underscored by the language found in the scope ruling on page 5 of the remand redetermination. In its scope ruling, Commerce explains that “[i]n accordance with the Court’s instructions, this redetermination . . . construes the scope of the order as excluding pipe

<sup>2</sup> “*Order*” was not specifically defined in the Remand Determination, but context, *passim*, indicates the original antidumping duty order was intended.

fittings used only in structural applications, *such as* King’s fittings used for structural applications.” Remand Determination at 5 (emphasis added). The phrase “pipe fittings used only in structural applications” provides that pipe fittings used in structural applications – regardless of the identity of the importer – are excluded from the order. The words “such as” identify pipe fittings used by King in structural applications as merely an example of such pipe fittings excluded from the antidumping duty order.

The language on page 4 of the remand redetermination, which states that “we find that fittings imported by King and used by King in structural applications . . . are not covered by the scope of the Order,” is not inconsistent with the scope ruling on page 5. This language must be read in the proper context. In the paragraph that precedes the statement in question, Commerce identifies factual evidence presented by King during the scope proceeding that indicated that its pipe fittings were used exclusively in structural applications and not piping systems. Remand Determination at 4. In restating this information about King’s business practice, Commerce responds in the following paragraph [with] its finding that pipe fittings imported and used by King now are excluded from the order. This finding on page 4, when read in its proper context, represents Commerce’s conclusion with respect to coverage based upon specific factual statements made in the preceding paragraph about King’s business practice. There is no basis for interpreting Commerce’s conclusion as to certain facts somehow constitutes the scope ruling itself. Because there is no internal inconsistency in the remand redetermination, King’s request that this matter be remanded to Commerce again should be rejected.

For similar reasons, King’s argument that Commerce should delete the words “used by King” from the remand redetermination is unsupported. *See* King’s Comments at 3–4; *see also* Remand Determination at 4 (“[W]e find that fittings imported by King and *used by King* in structural applications, as described above, are not covered by the scope of the Order”) (emphasis added). King argues that the phrase in question, which is found on page 4 of the remand redetermination, indicates that “in order to be excluded from the order, the imported pipe fittings must be used by King in structural applications.” King’s Comments at 4. King then explains that “pipe fittings imported by

King for resale and eventual use in structural applications are covered by the order, an interpretation in direct contradiction of the Court's order." *Id.*

As explained above, the phrase in question is part of a sentence that does not constitute the scope ruling. To the contrary, the sentence serves as the logical conclusion as to specific factual statements made in the preceding paragraph on page 4. There is no basis, therefore, to conclude that "pipe fittings imported by King for resale and eventual use in structural applications" somehow are covered by the antidumping duty order. *See* King's Comments at 4. Therefore, this Court should reject King's argument that Commerce should remove the phrase "used by King" from the remand redetermination.

Fourth, there is no valid basis for King's request that Commerce delete the word "only," which precedes "structural applications" in certain instances, from the remand redetermination. *See, e.g.,* Remand Redetermination at 5 ("[T]his redetermination pursuant to remand construes the scope of the order as excluding pipe fittings used *only* in structural applications . . . from the [*Order* ].") (emphasis added). According to King, the use of the word "only" "in this context . . . may mistakenly be read to the effect that 'dual use' pipe fittings are not excluded from the order as dual use pipe fittings are not limited in use to only structural applications." King's Comments at 3. King's concerns are unfounded.

This Court held that Commerce was required to exclude carbon steel butt-weld pipe fittings used for structural applications from the scope of the antidumping order. Commerce followed the Court's instruction by issuing a scope ruling that excluded such pipe fittings. *See* Remand Redetermination at 5. Commerce included the word "only" in its remand redetermination to emphasize that pipe fittings used in structural applications are excluded from the antidumping order (*i.e., only* pipe fittings used in structural applications are excluded from the [*Order* ]), whereas those used in piping systems remain covered by the [*Order* ]. The use of the word "only" in the remand redetermination is consistent with this distinction, and in no way renders Commerce's remand redetermination inconsistent with the Court's order.

King's insistence that the use of the word "only" may be misinterpreted is wholly speculative and unsupported by any

evidence. In any event, any such a misinterpretation would be inconsistent with the Court's holding that the end-use of the pipe fitting determines whether it is covered by the antidumping duty order, rather than the potential manner in which the pipe fitting may be used. *See* Court Order accompanying . . . Slip Op. 10–111 . . . at 2 (ordering Commerce to issue a scope determination “excluding carbon steel butt-weld pipe fittings *used* for structural applications from the scope of the antidumping order on carbon steel butt-weld pipe fittings from China.”) (emphasis added). For these reasons, King's request that the Court order Commerce to remove the word “only” from the remand redetermination should be denied.

Defendant's Response to Comments Regarding Redetermination Pursuant to Court Remand, dated December 16, 2010 (“Defendant's Response”), at 3–6 (court's ellipses in last paragraph).

For these reasons, King's request for further remand is denied.

## II A

For its part, TFA criticizes this court's original order of remand. TFA (re)argues that the *Order* was intended to cover *all* pipe fittings meeting the *Order*'s physical description and that this court's rationale on the absence of an expansive signal (“*e.g.*,” “*such*,” *etc.*) in the clause “used to join sections in piping systems” is a logical fallacy because a restrictive signal (“*exclusive*,” “*only*,” *etc.*), normally expected if structural applications were intended to be excluded from the *Order*'s scope, is likewise absent.<sup>3</sup> According to TFA, the Opinion reduces the second sentence of the scope language to “used . . . in piping systems” when the entire sentence actually serves to further define the term “butt-weld” by distinguishing such fittings from other fitting forms, such as threaded, grooved or bolted. The latter clauses of the second sentence, TFA contends, provide the “expansive signal”

<sup>3</sup> *See* Comments of Defendant-Intervenor Tube Forgings of America, Inc. on The United States Department of Commerce's Final Results of Redetermination Pursuant to *King Supply Company LLC, d/b/a King Architectural Metals v. United States, et al.*, Court No. 09–00477, Slip Op. 10–111 (September 30, 2010), dated December 1, 2010 (“TFA Comments”), at 5 (referencing Opinion at n.3). Specifically, TFA contends the referenced administrative determinations are “inapposite” to “the proposition that end-use restrictions are common and accepted limitations on the scope of antidumping duty orders because the determinations cited by the Court each include express restrictive language.” *Id.* However, these determinations were referenced only to support the observation that “Commerce has apparently described usage with more precision and specificity in other contexts when including or excluding products from the scope of an antidumping duty order.” Opinion at 6.

the court “required” and are proof that its reading of the sentence is correct and the court’s incorrect. “[A]t best,” TFA argues, “used . . . in piping systems” is “ambiguous” and is to be resolved by reference to the description contained in the petition, the initial investigation, and the determinations of Commerce and the ITC, as required by 19 C.F.R. § 351.225(k)(1). *See generally* TFA Comments at 3–7.

Such comments seem to overlook both the Opinion and the Remand Determination. *See, e.g.*, Opinion at 6 (“contrary to . . . the defendant-intervenors’ [ ] reading of the second sentence of the scope language, the fastening methods of pipe fittings are a separate consideration from, and do not alter, this apparently explicit product use requirement”).

It may be recalled the *Order* is directed against

carbon steel butt-weld pipe fittings, having an inside diameter of less than 14 inches, imported in either finished or unfinished form. These formed or forged pipe fittings are used to join sections in piping systems where conditions require permanent, welded connections, as distinguished from fittings based on other fastening methods (*e.g.*, threaded, grooved, or bolted fittings). . . .

57 Fed. Reg. at 29703.

It may also be recalled the domestic petitioners were aware this language was being employed as the investigation and determinations progressed. *See Order* at 9 (“the domestic pipe fittings industry submitted comments on the scope language of the investigations, with the result that the language was altered in certain ways not relevant to this proceeding”).

