

U.S. Court of International Trade

Slip Op. 20–17

UNITED STATES, Plaintiff, v. MAVERICK MARKETING, LLC ET AL.,
Defendants and Consolidated Defendants.

Before: Claire R. Kelly, Judge
Consol. Court No. 17–00174

[Granting in part and denying in part Defendants’ motions to compel discovery and consider sanctions.]

Dated: February 7, 2020

Stephen Carl Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for plaintiff United States. With him on the brief were *Joseph H. Hunt*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director.

Barry Marc Boren, Law Offices of Barry Boren, of Miami, FL, and *Gerson M. Joseph*, Gerson M. Joseph, P.A., of Weston, FL, for defendants Maverick Marketing, LLC and Good Times USA, LLC.

Rhonda A. Anderson, Rhonda A. Anderson, P.A., of Coral Gables, FL, for defendant Gateway Import Management, Inc.

MEMORANDUM AND ORDER

Kelly, Judge:

Before the court are motions to compel discovery, *see* [Defs.’ Maverick Marketing, LLC & Good Times USA, LLC’s] Mot. Order Compelling Disc. & Consideration Sanctions, Sept. 26, 2019, ECF No. 67 (“Maverick’s Mot.”); [Defs.’ Gateway Import Management, Inc. & Good Times USA, LLC’s] Mot. Order Compelling Disc. & Consideration Sanctions, Sept. 26, 2019, ECF No. 66 (from associated docket Ct. No. 17–00232) (“Gateway’s Mot.”) (collectively, “motion to compel”), filed pursuant to United States Court of International Trade (“USCIT”) Rule 37(a)(2).¹ Defendants Gateway Import Management, Inc. (“Gateway”), Good Times USA, LLC (“Good Times”), and Maverick Marketing, LLC (“Maverick”) contend that the United States (“Plaintiff”) has inadequately responded to Defendants’ requests for production (“RFPs”) and interrogatories, and ask the court to enter an order compelling Plaintiff to “provid[e] meaningful answers to the questions asked and specifically identify[] the documents referred to

¹ Defendants Maverick and Good Times moved to compel discovery in the lead docket of this consolidated action. *See* Maverick’s Mot. In addition, Defendants Gateway and Good Times filed a motion to compel discovery in the associated docket of Court No. 17–00232 but not in the lead docket. *See* Gateway’s Mot. The court considers the motions to compel together.

in their responses[.]” *See* Gateway’s Mot. at 15; Maverick’s Mot. at 17. Defendants also request that this court enter sanctions against Plaintiff for its alleged failure to respond to requested discovery. Gateway’s Mot. at 1; Maverick’s Mot. at 1. Plaintiff counters that Defendants’ motion to compel is “unwarranted” and requests the court to deny the motion. *See* Pl.’s Opp’n Defs.’ Mots. Compel. at 1, Oct. 11, 2019, ECF No. 69 (“Pl.’s Opp’n Br.”).

For the following reasons, this court grants Defendants’ motion to compel with respect to the following RFPs and Interrogatories: Maverick RFP Nos. 4, 10, 11, 12, 13, 14, 15, 16, 19, 20, 22, 24, 26, 27, 28, 29; Maverick Interrogatory Nos. 8, 9, 11, 19, 24; Gateway RFP Nos. 4, 5, 11, 12, 13, 14, 15, 16, 17, 19, 20, 22, 24, 27, 28, 29, 30; Gateway Interrogatory Nos. 8, 9, 11, 19, 24; Good Times RFP Nos. 1, 3, 9, 10, 13, 23; Good Times Interrogatory No. 19. However, Defendants’ motion to compel is denied with respect to the following RFPs and Interrogatories: Maverick RFP Nos. 9, 21, 25, 30, 31, 32, 33, 38, 39; Maverick Interrogatory Nos. 15, 20, 21, 25; Gateway RFP Nos. 10, 21, 26, 31, 32, 33, 34, 39, 40; Gateway Interrogatory Nos. 15, 20, 21, 25; Good Times RFP Nos. 4, 5, 6, 7, 8, 11, 15, 17, 18, 19, 20, 21; and, Good Times Interrogatory Nos. 7, 9, 10, 22, 23.

Finally, this court declines to consider sanctions against Plaintiff, at this juncture, for an alleged failure to comply with Defendants’ motion to compel.