As for *King*, its scope ruling did not depend upon discerning whether the scope language implies that all piping systems require permanent, welded connections, or that some piping systems do not require permanent, welded connections. The physical specifications of the merchandise subject to the scope of the *Order* and addressed in the latter part of the second sentence are not a matter of dispute and did not require further discussion. The operative scope language, indicated by this matter, is the following: (1) “*The products covered by this order*” (*i.e.*, subject merchandise; italics added) have certain physical characteristics. (2) “*These . . . pipe fittings*” (*i.e.*, subject merchandise) “*are used to join sections in piping systems where conditions require . . .*” *et cetera* (italics added).

This reference to use in piping systems cannot be ignored, or interpreted away, or expansively interpreted as merely “an example of an instance where a permanent, welded connection is desired.”<sup>4</sup> To do so effects a *material alteration* in the expressed scope of the *Order*, as originally published, and there is no authority for such alteration in the context of a scope inquiry pursuant to 19 C.F.R. § 351.225 (as previously discussed). *See, e.g., Duferco Steel Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002); *Eckstrom Industries, Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001); *Ericsson GE Mobile Communications, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995); *Allegheny Bradford Corp. v. United States*, 28 CIT 830, 342 F. Supp. 2d 1172 (2004). TFA, however, in essence argues for an interpretation that accomplishes precisely that.

TFA’s position, that the *Order* in fact covers all less-than-14-inch BWPF, depends for its validity on an *obvious* ellipsis in the second sentence of the scope language. None, however, is discernable. Even if familiarity with the product leads to the observation that BWPFs are not only used in piping systems, it does not logically follow, from the language employed in the *Order*, that “subject merchandise,” to which the *Order* is directed, is obviously or necessarily all BWPF. *See, e.g., Eurodif S.A. v. United States*, 30 CIT 682, 431 F. Supp. 2d 1351 (2006) (non-physical aspects of merchandise may remove it from the “class or kind of merchandise” intended to be covered by an unfair trade order), *aff’d* 217 Fed. Appx. 963 (Fed. Cir. 2007), *rev’d on other grounds*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 878 (2009).

Furthermore, *arguendo*, even if “used . . . in piping systems” could be construed as ambiguous, the court again notes (as it did in the Opinion) that there is nothing apparent in the record, nor do the parties point to anything, that would resolve that ambiguity. The investigation, as well as the determinations of Commerce and the ITC all describe the subject merchandise using language nearly identical to that used in the *Order*, to wit: “used . . . in piping systems,” Opinion at \_\_\_, and no evidence suggests (nor do the parties argue) that the term “piping systems” may be defined more broadly. *See generally* Opinion at 9–11. *Cf. John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 109 (1993) (“reading the words ‘to the extent’ to mean nothing more than ‘if,’ the Department has exceeded the scope of available ambiguity”); *United States v. Turkette*, 452 U.S. 576, 581, 587 n.10 (1981) (aids or guides to statutory interpretation are to be relied upon to resolve ambiguity, not create it); *Nippon Kogaku (USA), Inc. v. United States*, 673 F.2d, 380, 383 (1982) (same).

<sup>4</sup> *See Final Scope Ruling: Antidumping Duty Order on Carbon Steel Butt-Weld Pipe Fittings from the People’s Republic of China*, Public Record Document (“P.R. Doc.”) 29 at 5.

Since those sources did and do not illuminate that the *Order*'s scope language is susceptible to interpretation beyond the plain terms employed, any *arguendo* assumption of ambiguity at that point would necessarily call for reference to the *Diversified Products* criteria of 19 C.F.R. § 351.225(k)(2), as King previously argued in the alternative, which includes consideration of “the expectations of the ultimate end users” and “the ultimate end use of the product.” Such a review would not, at first blush, appear to support TFA's favored “interpretation.”

As previously discussed, the second sentence of the *Order*'s scope language identifies piping system use – and only piping system use – when describing how the subject merchandise is used. This is the public expression of the scope of the *Order* with respect to subject merchandise. The language employed is literal, plain, clear, and without obvious indication that “used . . . in piping systems” is superfluous or exemplary. See *Walgreen Co. of Deerfield IL v. United States*, 620 F.3d 1350, 1357 (Fed. Cir. 2010) (“[w]hile the petition, factual findings, legal conclusions, and preliminary orders can aid in the analysis, they cannot substitute for the language of the order itself, which remains the ‘cornerstone’ in any scope determination”) (italics added); *Duferco Steel Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002) (same). The only apparent statutory authorization for including articles that do not fall within an order's literal scope is via the anti-circumvention provisions of 19 U.S.C. § 1677j. See, e.g., *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1370 (Fed. Cir. 1998). The present matter, however, involves a scope inquiry, and it is, rather, TFA's reading of “used to join sections in piping systems” that amounts to a material alteration of that phrase. That reading expands beyond the plain meaning of this publicly expressed scope language to depend upon either the addition of material words that are conspicuously absent (e.g., an expansive signal), or ignorance of the phrase altogether. While the addition of a restrictive signal would certainly *add* clarity, TFA's argument in that regard does not logically imply that “used . . . in piping systems” is unclear in its own right, or susceptible of meaning other than as written. And by the same token, the scope language of the *Order* does not specify “all” with respect to the pipe fittings that are expressed to be the subject of the *Order*.

The *Order* may not be interpreted in a manner contrary to its literal terms. E.g., *Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990). TFA's (re)argument of the matter at this stage provides no cogent reason for altering the court's previous conclusion.

**B**

On the Remand Determination itself, TFA challenges Commerce's conclusion that the pipe fittings imported by King are used exclusively in structural applications as unsupported by substantial evidence. *See* TFA's Comments at 11–13. TFA contends

[t]he only record evidence supporting the conclusion that King and its customers *never* use the BWPF imported by King in piping systems is provided by King's assertions regarding the final use of the products. With respect to King's customers, the record is devoid of any evidence except King's unsupported and carefully qualified assertion that its BWPF is not used in piping systems "to the best of [its] knowledge." Verification of the claim that neither King nor its customers ever utilize BWPF imported by King in piping systems was not produced and[,] given the post-importation nature of King's assertion, is not possible.

Thus, the record contains, on one hand, King's assertion that its BWPF are not used in piping systems and, on the other hand, uncontroverted evidence that King's BWPF are physically identical to BWPF used in piping systems and are manufactured to meet industry standards for BWPF used in piping systems. [Commerce]'s conclusion that the BWPF imported by King are used exclusively in structural applications is thus unsupported by substantial evidence on the record and should be rejected.

*Id.* at 12–13 (italics in original).

The government's response is again instructive:

As an initial matter, the statement in Commerce's remand redetermination that King's pipe fittings were used exclusively for structural applications refers only to pipe fittings imported and used by King, not its customers. In the remand redetermination, Commerce quoted a statement from King's scope ruling request and explained that "King provided information and evidence supporting its claim that its fittings were used exclusively in 'the production of handrails and other structural applications.'" Remand Redetermination at 4 (quoting Letter to Secretary of Commerce, from Law Firm of Sandler, Travis & Rosenberg, P.A. (Mar. 30, 2009) ("Scope Request"), P.R. Doc. 1, at 7) (emphasis added). The citation following this statement reads: "See Scope Inquiry Request, at 7." This citation refers to the statement found on page 7 of King's scope ruling request, where

King explains that, “[t]o the extent *King Architectural* uses a small portion of its pipe fittings internally, that use is devoted exclusively to the production of handrails and other structural applications.” See Scope Request at 7 (emphasis added). Thus, as evidenced by the language on page 7 of King’s scope request, which Commerce directly quoted in its remand redetermination, the statement in the remand redetermination refers only to King’s use of its pipe fittings and not that of its customers.