BACKGROUND

Plaintiff commenced separate actions pursuant to section 592 of the Tariff Act of 1930, as amended 19 U.S.C. § 1592(d) (2012),² which were later consolidated. *See* Am. Summons, Aug. 3, 2017, ECF No. 8; Compl., July 10, 2017, ECF No. 2; Order, Sept. 12, 2019, ECF No. 66 (consolidating Ct. Nos. 17–00174, 17–00232, 19–00004, and 19–00019 under Ct. No. 17–00174). Plaintiff seeks to recover unpaid Federal Excise Tax (“FET”), with respect to entries of cigars made between July 10, 2012 and March 27, 2015 and alleges Defendants’ FET calculations were not, as statutorily required, based on arm’s length transactions. *See* Compl. at ¶¶ 1, 21–33; *see also* Pl.’s Opp’n Br. at 1.

Defendants raise several affirmative defenses. Relevant here, Maverick, Good Times, and Gateway, argue that they were not negligent “because they received and reasonably relied on professional advice from their customs house broker and an experience trade attorney”

² Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

and fully complied with applicable statutes and regulations.³ See Defs. [Maverick] & [Good Times's] Answers to Compl. at Third Affirm. Defense, Mar. 29, 2018, ECF No. 48 ("Maverick & Good Times's Answer"); Def. [Gateway's] Answer to Compl. at Third Affirm. Defense, Aug. 1, 2018, ECF No. 49 ("Gateway's Answer") (from associated docket Ct. No. 17-00232).⁴ Defendants also argue that they "were not negligent" because "Plaintiff had established a uniform practice" of allowing the same behavior complained of in this case. See *id.* at Fifth Affirm. Defense.

On March 12, 2019, Defendants served their respective interrogatories on Plaintiff. See Gateway's Mot. at Exs. C–D; Maverick's Mot. at Exs. C–D. Thereafter, on April 4, 2019, Defendants served their respective RFPs on Plaintiff. Gateway's Mot. at Exs. A–B; Maverick's Mot. at Exs. A–B. On April 12, 2019, Plaintiff responded to Defendants' interrogatories; following an agreed extension of time, Plaintiff replied to Defendants' RFPs on June 7, 2019. Gateway's Mot. at Exs. E–H; Maverick's Mot. at Exs. E–H. On June 27, 2019, Defendants notified Plaintiff of their objections to Plaintiff's RFP and interrogatory responses. Gateway's Mot. at Exs. I–L; Maverick's Mot. at Exs. I–L. Plaintiff responded to Defendants' objections on July 10, 2019 and supplemented its responses. Gateway's Mot. at Exs. M–N; Maverick's Mot. at Exs. M–N.

This court conferred with the parties twice in an effort to resolve their dispute. See Teleconference, Oct. 18, 2019, ECF No. 72; Memo. & Order, Nov. 1, 2019, ECF No. 73; Teleconference, Jan. 24, 2020, ECF No. 83; Order, Jan. 24, 2020, ECF No. 85. Unfortunately, a

³ In their First and Second Affirmative Defenses, Defendants allege that 26 C.F.R. § 48.4216(b)(2)(e) (2012), which Plaintiff references in its complaint, see Compl. at ¶ 10, is "void for ambiguity," facially and as applied. See Defs. [Maverick] & [Good Times's] Answer to Compl. at First & Second Affirm. Defenses, Mar. 29, 2018, ECF No. 48 ("Maverick & Good Times's Answer"), Def. [Good Times's] Answer to Compl. at First & Second Affirm. Defenses, Aug. 1, 2018, ECF No. 49 (from associated docket Ct. No. 17-00232) ("Good Times's Answer"); Gateway's Answer at First & Second Affirm. Defenses (collectively, "Defendants' Answers"). That regulation defines sales at arm's-length. See 26 C.F.R. § 48.4216(b)(2)(e). Good Times also avers that 26 C.F.R. § 48.4216(b)(2)(e) does not apply to any of its transactions. Good Times's Answer at First & Second Affirm. Defenses.