Ignoring that Commerce referred only to the manner in which King itself uses its pipe fittings, TFA incorrectly concludes that there is not substantial evidence on the record to support a finding that King’s pipe fittings are used in structural applications. Contrary to TFA’s contentions, as explained in the remand redetermination, King provided sufficient substantial evidence to support its claim, including, but not limited to, written statements from King itself, statements from its website, as well as photographs. See Remand Redetermination at 4; see also Scope Request at 7 (“To the extent *King Architectural* uses a small portion of its pipe fittings internally, that use is devoted exclusively to the production of handrails and other structural applications.”); see also Scope Request at Attachment 8B (providing several photographs of pipe fittings produced by King and used in structural applications); see also Scope Request at Attachment 9E (containing a page from King’s website, which describes King’s business as limited to producing pipe fittings only used in structural applications). An examination of this evidence demonstrates that Commerce reasonably concluded that to the extent King uses pipe fittings, those pipe fittings are used exclusively in structural applications. Substantial evidence is “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); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Thus, to decide that a decision is supported by substantial evidence, the Court need only find evidence “which could reasonably lead to [Commerce’s] conclusion,” so that the conclusion was a “rational decision.” *Matsushita Electrical Industrial Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). In light of the uncontested evidence presented, Commerce reasonably concluded that King’s pipe fittings are used in structural applications. Because Commerce’s determination is supported by substantial evidence, this Court should reject TFA’s request for further remand proceedings.

Defendant's Response at 8–9.

Examination of the record reveals substantial evidence supporting Commerce's conclusion. The Remand Determination will therefore be sustained and final judgment entered.

Dated: January 6, 2011

New York, New York

*/s/ R. Kenton Musgrave*

R. KENTON MUSGRAVE, SENIOR JUDGE

***ERRATA***

*King Supply Co., d/b/a/ King Architectural Metals v. United States*,  
Court No. 09-00477, Slip Op. 11-2 (Jan 6, 2011):

In the precis, change “remanded” to “sustained” and delete the remainder of the sentence.

## Slip Op. 11-3

UNION STEEL, Plaintiff, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION AND NUCOR CORPORATION, Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge  
Court No. 08-00101

[Holding contrary to law the decision of the United States Department of Commerce made on remand to retain the existing model-match methodology and ordering a second remand]

Dated: January 11, 2011

*Troutman Sanders LLP (Donald B. Cameron, Brady W. Mills, Julie C. Mendoza, and R. Will Planert)* for plaintiff.

*Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Claudia Burke*); *Jonathan Zielinski* and *Daniel J. Calhoun*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

*Skadden Arps Slate Meagher & Flom, LLP (Ellen J. Schneider, Jeffrey D. Gerrish, Jared R. Wessel, John J. Mangan, and Robert E. Lighthizer)* for defendant-intervenor United States Steel Corporation.

*Wiley Rein, LLP (Timothy C. Brightbill, Alan H. Price, and Robert E. DeFrancesco, III)* for defendant-intervenor Nucor Corporation.

## OPINION AND ORDER

**Stanceu, Judge:**

### *I. Introduction*

Plaintiff Union Steel Manufacturing Co., Ltd. (“Union”) brought this action to contest a final determination (“Final Results”) issued by the International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”), in the thirteenth administrative review of an antidumping duty order on imports of certain corrosion-resistant carbon steel flat (“CORE”) products from the Republic of Korea (“Korea”). See *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Thirteenth Admin. Review*, 73 Fed. Reg. 14,220 (Mar. 17, 2008) (“*Final Results*”). Previously, the court denied relief on one of plaintiff’s claims, which challenged the Department’s construction of section 771(35) of the Tariff Act of 1930, 19 U.S.C. § 1677(35) (2006), to allow application of “zeroing,” *i.e.*, the deeming of the sales a respondent makes in the United States at prices above normal value to have individual dumping margins of zero rather than negative margins. *Union Steel v. United States*, 33 CIT \_\_, \_\_, 645 F. Supp. 2d 1298, 1300 (2009). At the same time, the court granted defendant’s request for a

voluntary remand on the issue raised by plaintiff's other claim in this case, which contested the application of Commerce's "model-match" methodology in the thirteenth review. *Id.* at \_\_\_, 645 F. Supp. 2d at 1309–10. In this second claim, Union challenged Commerce's model-match methodology, under which Commerce compared Union's U.S. sales of painted CORE products to Union's home market sales, which included not only painted CORE products but also "laminated" CORE products, *i.e.*, CORE products coated with a plastic film made of polyethylene terephthalate ("PET") or polyvinyl chloride ("PVC"). Br. in Supp. of the Mot. of Pl. Union Steel for J. Upon the Agency R. 3 ("Pl.'s Br."). In making that comparison, the model-match methodology relied on the definition of "foreign like product" in section 771(16)(A) of the Tariff Act of 1930, under which merchandise may be compared if it is "identical in physical characteristics." 19 U.S.C. § 1677(16)(A).

Before the court is the redetermination the Department issued in response to the court's remand order ("Remand Redetermination"), in which Commerce decided to leave unchanged its model-match methodology. *Final Results of Redetermination Pursuant to Remand* (Dec. 28, 2009) ("*Remand Redetermination*"). Plaintiff raises various arguments in opposition to the Remand Redetermination, which defendant-intervenors urge the court to affirm. *See* Pl. Union Steel's Comments on Def. United States' Final Results of Redetermination Pursuant to Remand ("Pl.'s Comments"); United States Steel Corp.'s Comments on the Final Redetermination Pursuant to Ct. Remand Issued by the Department of Commerce ("U.S. Steel's Remand Comments"); Nucor Corp.'s Comments on Remand Results. Because the record lacks substantial evidence to support a finding that the physical differences distinguishing the laminated CORE products from the CORE products the Department compared to the laminated CORE products are minor and commercially insignificant, the court sets the Remand Redetermination aside as contrary to law and orders Commerce to issue a second remand redetermination in accordance with this Opinion and Order.

## ***II. Background***

The background of this case is set forth in the court's previous opinion and is supplemented herein. *See Union Steel*, 33 CIT at \_\_\_, 645 F. Supp. 2d at 1300–02.

Rejecting a proposal by Union, Commerce, in the Final Results and again in the Remand Redetermination, declined to adopt a separate model-match type category for CORE products that were coated with

a plastic film. *Remand Redetermination* 5–6. Union had sales of such laminated products in Korea during the period of review (from August 1, 2005 to July 31, 2006) but had no sales of its laminated CORE products in the United States during that period. Pl.’s Br. 3. In support of its proposed type category for laminated products, Union argued that its laminated products underwent a different production process than its painted products, were physically different from its painted products because they were coated with a plastic film, and were costlier than its painted products. *Id.* at 3–7.

As it had in the Final Results, Commerce, in the Remand Redetermination, grouped the home market sales of products Union had sought to have categorized as laminated products within the type category of “All Other” painted products. *Remand Redetermination* 1; see Issues & Decisions Mem., A-580–816, ARP 3–08, at 14–15 (Mar. 10, 2008) (Admin. R. Doc. No. 4563), available at <http://ia.ita.doc.gov/frn/summary/KOREA-SOUTH/E8-5298-1.pdf> (“*Decision Mem.*”); *Final Results*, 73 Fed. Reg. at 14,221 (incorporating by reference the *Decision Mem.*). Rejecting the need to change its model-match methodology, Commerce on remand made no change in the final antidumping duty margin of 4.35% that Commerce assigned to Union in the Final Results, *Final Results*, 73 Fed. Reg. at 14,221, stating that “[i]n accordance with the Court’s instructions, the Department has reviewed and reconsidered information on the record to determine whether on remand to revise its model-match methodology to include a separate category for laminated products as advocated by respondent Union Steel.” *Remand Redetermination* 1. The Remand Redetermination states that “the Department finds that record evidence does not support revising its model-match methodology with respect to laminated products.” *Id.*

Upon plaintiff’s motion, the court held oral argument on the Remand Redetermination on July 16, 2010. The parties since have made post-argument submissions. Pl. Union Steel’s Post-Oral Argument Comments on Commerce’s Remand Redetermination (“Pl.’s Post-Oral Argument Comments”); Def.’s Resp. to Pl.’s Post-Oral Argument Comments on Commerce’s Remand Redetermination (“Def.’s Post-Oral Argument Resp.”); Nucor Corp.’s Post-Oral Argument Resp. Comments (“Nucor’s Post-Oral Argument Comments”); U.S. Steel Corp.’s Resp. to Pl. Union Steel’s Post-Oral Argument Comments (“U.S. Steel’s Post-Oral Argument Resp.”).

### **III. Discussion**

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), pursuant to which the court

reviews actions commenced under section 516A of the Tariff Act of 1930, 19 U.S.C. § 1516a, including an action contesting the final results of an administrative review that Commerce issues under section 751 of the Tariff Act of 1930, 19 U.S.C. § 1675(a). 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). “Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

In the Remand Redetermination, Commerce explained that its model-match type categories, as developed during the investigation and first administrative review, resulted from a determination “that CORE products should be separated into four categories: clad, unpainted, painted, and painted with polyvinylidene fluoride (PVDF).” *Remand Redetermination* 1. Commerce also explained that during the development of these four categories, certain parties requested that the Department create an additional category for laminated products, that the Department did not do so at the time, and that the Department decided instead to group laminated products with painted products for model-match purposes. *Id.* at 2. During the review at issue in this case, Commerce rejected Union’s proposal to place laminated CORE products in a separate type category instead of combining laminated products with the “other painted” products, *i.e.*, the painted CORE products other than CORE products that are painted with PVDF. *Decision Mem.* 14–15.

In an administrative review, Commerce is required generally to determine the normal value, the export price or constructed export price, and the dumping margin for each entry of the subject merchandise. 19 U.S.C. § 1675(a)(2). Determining a dumping margin requires Commerce to compare the export price or constructed export price with the normal value, which as a general matter is determined according to the price at which the foreign like product is sold for consumption in the exporting country (the “home market”). 19 U.S.C. § 1677b(a)(1)(B). For this comparison, Commerce, in accordance with the statutory definition of “foreign like product” set forth in 19 U.S.C. § 1677(16)(A), first attempts to match subject merchandise with merchandise “which is *identical* in physical characteristics with, and was produced in the same country by the same person as, that merchandise.” *See id.* § 1677(16)(A) (emphasis added). Only if “a determination for the purposes of part II of this subtitle,” which part is labeled “Imposition of Antidumping Duties,” cannot “be satisfactorily made”

does Commerce, in accordance with § 1677(16)(B), seek to match the subject merchandise with merchandise produced in the same country and by the same person that is “*like* that merchandise in component material or materials and in the purposes for which used.” *Id.* § 1677(16)(B) (emphasis added). If the latter determination cannot be satisfactorily made under § 1677(16)(B), Commerce is to consider, under § 1677(16)(C), whether merchandise produced in the same country and by the same person that is “of the same general class or kind as the subject merchandise” and “like that merchandise in the purposes for which used” may reasonably be compared with the subject merchandise. *Id.* § 1677(16)(C).

On remand, in again rejecting Union’s proposal and thereby treating Union’s laminated CORE products as “other painted” CORE products, the Department applied the “like product” definition of subparagraph (A) of § 1677(16). *See Remand Redetermination* 3–6. Although the Remand Redetermination does not state this point clearly, it includes text accompanied by a case citation with a parenthetical, as follows:

Thus, the Department has considerable discretion in interpreting the statute and developing an appropriate model-match methodology. *See Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1384 (Fed. Cir. 2001) (noting with respect to the subsection of 1677(16) applicable in this case, *subsection (A)*, that “Commerce has considerable discretion in defining ‘identical in physical characteristics.’”).

*Id.* at 3 (emphasis added). Defendant’s counsel, Ms. Claudia Burke, confirmed at oral argument that the Remand Redetermination applied § 1677(16)(A), as indicated by the Department’s not allowing an adjustment to normal value to account for the difference in the variable cost of manufacturing the merchandise (“difmer adjustment”) when comparing Union’s subject painted CORE products with the home market laminated CORE products. Oral Tr. 49–50 (July 16, 2010).<sup>1</sup> Based on the above-quoted parenthetical and the clarification provided by defendant’s counsel, the court analyzes the issue pre-

<sup>1</sup> At oral argument, the following discussion relevant to this issue took place:

The Court: Why didn’t you do the difmer? Why didn’t they get the benefit of the difmer? Ms.

Burke: Well, like Mr. Mills [counsel for plaintiff Brady W. Mills] explained, we wouldn’t do the difmer when we’re in the first part of the statute.

The Court: Are you saying that you’re in (a)?

Ms. Burke: Yes.

The Court: Where in the remand redetermination does it say that?

Ms. Burke: Well, I don’t think it says it per se but I’ll – I mean it doesn’t explicitly say it in the way that I think the Court would like it to but I think it can be obviously drawn from the discussion.

Oral Tr. 49–50 (July 16, 2010).

sented by the Remand Redetermination according to the § 1677(16)(A) definition of foreign like product. Under that definition, the merchandise sold in the comparison market (here, the home market, Korea) must be “identical in physical characteristics with” the subject merchandise. 19 U.S.C. § 1677(16)(A).

In the case the Department cited, *Pesquera Mares Australes Ltda. v. United States*, the U.S. Court of Appeals for the Federal Circuit (“Court of Appeals”) affirmed the Court of International Trade’s decision sustaining the Department’s matching of premium grade salmon with comparison market sales of both premium grade and super-premium grade salmon. 266 F.3d 1372, 1385 (Fed. Cir. 2001). Affording the Department’s statutory construction deference according to the Supreme Court’s analysis in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984), the Court of Appeals upheld as reasonable the Department’s construing the statutory term “identical in physical characteristics” such that merchandise should be considered identical despite the existence of minor, commercially insignificant differences in physical characteristics. *Id.* at 1383–84 (“Commerce has concluded that merchandise should be considered to be identical despite the existence of minor differences in physical characteristics, if those minor differences are not commercially significant.”). The appellate court then sustained, under the substantial evidence standard, the Department’s finding “that super-premium was not a commercially recognized separate grade of salmon for purposes of the Japanese salmon import market.” *Id.* at 1384.

In upholding the Department’s statutory construction, the opinion in *Pesquera* provides guidance on the meaning of the statutory term “identical in physical characteristics.” Concluding that dictionary definitions of the word “identical” established two distinct common usages, the Court of Appeals saw the choice as between construing the term to mean having the exact same identity or, alternatively, construing the term to mean having such a near similarity or resemblance as to be essentially equal or interchangeable or having such close resemblance and such minor differences as to be essentially the same. *Id.* at 1382–83. Concluding that a construction of “identical” according to the latter category of definitions was reasonable, the Court of Appeals upheld Commerce’s construction of the statutory term “identical in physical characteristics” to mean “that merchandise should be considered to be identical despite the existence of minor differences in physical characteristics, if those minor differences are not commercially significant.” *Id.* at 1384.

The Remand Redetermination appears to rely on the same statutory construction of the term “identical in physical characteristics” that the Court of Appeals affirmed in *Pesquera*. See *Remand Redetermination* 4. To the extent that the Remand Redetermination does so, the court defers to the Department’s construction. The court proceeds to consider the question of whether the Remand Redetermination lawfully compared laminated and non-laminated, painted CORE products as “identical in physical characteristics” within the meaning of that term as used in 19 U.S.C. § 1677(16)(A) and expounded in *Pesquera*. Such comparisons are lawful only if substantial evidence on the record in this case can support a factual determination that the physical characteristics distinguishing laminated CORE products from the “other painted,” *i.e.*, non-laminated, CORE products to which Commerce compared laminated CORE products are minor and not commercially significant. For the reasons discussed below, the court concludes that substantial evidence does not exist on the record to support such a determination.