In their Fourth, Sixth, and Seventh Affirmative Defenses, Defendants aver they were not liable for failing to disclose any alleged "special arrangement" because: they provided all required information to Customs and Border Protection, see Defendants' Answers at Fourth Affirm. Defense; the sales between Maverick and Good Times were not made pursuant to a "special arrangement" because the parties stood in adverse economic positions, see *id.* at Sixth Affirm. Defense; and, Maverick and Good Times were not related parties but an independent contractor and buyer, respectively. See *id.* at Seventh Affirm. Defense.

⁴ Good Times separately avers that it was not negligent with respect to any allegedly false statements made to Customs, because it was not the importer and thus did not communicate with Customs, both generally and regarding these entries, and was under no obligation to do so. See Good Times's Answer at Third Affirm. Defense.

significant number of items remain in dispute. *See* Defs.’ Discovery Status Report, Feb. 3, 2020, ECF No. 89.⁵

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1582. *See United States v. Maverick Mktg., LLC*, 42 CIT __, __, 322 F. Supp. 3d 1373, 1379 (2018) (holding that the court possesses subject-matter jurisdiction in this case) (“*Maverick I*”); *see also United States v. Gateway Imp. Mgmt.*, 42 CIT __, 324 F. Supp. 3d 1328 (2018). This court has broad discretion in deciding discovery matters. *See United States v. Greenlight Organic, Inc.*, 41 CIT __, __, 280 F. Supp. 3d 1367, 1378 (2017). USCIT Rule 26(b)(1) permits “discovery regarding any non-privileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of discovery in resolving the issues, and whether the burden or expense of the discovery outweighs its likely benefit.” USCIT R. 26(b)(1). Information within the scope of discovery need not be admissible in evidence to be discoverable. *Id.* “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” Fed. R. Evid. 401.

DISCUSSION

I. Discovery of Trademark and Audit Information Concerning Nonparties

Defendants requested every document or record “which identifies all the trademarks on the cigars manufactured by [various commercial entities] that were imported by [various importers.]” *Maverick Status Report at Maverick RFP Nos. 30–33; Gateway Status Report at Gateway RFP Nos. 31–34.*⁶ Defendants contend that the requested

⁵ Defendants jointly filed their respective discovery status reports. Given that the discovery status reports itemize, and excerpt, only the interrogatories and RFPs that remain in dispute, this opinion refers to those status reports, rather than the exhibits containing, inter alia, the RFPs, Interrogatories, and Responses appended to Defendants’ motions to compel. *See* Discovery Status Report of Def. [Good Times] in the *Maverick and Gateway Cases*, Feb. 3, 2020, ECF No. 89–1 (“*Good Times Status Report*”); Discovery Status Report of Def. [Maverick], Feb. 3, 2020, ECF No. 89–2 (“*Maverick Status Report*”); Amend. Status Report of Def. [Gateway], Feb. 4, 2020, ECF No. 90 (“*Gateway Status Report*”).

⁶ Defendants requested information that identifies: “all the trademarks on cigars manufactured by Swedish Match Dominicana that were imported by Family Tobacco”; “all the trademarks on the cigars manufactured by Swisher Dominicana that were imported by Family Tobacco Traders”; “all the trademarks on large cigars imported by All American Tobacco where the trademarks were not owned or registered by All-American Tobacco”; and,

trademark information is relevant because it supports Defendants' affirmative defenses, against Plaintiff's penalty action under 19 U.S.C. § 1592(a), which provides that no person may, by negligence, introduce or attempt to introduce any merchandise into the commerce of the United States by a material and false statement or omission. *Maverick's Mot.* at 8; *Gateway's Mot.* at 7; *see also United States v. Ford Motor Co.*, 463 F.3d 1267, 1279 (Fed. Cir. 2006) (To establish a violation of section 1592(a), "Customs has the burden merely to show that a materially false statement . . . occurred; once it has done so, the defendant must affirmatively demonstrate that it exercised reasonable care under the circumstances."). Defendants contend that their requests are proper because they tend to show that Defendants acted in reasonable belief that the goods were properly entered, and the FETs were appropriately calculated. *See Maverick's Mot.* at 12; *Gateway's Mot.* at 11. To this end, Defendants specifically allege that (1) Customs and Border Protection ("Customs") had an established and uniform practice ("EUP") of allowing what Defendants did here, and (2) that Defendants exercised reasonable care. *See Maverick's Mot.* at 8, 12; *Gateway's Mot.* at 7, 11; *see also Compl.* at ¶ 20; *Maverick & Good Times's Answer at Third & Fifth Affirm. Defenses*; *Gateway's Answer at Third & Fifth Affirm. Defenses*.⁷ Plaintiff objects to each request, averring that the requested information is "irrelevant [and private] information regarding unrelated taxpayers" that would be "overly burdensome [to produce] pursuant to USCIT R. 26(b)(1)."⁸ *See Maverick Status Report at Maverick RFP Nos. 30–33*; *Gateway Status Report at Gateway RFP Nos. 31–34*. For the reasons that follow, Defendants arguments misconstrue both the requirements for establishing a uniform practice and the reasonable care standard.