***A. The Remand Redetermination Relies on Factual Findings that Have Little, If Any, Probative Weight on Whether the Physical Differences Are Minor and Not Commercially Significant***

At the outset of its analysis, the Remand Redetermination states that “[i]n the twelfth administrative review,” *i.e.*, the review previous to the one at issue in this case, “the Department engaged in a detailed analysis of the sales and cost information submitted by the parties on the record of that review to support its continued reliance on the model-match methodology classifying laminated CORE within the painted category.” *Remand Redetermination* 4 (citations omitted). With respect to the review at issue here, Commerce states that “[o]n remand in the thirteenth administrative review, we have now performed a similar analysis on Union Steel’s sales, cost and customer data from the record of the thirteenth administrative review as we did in the twelfth administrative review” and concludes that “the Department’s findings are consistent for both reviews.” *Id.* Alluding to the current and the previous review, the Remand Redetermination states four findings of fact, which it characterizes as common to both reviews, *id.* at 4–5, and then bases the following determination on those four findings: “Based on the above findings, the Department determines that there is nothing new on the factual record of the thirteenth administrative review that would cause us to reach a different conclusion about the model-match methodology from that made in the twelfth administrative review.” *Id.* at 5. Those four findings, even if presumed to be supported by substantial record

evidence, are only minimally probative on the factual issue of whether the physical differences between laminated CORE products and painted CORE products are minor and not commercially significant.

Commerce found, first, that “[t]he range of prices for laminated CORE products is within the range of prices for other painted CORE products for both reviews.” *Id.* at 4. Even though grounded in record evidence, this finding has little or no probativity on the factual issue of whether laminated CORE products are distinguished from “other painted” CORE products by only minor and commercially insignificant physical differences. Commerce did not find that two otherwise identical CORE products, one of which is painted and the other of which is laminated, sell at the same or approximately the same price. The record shows that CORE products, regardless of whether painted or laminated, are produced and sold in various product specifications, in a very broad range of prices. *Id.* attachment 1 (“Model Match Variables”), attachment 2 (“Final Analysis Memo for Laminated CORE Products”). Setting forth price data in broad ranges is not informative on the question of what price difference may exist, typically or on average, between laminated and non-laminated, painted CORE products that do not differ except with respect to the presence of paint as opposed to laminate. Other evidence of record, however, bears directly on that question. See *Letter from Union to the Sec’y of Commerce* 6 (Nov. 20, 2006) (Admin. R. Doc. No. 3944) (“*Union’s Questionnaire Resp.*”) (“Laminating the steel increases . . . the sales price by” a significant percentage over painted products.).

The second finding stated in the Remand Redetermination is that “[t]he prices for laminated CORE products are identical to prices for other painted CORE products at a greater frequency in the thirteenth administrative review than in the twelfth administrative review.” *Remand Redetermination* 4. This finding, as stated in the Remand Redetermination, has little if any probative weight for the issue Commerce was required to resolve. It is simply a comparison with prior-review data, the significance of which is not explained.

Third, the Remand Redetermination states that “[a] comparable number of customers purchased both laminated CORE products and other painted CORE products from Union Steel in the twelfth administrative review and thirteenth administrative review.” *Id.* This finding has little relevance to the issue Commerce was required to consider. Regardless of whether a purchaser is a distributor or a manufacturer, the fact that the same customer purchased Union’s laminated CORE products as well as Union’s non-laminated, painted CORE products does not signify that the customer considered the

physical differences in the two products to be minor and commercially insignificant. A distributor may distribute various CORE products, as well as other steel products, and a manufacturer may purchase different CORE products for different applications. Finally, the comparison the Department makes to the corresponding data in the twelfth review, which is not at issue in this case, does not lend significance to the findings Commerce made in the thirteenth review.

The fourth stated finding is that “[t]he total cost of manufacture for laminated CORE products is within the range of the total cost of manufacture for other painted CORE products for both reviews.” *Id.* at 5. Commerce approached the question of a differential in manufacturing costs by examining and comparing broad ranges of manufacturing costs for all types of painted and laminated CORE products. Here also, evidence based on broad ranges has little or no probativity on the issue of whether the two groups of products are distinguished only by minor and commercially insignificant physical differences. Because the record demonstrates that both painting and laminating are conducted on the same types of substrates, more probative evidence would address the question of whether the cost of laminating is equivalent to the cost of painting. Union stated in its response to the Department’s questionnaire that its laminating process, on average, costs significantly more to perform than does painting. *Union’s Questionnaire Resp.* 6. In its supplemental questionnaire response, Union stated that “[b]ecause PET film and PVC film are more expensive than the various paints used for other color coated products, including PVDF, and require more complicated processing know-how, the production cost and sales price are higher than other painted products.” *Letter from Union to the Sec’y of Commerce* 20 (Feb. 2, 2007) (Admin. R. Doc. No. 4036) (“*Union’s Supplemental Questionnaire Resp.*”). It appears that Commerce declined to consider this evidence that laminated CORE products cost more to produce than painted CORE products. Observing in the Remand Redetermination that “Union proposes to isolate only the costs associated with the differences between laminate versus paint,” Commerce dismisses this inquiry by concluding that “[a]s stated above, in the context of our model-match analysis, we look at these products from an overall perspective.” *Remand Redetermination* 9. Commerce reasoned that “[a]ny analysis performed in calculating margins will not be limited to cost differences associated with this one small part of the overall manufacturing process and cost buildup” and gave as an example that it uses total cost of production in determining whether sales are made below cost. *Id.* The court disagrees with this reasoning. Evidence that laminating a particular CORE product costs more than

painting that same CORE product is relevant to the question of whether the physical differences between laminated and non-laminated, painted CORE products are minor and commercially insignificant. Comparing the total cost of producing a laminated CORE product to the total cost of producing a non-laminated, painted CORE product is relevant to that question only if the two products are identical except with respect to the coating, *i.e.* paint or laminate. Were the physical differences between laminated and non-laminated, painted CORE products to have no significance in the marketplace, and were laminating more costly to perform than painting, it would be irrational for a manufacturer, absent an unusual circumstance, to produce laminated CORE products.<sup>2</sup>

Even if two hypothetical products cost the same to produce and to buy, it would not necessarily follow that the two products are “identical” for purposes of 19 U.S.C. § 1677(16)(A). Customers still might view the two products as different in a commercial sense. Regardless of relative cost of production, two products that have physical differences that are not minor and commercially insignificant but are approximately equal in commercial value may be compared, in some circumstances, under subparagraph (B) of 19 U.S.C. § 1677(16). In contrast, subparagraph (A) requires that the two products, even if costing the same to buy or produce, be “identical in *physical* characteristics.” 19 U.S.C. § 1677(16)(A) (emphasis added); *see Pesquera*, 266 F.3d at 1383–84. Therefore, price and production cost are relevant to, but not determinative of, the issue of whether a physical difference has commercial significance. The Department’s findings as to price and cost, being based on comparisons of broad price and cost ranges, fail to support even a conclusion that otherwise-identical laminated and non-laminated, painted CORE products sell for the same price and have the same cost of manufacture. As discussed above, the remaining finding, that the same customers purchased both laminated and other painted CORE products from Union, also lacks probativity on the critical issue in this case. These four findings, individually and in aggregate, therefore offer little, if any, support for an ultimate finding that the physical differences in question are minor and not commercially significant.

---

<sup>2</sup> A circumstance could be envisioned, for example, in which a material shortage required resort to a different, and much more expensive, process in order to allow production of a commercially equivalent product; another example is a more expensive process that does not result in a commercially-significant physical difference but is necessary because a producer lacks a necessary patent to perform the less expensive process. The record in this case presents no evidence of any such unusual circumstance.

Although basing its overall conclusion on the four findings discussed above, the Remand Redetermination includes some additional findings. Commerce states that “there are physical differences that exist within each of the ‘other painted products.’” *Remand Redetermination* 5. However, the question of whether physical differences between some painted CORE products and other painted CORE products would preclude a proper identical merchandise finding under § 1677(16)(A) is not before the court in this case. The Department’s grouping as “identical” all painted CORE products except for PVDF-painted CORE products may or may not be lawful, but in this litigation, Union does not challenge as overly broad the scope of the “other painted” type category, except to claim that the type category does not properly include laminated CORE products. A finding that various physical differences exist among the grouped painted CORE products does not indicate or suggest that the physical differences separating laminated CORE products from any non-laminated, painted CORE product—differences that Commerce itself acknowledges to exist—are minor and not commercially significant.

Similarly, with respect to “the differences between laminated and other painted CORE products articulated by Union,” Commerce further states that “[w]e found that there were differences in physical characteristics, end uses, costs and selling prices across all of these products.” *Id.* Summarizing record data, the Remand Redetermination states that “[t]hus, the record shows many differences and similarities between laminated and other CORE products, just as there are among and between all products.” *Id.* at 6. Because, as the record evidence demonstrates, both laminated and non-laminated, painted CORE products are made to various specifications, the model-match methodology groups into the various type categories products that have some physical variations. That the model-match methodology, properly or not, made § 1677(16)(A) comparisons not at issue here, involving CORE products within the same type category that have different physical characteristics and end uses, does not justify the specific decision before the court, which was to compare as “identical” laminated CORE products and non-laminated, painted CORE products.

For the reasons the court has discussed, the various factual findings discussed above have little, if any, probative weight on the issue of whether laminated CORE products and the other CORE products that Commerce found identical to laminated CORE products are distinguished by only minor physical differences that are not commercially significant.

***B. The Department's Determination that Laminated CORE Products Are Not "Marketed Separately" from Other CORE Products Is Unsupported by Substantial Record Evidence***

In addressing the issue of whether the physical differences distinguishing laminated CORE products from the other CORE products which the model-match methodology considered, under 19 U.S.C. § 1677(16)(A), to be "identical" to laminated CORE products have commercial significance, the Remand Redetermination relies on another finding that lacks probativity. Specifically, the Department finds that "laminated products are included with painted and other products in the same product brochure, which is used by the company to market their products to customers." *Id.* From that finding, the Department reaches the unwarranted conclusion that "[i]f laminated CORE were such a different or unique product as claimed by Union Steel, the Department might reasonably expect to see record evidence that laminated CORE is marketed separately" and determines that "[t]he record evidence, however, supports the opposite conclusion." *Id.* The only evidence on which Commerce relies expressly for that factual determination consists of a Union brochure and a brochure of its affiliate, Union Coating Co., Ltd ("Unico"). See *Letter from Union to the Sec'y of Commerce* exhibit A-28, at 552–607 (Nov. 13, 2006) (Admin. R. Doc. No. 3933) ("*Union's Section A Resp.*"). Those brochures, and others on the record, do not amount to substantial evidence that laminated CORE products are not marketed separately from other CORE products. Instead, the brochures, as well as other evidence of record consisting of Union's questionnaire responses, refute such a finding.

The inclusion of different products in a company's brochure does not, by itself, mean that the physical differences between those products are minor and not commercially significant. Commerce had no factual basis on which to assume that a manufacturer would never choose to describe commercially different products in the same brochure. What is meaningful instead is the information the product brochures contain about the physical differences between laminated CORE products and non-laminated, painted CORE products.

Although the record contains a Union brochure and a Unico brochure that describe both laminated and non-laminated, painted CORE products, the texts of these brochures differentiate between the two groups of products. The record describes three lines of PET-film laminated CORE marketed by Union, "Unipet," "Unilux," and

“White Board,” each of which is listed on the page of Union’s brochure labeled “High-tech Steel”<sup>3</sup> and not on the page labeled “Pre-painted Steel.” *Id.* exhibit A-28, at 575–76. The record also contains a separate brochure for Unipet, which is described as “a laminated steel sheet with the printed PET (Polyethylene Terephthalate [sic]) film on primer-coated galvanized steel sheet.” *Union’s Supplemental Questionnaire Resp.* exhibit B-22. Even though, as Union acknowledges, Unico “do[es] not have a separate product brochure for laminated products,” the record shows that Unico has two brands consisting of only laminated CORE products, “Bristar” and “Natulami.”<sup>4</sup> *Id.* at 18 & exhibit B-22. Specifically, excerpts from material that appeared on Unico’s website describe Bristar and Natulami as “LAMINATED Steel Plate.” *Id.* exhibit B-22. A Unico brochure indicates under a “Product Characteristics” heading that Bristar and Natulami are coated with either PVC or a combination of PVC and PET, while Unico’s non-laminated, painted CORE products are not. *Union’s Section A Resp.* exhibit A-28, at 595–603.

The brochures on the record do not constitute substantial evidence for the Department’s finding that laminated CORE products are not marketed separately from other CORE products. Together with other record evidence, the brochures establish, to the contrary, that Union produces and markets separate product lines of PET-film-laminated CORE products, *i.e.*, the Unipet, Unilux, and White Board lines of products. *Id.* exhibit A-28, at 576. The record also shows that Union’s affiliate, Unico, markets two lines of CORE products, Bristar and Natulami, laminated with either PVC film or a combination of PVC film and PET film. *See, e.g., Union’s Section A Resp.* exhibit A-28, at 594. The court, therefore, concludes that the record evidence does not sustain Commerce’s finding that these products are not “marketed separately.”

---

<sup>3</sup> Contrary to Union’s statements in a questionnaire response, “Univure,” a Union brand also listed on the “High-tech Steel” page of Union’s brochure, does not appear to be laminated CORE. *See Letter from Union to the Sec’y of Commerce* exhibit A-28, at 576 (Nov. 13, 2006) (Admin. R. Doc. No. 3933) (“*Union’s Section A Resp.*”) Union stated that Univure is one of its “brand-name laminated products” but also stated that its laminated products are coated with polyethylene terephthalate (“PET”) film. *Letter from Union to the Sec’y of Commerce* 18 (Feb. 2, 2007) (Admin. R. Doc. No. 4036) (“*Union’s Supplemental Questionnaire Resp.*”). Univure is not described in any product brochure as being coated with a plastic film such as PET and therefore does not appear to be a laminated product. *See Union’s Section A Resp.* exhibit A-28, at 576 (describing Univure as having a “[l]ayer of patterns printed on the steel surface by removing the laminated printed film with various patterns.”); *Union’s Supplemental Questionnaire Resp.* exhibit B-22.

<sup>4</sup> Some record evidence refers to “Naturami” instead of “Natulami.” *Union’s Supplemental Questionnaire Resp.* 18 & exhibit B-22.

***C. The Record on the Whole Does Not Contain Substantial Evidence Establishing that the Physical Differences in Question Are Minor and Commercially Insignificant***

Despite its apparent reliance on the statutory construction affirmed in *Pesquera*, the Remand Redetermination does not contain a finding that the two groups of products in question are, in a commercial sense, essentially equal or interchangeable. This omission is noteworthy, for two reasons. First, language in the *Pesquera* opinion suggests that physical differences are minor and commercially insignificant if the two products under consideration can be described as “essentially equal or interchangeable.” *Pesquera*, 266 F.3d at 1382 (quoting *The American Heritage Dictionary* 639 (2d ed. 1991)). Second, as a matter of logic, it is difficult to envision how the physical differences separating the two groups of products at issue in this case could be considered to be minor and commercially insignificant unless the two groups of products are viewed by customers as generally equal or interchangeable in the marketplace. The court is unable to find on the record substantial evidence to support a finding that the two product groups are viewed in this way, and what evidence exists is inconsistent with such a finding. *Cf. Pesquera*, 266 F.3d at 1378 (describing the Department’s findings that in various countries the highest grade of salmon was the “superior” grade, which Commerce found equivalent to the Japanese “premium” grade, and that superior grade salmon would contain some salmon that, like “super-premium” grade salmon, would be without defects).