Defendants allege as an affirmative defense that Customs has an "established and uniform practice of allowing and liquidating entries involving the exact same behavior complained of in this case in numerous ports, by numerous importers, over a long period of time."

"all the trademarks on large cigars imported by Family Tobacco Traders where the trademarks were not owned or registered by Family Tobacco Traders." *Maverick Status Report at Maverick RFP Nos. 30–33*; *Gateway Status Report at Gateway RFP Nos. 31–34*

⁷ The Third and Fifth Affirmative Defenses relate to whether Defendants acted reasonably. As noted above, they concern, respectively, Defendants' receipt and reliance on professional advice and Plaintiff's allegedly established and uniform practice of allowing the same behavior. *See Maverick & Good Times's Answer at Third & Fifth Affirm. Defenses*; *Gateway's Answer at Third & Fifth Affirm. Defenses*.

⁸ Further, Plaintiff avers that is prohibited from producing third-party tax information by statute, absent a waiver from each taxpayer. *See, e.g., Maverick Status Report at Maverick RFP Nos. 30–33*. Given that RFP Nos. 30–33 request irrelevant information, the court does not address whether Plaintiff is proscribed from disclosing third-party tax information in discovery.

See Maverick & Good Times’s Answer at Fifth Affirm. Defense; Gateway’s Answer at Fifth Affirm. Defense. They refer to Customs’ long-standing position, now codified at 19 U.S.C. § 1315, to give notice of a change in EUP that results in a higher rate of duty or charge. The proscription against unnotified changes to an EUP, set forth under section 1315, centers on the consistent administration of rates of duty or charges. Section 1315 provides that “[n]o administrative ruling resulting in the imposition of a higher rate of duty or charge . . . applicable to imported merchandise under an [EUP] shall be effective” without notice. *See* 19 U.S.C. § 1315(d). Before the publication of a ruling which has the effect of changing a rate of duty or charge within the meaning of 19 U.S.C. § 1315(d), notice that the practice (or prior ruling on which that practice was based) is under review will be published in the Federal Register and interested parties will be given an opportunity to make written submissions with respect to the correctness of the contemplated change. The invocation of EUP is simply inapposite. It applies to rulings that establish rates of duty or charges, not enforcement decisions. *See, e.g., Sea-Land Service, Inc. v. United States*, 23 CIT 679, 689–90, 69 F. Supp. 2d 1371, 1380 (1999) (noting that section 1315(d) is limited to an administrative ruling and does not apply when a judicial decision mandates a change in an EUP).

Moreover, even if one were to adapt the principle embodied in the terminology EUP, here it would be a poor fit. The plain meaning of practice is “[t]he act of accomplishing something; the actual application of knowledge through performance.” BLACK’S LAW DICTIONARY 1419 (11th ed. 2019).⁹ Declining to act, therefore, does not establish a practice. By contrast, the government has discretion to dedicate resources in bringing civil actions as it sees fit. Therefore, Defendants attempt to defend the complained-of behavior by reference to Customs’ alleged practice of non-enforcement not only misconstrues section 1315 but also misunderstands Customs’ enforcement authority.