The Remand Redetermination reaches an overall finding that “although we agree that there are certain physical differences between laminated and other painted products, we disagree that these differences result in a significant commercial difference that would render the products *non-comparable*.” *Remand Redetermination* 5 (emphasis added). This formulation of a factual determination is conclusory. It fails to address the central issue that Commerce was required to resolve on remand. Two groups of products that are not “identical” might not, for purposes of identification of the foreign like product, necessarily be “non-comparable” under 19 U.S.C. § 1677(16)(B) or (C). However, when proceeding under § 1677(16)(A), as opposed to § 1677(16)(B) or (C), Commerce is held to the “identical” standard, under which differences in physical characteristics in the two groups of products being compared may exist, but if they exist, these differences must be minor and not commercially significant. In this case, Commerce insisted on matching as “identical,” according to § 1677(16)(A), Union’s sales of non-laminated, painted CORE products in the United States with sales in Korea that included both laminated

and non-laminated, painted CORE products. All but one of the findings of fact that the Department made to support that determination had little, if any, probative weight on the issue of the commercial significance of the physical differences. The finding of fact that laminated CORE products are not “marketed separately” from non-laminated, painted CORE products, although it is vaguely expressed, arguably would have had some probativity with respect to that issue. However, that finding is unsupported by substantial record evidence and, instead, is contradicted by the evidence consisting of the brochures and questionnaire responses.

After reviewing the record as whole, the court concludes that record evidence consisting of the brochures, the questionnaire responses, and Union’s reported price and cost data does not constitute substantial evidence to support a finding that the physical differences between laminated and non-laminated, painted CORE products are minor and not commercially significant. The brochures and questionnaire responses establish that laminated and non-laminated, painted CORE products result from different coating processes and are comprised of different materials. *See, e.g., Union’s Section A Resp.* exhibit A-28, at 576, 591–93; *Union’s Questionnaire Resp.* 5–6. According to a questionnaire response, these differences gave laminated CORE products different physical characteristics from those of the non-laminated, painted CORE products. Union stated in the questionnaire response that “[c]ompared to the normal painted products, laminated products have physical properties such as unrestricted expression of various patterns, superior durability, environmentally-friendly material, etc.” *Union’s Questionnaire Resp.* 6; *see also Union’s Section A Resp.* exhibit A-28, at 576. According to another questionnaire response, the different physical characteristics are significant to Union’s customers. Union stated that its “salesmen work with their customers to make sure that they obtain the right product for their needs” and that “[s]hould that need best be served with a laminated product, Union would sell the laminated product to the customer.” *Union’s Supplemental Questionnaire Resp.* 22.

A finding that the physical characteristics that distinguish laminated CORE products have no commercial significance must confront the record evidence showing that Union and Unico have invested in production equipment and other resources necessary to produce and market laminated CORE products while concurrently producing and marketing non-laminated, painted CORE products. The product brochures and questionnaire responses establish that Union produces three separate lines of PET-film-laminated CORE products and that its affiliate, Unico, produces two separate lines of CORE products

laminated with either PVC film or a combination of PVC film and PET film. In sum, the record evidence refutes a finding that the physical differences between laminated and non-laminated, painted CORE products are minor and not commercially significant.

Defendant-intervenor United States Steel Corporation (“U.S. Steel”) argues that the record supports a finding that the physical differences between laminated and non-laminated, painted CORE products are minor because Unico’s brochure shows that both groups of products “are used for the exact same purposes.” U.S. Steel’s Remand Comments 11. U.S. Steel’s contention is unwarranted by the record evidence. Unico’s brochure shows that laminated CORE products share many applications with certain non-laminated, painted CORE products, *e.g.*, the outer casings on home appliances such as refrigerators and microwaves and applications as interior building materials. *Union’s Section A Resp.* exhibit A-28, 595, 597, 599, 601, 603. Neither this brochure nor other record evidence shows, however, that customers perceive no significant differences between these two groups of products. To the contrary, the record contains evidence that Union’s sales personnel recommend laminated CORE products to satisfy the requirements of certain customers, *Union’s Supplemental Questionnaire Resp.* 22, and that laminated CORE products are more durable than non-laminated, painted CORE products, *Union’s Questionnaire Resp.* 6.

Defendant and defendant-intervenors also argue that the physical differences between laminated and non-laminated, painted CORE products were minor and not commercially significant because laminated products were not typically more expensive to produce than non-laminated, painted CORE products. *See, e.g.*, Def.’s Post-Oral Argument Resp. 6. The evidence does not support how these parties characterize the costs of production, and their characterization would have little probative weight in any case. The evidence shows that typically, but not invariably, laminated CORE products were more expensive to produce than non-laminated, painted CORE products: in a comparison of thirty-nine sets of otherwise identical CORE products, laminated products were more expensive to produce than non-laminated, painted CORE products in thirty-four instances. Pl.’s Post-Oral Argument Comments 9 n.5 & attachment 1. As discussed previously, even if the evidence showed that production costs were not typically different, such evidence would not be determinative on the question of whether the two groups of products are distinguished only by physical differences that are minor and not commercially significant.

Defendant and defendant-intervenors attempt to discredit the data showing that the weighted-average cost to produce laminated CORE products substantially exceeded the weighted-average cost to produce non-laminated, painted CORE products, *Union's Supplemental Questionnaire Resp.* exhibit B-24, contending that, because the products within both groups have substantially different costs of production, a weighted-average reflects only the relative cost to produce the mix of products sold during the period of review. *See, e.g.,* Def.'s Post-Oral Argument Resp. 9. Regardless of the limits inherent in weighted averages, this argument is unconvincing. Again, the record as a whole fails to support a finding that otherwise identical laminated CORE products and non-laminated, painted CORE products cost the same to produce. *See* Pl.'s Post-Oral Argument Comments 9 n.5 & attachment 1 (showing that, for thirty-four of thirty-nine sets of otherwise identical products, the laminated product were more expensive to produce); *Union's Questionnaire Resp.* 6 (indicating that lamination increases the total cost of manufacture).

Defendant-intervenor Nucor Corporation argues that the evident difference in the costs of producing these groups of products is not relevant because it is mostly due to savings from economies of scale associated with the far greater production of non-laminated, painted CORE. Nucor's Post-Oral Argument Comments 6–11. This contention appears to be based on an unsupported assumption concerning economies of scale, but even taken at face value the contention acknowledges that laminated CORE products cost more to produce than non-laminated, painted CORE products.

Defendant-intervenor U.S. Steel argues that the record evidence demonstrates no "significant" differences between the costs to produce laminated and non-laminated, painted CORE products because (1) raw materials costs were in the same range, with different varieties of both groups of products having low, median, and high production costs, (2) the differences in the costs of paint and laminate are not substantial, and (3) with respect to Unico, the overhead expenses associated with non-laminated, painted CORE products are greater than the overhead expenses associated with laminated CORE products. U.S. Steel's Post-Oral Argument Resp. 4–11. The evidence on which these arguments rely fails to show that laminated CORE products were not typically more expensive to produce than non-laminated, painted CORE products. First, evidence that costs were in similar ranges and were concentrated at similar levels says little about whether production costs for laminated and non-laminated, painted CORE products were typically similar because both laminated and non-laminated CORE products were produced in various

sizes and specifications. *Remand Redetermination* attachment 1 (“Model Match Variables”), attachment 2 (“Final Analysis Memo for Laminated CORE Products”). Second, U.S. Steel’s statement that the costs of paint and laminate are similar is not supported by the record, which shows that most of Union’s paints cost less than PET film or PVC film. See *Letter from Union to the Sec’y of Commerce* exhibit D-43, at 27 (Mar. 2, 2007) (Admin. R. Doc. No. 4066). Third, U.S. Steel’s argument about overhead costs is unpersuasive because overhead is only one component of Unico’s manufacturing cost, and Unico’s total per-unit cost of manufacture for laminated CORE products is greater than its total per-unit cost of manufacture for non-laminated, painted CORE products. See *Union’s Supplemental Questionnaire Resp.* exhibit B-24.