With respect to Defendants’ “reasonable care” defense, Customs’ guidelines define “reasonable care” as follows:

All parties, including importers of record or their agents, are required to exercise reasonable care in fulfilling their responsibilities involving entry of merchandise. These responsibilities include, but are not limited to: providing a classification and value for the merchandise; furnishing information sufficient to permit Customs to determine the final classification and valua-

⁹ The term “establish” is defined as “[t]o make or form; to bring about or into existence”, and “uniform” as “[c]haracterized by a lack of variation; identical or consistent.” BLACK’S LAW DICTIONARY 688, 1840 (11th ed. 2019).

tion of merchandise; taking measures that will lead to and assure the preparation of accurate documentation, and determining whether any applicable requirements of law with respect to these issues are met. In addition, all parties, including the importer, must use reasonable care to provide accurate information or documentation to enable Customs to determine if the merchandise may be released. Customs may consider an importer's failure to follow a binding Customs ruling a lack of reasonable care. In addition, unreasonable classification will be considered a lack of reasonable care (e.g., imported snow skis are classified as water skis). Failure to exercise reasonable care in connection with the importation of merchandise may result in imposition of a section 592 penalty for fraud, gross negligence or negligence.

19 C.F.R. Pt. 171, App. B(D)(6) (2014).¹⁰ Therefore, importers exercise reasonable care when they, inter alia, provide sufficient and accurate information to Customs to permit it to determine the proper value of the merchandise. Here, Defendants are accused of making material omissions, and false declarations, having the potential to prevent proper valuation of the merchandise. *See* Compl. at ¶ 23, July 10, 2017, ECF No. 2; Compl. at ¶ 23, Sept. 6, 2017 ECF No. 2 (from associated docket Ct. No. 17–00232). Evidence of how Plaintiff has treated other such omissions and declarations is not relevant to the question of whether Defendants acted reasonably.¹¹ The reasonable care standard is concerned with the reasonableness of a defendant's actions alone—not whether the actions of similarly situated entities evinces a “reasonableness” standard that would bear on defendant's actions. *See e.g., United States v. Aegis Sec. Ins. Co.*, 43 CIT __, __, Slip Op. 19–162 at 26 (Dec. 17, 2019) (determining that, whether or not similarly situated importers would have made the same error, or “would have been similarly inattentive,” does not inform the question of whether the importer acted reasonably. Whether or not one exercises reasonable care does not depend upon the “consensus in the community[,]” but rather, on the “application of reason.”).

¹⁰ The citation is to the Code of Federal Regulations 2014 edition, the most recent version in effect at the time of the last entries of the subject merchandise. The entries at issue in this action were imported between the years 2012 and 2015. *See* Compl. at ¶ 1.

¹¹ The HR Report on the amendments to 19 U.S.C. § 1592 provides examples of steps an importer should take in meeting the “reasonable care” standard, including: “seeking guidance from the Customs Service through the pre-importation or formal ruling program; consulting with a Customs broker, a Customs consultant, or a public accountant or an attorney; using in-house employees such as counsel, [etc.]” H.R. REP.NO. 103–361, pt.1, at 120 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2552, 2670. Notably, these examples do not include relying on the government's past action or inaction toward the behavior. *Id.*

Likewise, Defendants' desire, here, to see investigatory files in order to demonstrate that the United States has not acted in a similar manner against other companies in the past cannot serve any relevant purpose. *See* Maverick & Good Times's Answer at Fifth Affirm. Defense; Gateway's Answer at Fifth Affirm. Defense. Customs' past enforcement decisions are not relevant to the question of whether the importer has exercised reasonable care. *See e.g., United States v. Hitachi America, Ltd.*, 21 CIT 373, 391, 964 F. Supp. 344, 363 (1997), *aff'd* in part, *rev'd* in part on other grounds, 172 F.3d 1319 (1999) (the federal government is not estopped to enforce laws against citizens when it later ascertains that their actions were not in compliance with the law.).¹²

Accordingly, the motion to compel responses to Maverick RFP Nos. 9, 25, 30, 31, 32, 33, 38, 39 and Gateway RFP Nos. 10, 26, 31, 32, 33, 34, 39, 40 is denied, because the discovery sought is not relevant.

II. Affiliate Tax Information

Defendants' request for affiliate nonparty tax information is also denied for lack of relevancy. Defendants argue that the affiliate nonparty tax information is relevant because it would demonstrate that its importation practices were reasonable under the circumstances. *See* Maverick's Mot. at 7–13. Specifically, Good Times explained that “[t]he history of the governments' interaction with Good Times and its owners is relevant to the Defendants fifth affirmative defense which asserts ‘that Plaintiff had a uniform and established practice of allowing and liquidating entries involving the exact same behavior complained of in this case[.]’” Maverick's Mot. Ex. I at 2. Here, as explained above, evidence that the government refrained, in the past, from acting against similar arrangements is not relevant to the issue of whether Defendants acted negligently because the reasonable care inquiry is focused on whether Defendants themselves acted reasonably. *See Aegis*, 43 CIT at __, Slip Op 19–162 at 24–27. Plaintiff is not estopped from commencing this enforcement. *See Hitachi*, 21 CIT at 391, 964 F. Supp. at 363. Therefore, the motion to compel responses is denied for Good Times RFP Nos. 4, 5, 6, 7, 8, 15, 17, 18, 19, 20, 21.

¹² Defendants also argue that they need much of this information to discern how Plaintiff calculated the FETs due. *See* Maverick Status Report at Maverick RFP Nos. 9, 25, 38, 39; Gateway Status Report at Gateway RFP Nos. 10, 26, 39, 40. Separately, Defendants specifically seek to compel documents concerning the calculation of the FET, and the court is granting the Defendants' motion with respect to those particular requests. *See, e.g.,* Maverick Status Report at Maverick RFP No. 4; Gateway Status Report at Gateway RFP Nos. 4, 5.

III. Remaining RFPs and Interrogatories

The remaining RFPs and interrogatories in dispute largely concern the sufficiency of Plaintiff's response either with respect to electronically stored information ("ESI"), or the completeness of interrogatories. The Defendant's motion to compel is granted with respect to Maverick RFP Nos. 4, 10, 11, 12, 13, 14, 15, 16, 19, 20, 22, 24, 26, 27, 28, 29; Gateway RFP Nos. 4, 5, 11, 12, 13, 14, 15, 16, 17, 19, 20, 22, 24, 27, 28, 29, 30; Good Times RFP Nos. 1, 3, 9, 10, 13, 23; Maverick Interrogatory Nos. 8, 9, 11, 19, 24; Gateway Interrogatory Nos. 8, 9, 11, 19, 24; and, Good Times Interrogatory No. 19. The motion is denied with respect to Maverick RFP No. 21, Gateway RFP No. 21, Good Times RFP No. 11, as well as Maverick Interrogatory Nos. 15, 20, 21, 25; Gateway Interrogatory Nos. 15, 20, 21, 25; and, Good Times Interrogatory Nos. 7, 9, 10, 22, 23, as discussed further below.

RFPs

U.S. Court of International Trade Rule 34(b) governs production of ESI and provides:

Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

- (i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;
- (ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms which it is ordinarily maintained or in a reasonably usable form or forms[.]

USCIT R. 34(b)(2)(E); *see also* Fed. R. Civ. P. 34(b)(2)(E). Rule 34(b)(2)(E) addresses the form that a production of documents or ESI should assume in response to a request for production, and contemplates that a responding party must produce ESI organized and labeled to correspond to the categories in the request, unless the responding party can produce ESI as maintained in the ordinary course of business.¹³

¹³ Decisions interpreting the analogous Federal Rule of Civil Procedure Rule 34(b)(2)(E) provide guidance to discerning the requirements of production. *See* USCIT R. 1 ("The court may refer for guidance to the rules of other courts."). Courts are split as to whether ESI production must comply with both Federal Rule of Civil Procedure Rule 34(b)(2)(E)(i) and 34(b)(2)(E)(ii), given that subsections (i) and (ii) appear to impose separate requirements on "documents" and "ESI." Some courts read the Advisory Committee Notes as evincing the

Therefore, although Rule 34 may not oblige a responding party to organize and label documents for the convenience of the requesting party, the production of ESI must be rationally organized to permit the requesting party, with reasonable effort, to identify and obtain the documents responsive to their request. *See City of Colton v. American Promotional Events, Inc.*, 277 F.R.D. 578, 584–85 (C.D. Cal. 2011). A responding party fails to meet its duty of production when it produces undifferentiated documents, raising “unnecessary obstacles for the requesting party” in the production of ESI. *See Fed. R. Civ. P. 34 Advisory Committee Notes (2006 Amendment, subdivision b)*.

Plaintiff’s production with respect to many RFPs is insufficient. Defendants’ RFPs were often met with the general assertion that “[t]he Government has produced all responsive, non-privileged documents in its possession.” *See, e.g.*, Good Times Status Report at Good Times RFP No. 10. Sometimes the responses reference examples yet contain inconclusive language such as “include” and “and other documents”—which Defendants object to as failing to identify what other responsive documents are contained in the record.¹⁴ *See, e.g.*, drafter’s intent to distinguish traditional hardcopy production from the “new” category of electronic production. *See, e.g.*, *National Jewish Health v. WebMD Health Services Group, Inc.*, 305 F.R.D. 247, 252–53 (D. Colo. 2016) (referring to Fed. R. Civ. P. 34 Advisory Committee Notes (2006 Amendment, subdivision b)). In doing so, they emphasize that the searchability of electronic documents, unlike paper documents, warrants two different production procedures. *See id.* at 253. Although a particular ESI form may be “reasonably usable” if it is searchable, *see, e.g.*, *Anderson Living Trust*, 298 F.R.D. 514, 527 (D. N.M. 2014) (explaining that the drafters of Rule 34(b)(2)(E)(ii) intended to treat ESI as an entirely new category, separate and apart from documents, in order to recognize that text searching technologies allow parties to organize ESI according to their own preferences), other courts have reasoned that a mere ability to search without organizing guideposts does not promote the expeditious resolution of the dispute, the purpose of discovery. *See, e.g.*, *City of Colton*, 277 F.R.D. at 584.

Given the nature of the present dispute and the types of documents involved, it would be counterproductive to adopt an approach that imposes no organizing guideposts. As a specialized court that may confront discovery disputes involving voluminous government files—electronic, paper, and electronic versions of paper documents—that are maintained by various agencies, as well as industry and company documents and files, it is unlikely that the documentary record, reviewed by the court, will correspond to the “form or forms which it is ordinarily maintained,” *see* USCIT R. 34(b)(2)(E)(ii), or that mere searchability will enable a party requesting production to reasonably identify responsive documents. Moreover, this approach is also supported, in part, by the Advisory Committee Note to the 2006 amendment, which states that “a Rule 34 request for production of ‘documents’ should be understood to encompass, and the response should include, [ESI] unless discovery in the action has clearly distinguished between [ESI] and ‘documents’.” Fed. R. Civ. P. 34 Advisory Committee Notes (2006 Amendment, subdivision a). Thus, to the extent that the parties in this case disagree on whether subparagraph (i) or (ii) governs disposition of the motion to compel, Gateway’s Mot. at 3–4; Maverick’s Mot. at 4–5, both apply to Plaintiff’s production.

¹⁴ If a party fails to disclose information—or to supplement interrogatory and RFP responses in a timely manner or as ordered by the court—that party “is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” USCIT R. 26(a), 26(e), 37(c)(1). Moreover, under USCIT Rule 37(a)(3), for purposes of a motion to compel, “an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.”

id. at Good Times RFP Nos. 1, 3. Likewise, Plaintiff references emails in a general sense without any indication as to what emails are responsive or how they might be located. *See, e.g., id.* at Good Times RFP No. 1. Further, Plaintiff asserts it has produced all non-privileged documents, yet it fails to provide a privilege log. *See, e.g., id.* at Good Times RFP No. 10, 13. Although it is true that searchable ESI weighs in favor of usability, “the purpose of discovery is to enable parties to obtain the factual information needed to prepare their cases for trial[.]” *Primos, Inc. v. Hunter’s Specialties, Inc.*, 451 F.3d 841, 851 (Fed. Cir. 2006). In this case, Plaintiff’s general responses, with inconclusive language and no direction as to where to find relevant documents, and without furnishing a privilege log, fall short. The court “must therefore consider the ‘unfair and prejudicial surprise’ to a party that may result from allowing [last-minute production of evidence] to be presented during trial.” *Id.* (citations omitted). The purpose of discovery is to narrow the issues and to secure both the evidence to be used at trial as well as information as to the existence of evidence that may be used at trial. *United States v. Optrex Am., Inc.*, 28 CIT 987, 988, Slip Op. 04–79 at 2 (2004). “Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.” *Id.* at 988 (citing to *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)).

Plaintiff must answer the RFPs posed to it comprehensively, and state whether or not there are any other responsive documents, contained in the ESI, and, if so, either identify those documents, by Bates number or another label, or provide Defendants with sufficient information so that it can identify and find those documents. Therefore, Defendants’ motion to compel is granted with respect to the following requests:

- Maverick RFP Nos. 4, 10, 11, 12, 13, 14, 15, 16, 19, 20, 22, 24, 26, 27, 28, 29;
- Gateway RFP Nos. 4, 5, 11, 12, 13, 14, 15, 16, 17, 19, 20, 22, 24, 27, 28, 29, 30; and,
- Good Times RFP Nos. 1, 3, 9, 10, 13, 23.

Finally, Plaintiff’s production in response to Good Times RFP No. 11 is sufficient because Plaintiff has indicated where, in Plaintiff’s production, Defendants may locate the requested information. Plaintiff’s production is also sufficient for Maverick RFP No. 21 and Gateway RFP No. 21, because Plaintiff has indicated that it is “currently

Therefore, the court will not allow Plaintiff to avoid a potential Rule 37(c)(1) sanction by simply asserting that the relevant document is among the documents produced.

unaware of any such documents.” As Defendants note, should Plaintiff become aware of such documents, Plaintiff shall be obliged to disclose such information in a timely manner pursuant to USCIT Rule 26(e).

Interrogatories

Defendants challenge Plaintiff’s interrogatory responses as deficient and not in compliance with USCIT Rule 33(d), which sets out the parameters for a responding party to answer an interrogatory by producing business records, including ESI. Gateway’s Mot. at 12–15; Maverick’s Mot. at 13–17. Defendants contend that Plaintiff must specify the documents from which it can obtain an answer to its interrogatories. Gateway’s Mot. at 13–14; Maverick’s Mot. at 14–15. Plaintiff counters that “[n]o further interrogatory responses are warranted because [its] production of easily searchable ESI is more than sufficient to meet the USCIT R. 33(d) requirements.” Pl.’s Opp’n Br. at 10. For the reasons that follow, Defendant’s motion to compel is granted for Maverick Interrogatory Nos. 8, 9, 11, 19, 24; Gateway Interrogatory Nos. 8, 9, 11, 19, 24; and, Good Times Interrogatory No. 19. However, the motion is denied for Maverick Interrogatory Nos. 15, 20, 21, 25; Gateway Interrogatory Nos. 15, 20, 21, 25; and, Good Times Interrogatory Nos. 7, 9, 10, 22, 23.

USCIT Rule 33(d) permits a responding party to answer an interrogatory by producing business records in circumstances where “the answer to an interrogatory may be determined by examining . . . a party’s business records (including electronically stored information)” and “the burden of deriving or ascertaining the answer will be substantially the same for either party[.]” USCIT R. 33(d). If such circumstances exist, then the responding party must further “(1) specify[] the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and (2) giv[e] the interrogating party a reasonable opportunity to examine and audit the records[.]” *Id.*

Courts determine the adequacy of an Federal Rule of Civil Procedure Rule 33(d) response according to the nature and specificity of the request, *see In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 320, 323 (N.D. Ill. 2005) (whether an interrogatory is responsive depends, first, on the question asked),¹⁵ with due attention given to the superior

¹⁵ An interrogatory may inquire into a party’s contentions in or opinions of the case, which “may be used to narrow and define the issues for trial” and help a party determine the proof required to rebut the other party’s position. *Johnson v. Kraft Foods North America, Inc.*, 236 F.R.D. 535, 544 (D. Kan. 2006). Rule 33(d) governs such “contention interrogatories,” and, insofar as a contention interrogatory seeks material facts supporting allegations, courts

knowledge and familiarity the responding party has with the referenced documents. *See e.g., Bayview Loan Servicing, LLC v. Boland*, 259 F.R.D. 516, 519 (D. Colo. 2009) (holding that plaintiff's response to interrogatories that asked for specific information was insufficient, because plaintiff merely indicated that information was on a CD, even though the CD indexed and catalogued files). Vague references to documents do not suffice; rather, the responding party must "adequately and precisely specif[y] for each interrogatory, the actual documents where information will be found." *See U.S. S.E.C. v. Elf-indepan, S.A.*, 206 F.R.D. 574, 576–77 (M.D.N.C. 2002).

Defendants Maverick and Gateway request that Plaintiff state or identify with specificity "every fact" or "every statement" that it believes demonstrates a specific allegation made in the complaint in Interrogatory Nos. 8, 9, 19. *See* Maverick Status Report at