For the various reasons discussed above, the court concludes that the record as a whole does not contain substantial evidence that the physical differences separating laminated CORE products and non-laminated, painted CORE products are minor and not commercially significant. Therefore, it was unlawful for Commerce to compare these groups of products as “identical” according to 19 U.S.C. § 1677(16)(A).

***D. The Department’s Claimed Reliance on a Practice Not to Alter a Model-Match Methodology Absent Compelling Reasons Does Not Suffice to Sustain the Remand Redetermination***

The Remand Redetermination relies on a claimed “practice . . . not to alter a model-match methodology developed at an earlier stage of a proceeding absent ‘compelling reasons’ for the modification.” *Remand Redetermination* 4. In support of this reliance, the Remand Redetermination cites various decisions of the Court of International Trade for the proposition that the practice is grounded in a reasonable construction of the antidumping statute. *Id.* (citing *Fagersta Stainless AB v. United States*, 32 CIT \_\_, 577 F. Supp. 2d 1270 (2008); *SKF USA Inc. v. United States*, 31 CIT 951, 491 F. Supp. 2d 1354 (2007), *aff’d* 537 F.3d 1373 (Fed. Cir. 2008) and *Mittal Steel USA, Inc. v. United States*, 31 CIT 1395 (2007)). After making various factual findings, the Remand Redetermination states as follows: “[t]he Department finds on remand that the record evidence does not support the assertion that meaningful physical and commercial differences between laminated and other painted CORE products justify a departure from its previous model match methodology.” *Id.* at 10.

The prior decisions of the Court of International Trade cited in the Remand Redetermination are not binding on the court in this case. More important, however, is that those prior decisions do not state a

principle under which the court may affirm the Remand Redetermination. None of the cited cases hold that the Department is free to do what it did here, which was to refuse, under a “compelling reasons” standard, to modify a model-match methodology on a record that does not permit the Department to find that laminated and “other painted” CORE products are “identical in physical characteristics” as required by 19 U.S.C. § 1677(16)(A). Whatever the merits of its claimed practice, the Department cannot comply with the definition of “foreign like product” in § 1677(16)(A) unless it can find, based on substantial evidence, that the physical differences involved are minor and not commercially significant. The analysis undertaken by the Court of Appeals in *Pesquera* confirms this point. *Pesquera*, 266 F.3d at 1384 (stating, after affirming the Department’s construction of the statute, that “[w]e must also determine whether Commerce’s commercial practice determination here is supported by substantial evidence and whether Commerce has provided an adequate explanation for its determination.”). In the circumstances of this case, the fact that Commerce is applying a model-match methodology that it used in prior reviews is insufficient to justify a determination that lacks such a valid finding. The cases the Remand Redetermination cites do not hold to the contrary.

In *Fagersta*, a factual issue critical to the challenge to the model-match methodology was whether stainless steel wire rod (“SSWR”) made using a process of electro-slag refining, which plaintiff *Fagersta Stainless AB* defined as “a separate and significant processing stage . . . [that] imparts unique material qualities, primarily superior fatigue resistance, to the finished wire rod product,” *Fagersta*, 32 CIT at \_\_\_, 577 F. Supp. 2d at 1274 (alterations in original), differed physically from other SSWR in a way that was commercially significant, *id.* at \_\_\_, 577 F. Supp. 2d at 1278–79. Basing its decision on the record evidence, the Court of International Trade sustained the Department’s finding that the physical difference was not commercially significant. *Id.* at \_\_\_, 577 F. Supp. 2d at 1279–80. In contrast, the record in this case will not support such a finding.

*SKF USA* did not address the narrow issue presented by this case. In *SKF USA*, the Court of International Trade upheld the Department’s decision to revise the long-standing “family” methodology for matching various models of ball bearings in favor of a new methodology that involved, *inter alia*, a difmer adjustment. *See SKF USA*, 31 CIT at 953–60, 491 F. Supp. 2d at 1358–63. The case did not involve a decision to modify, or refuse to modify, a model-match methodology that was grounded solely in the “identical in physical characteristics” criterion of 19 U.S.C. § 1677(16)(A).

*Mittal* does not stand for a principle under which the court may uphold the Remand Redetermination. Although *Mittal* involved the model-match methodology applied to CORE products from Korea, the question presented was whether the Department acted lawfully in rejecting a request of the petitioner to require respondents to provide more specific product information in a supplemental questionnaire, on the premise that had these data been collected, petitioners possibly would have been able to uncover a compelling reason for changing the model-match methodology. *Mittal*, 31 CIT at 1397–98. The Court of International Trade upheld, as supported by substantial record evidence, the Department’s decision not to request the additional information. *Id.* at 1400.

In conclusion, the judicial decisions on which the Remand Redetermination relies do not support a principle under which the decision challenged here can be sustained. The existence of a practice of declining to modify an existing model-match methodology absent “compelling reasons” does not suffice to support unlawful comparisons under 19 U.S.C. § 1677(16)(A). That the record fails to support, with substantial evidence, a finding that the merchandise being compared is in fact “identical in physical characteristics” within the meaning of that provision must be viewed, in the context of this case, as a “compelling reason” to change the model-match methodology to bring that methodology into compliance with law.

#### **IV. Conclusion**

The Remand Redetermination must be set aside as contrary to law. The current record does not contain substantial evidence to support a determination that laminated CORE products may be compared with “other painted,” *i.e.*, non-laminated, painted CORE products under the “identical in physical characteristics” requirement of the foreign like product definition in 19 U.S.C. § 1677(16)(A). Therefore, Commerce, on the second remand, may not compare laminated CORE and non-laminated, painted CORE products under § 1677(16)(A) unless it reopens the record, conducts a sufficient investigation on the question of whether the physical differences distinguishing laminated and non-laminated, painted CORE products are minor and not commercially significant, and reaches appropriate, probative findings that are supported by substantial evidence on the reopened record. If Commerce decides not to proceed in this way, on the second remand it must modify the model-match methodology applied in the Final Results to avoid comparing laminated CORE and non-laminated, painted CORE as products “identical in physical characteristics” under § 1677(16)(A).

### ORDER

Upon consideration of all proceedings and submissions herein, and upon due deliberation, it is hereby

**ORDERED** that the *Final Results of Redetermination Pursuant to Remand* (Dec. 28, 2009) (“Remand Redetermination”) be, and hereby are, set aside as contrary to law; it is further

**ORDERED** that Commerce, upon remand, shall review and reconsider its “modelmatch” methodology, including its decision, made in *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Thirteenth Admin. Review*, 73 Fed. Reg. 14,220 (Mar. 17, 2008) (“Final Results”), and made again in the Remand Redetermination, to deny Union’s request for a revision of that model-match methodology, by which Commerce compared the types of subject merchandise in plaintiff’s U.S. sales with the types of foreign like products in plaintiff’s sales in its home market; it is further

**ORDERED** that, on remand, the Department may reopen the record to re-investigate the question of whether the physical differences that have been established to exist between laminated and non-laminated, painted CORE products are minor and commercially insignificant; it is further

**ORDERED** that if Commerce does not reopen the record to re-investigate the question of whether the physical differences that have been established to exist between laminated and non-laminated, painted CORE products are minor and commercially insignificant, then it must alter the model-match methodology that was applied in the Final Results and Remand Redetermination so that laminated and non-laminated, painted CORE products are not compared according to 19 U.S.C. § 1677(16)(A) and recalculate Union’s margin accordingly; it is further

**ORDERED** that the second redetermination must comply in all respects with this Opinion and Order, be supported by substantial evidence, and be otherwise in accordance with law; and it is further

**ORDERED** that the Department shall have ninety (90) days from the date of this Opinion and Order to file its second redetermination upon remand in this proceeding, that plaintiff and defendant-intervenors shall have thirty (30) days from the filing of the second redetermination upon remand to file comments thereon with the court, and that defendant shall have fifteen (15) days thereafter to file any reply to such comments.

Dated: January 11, 2011

New York, New York

*/s/ Timothy C. Stanceu*

TIMOTHY C. STANCEU

JUDGE

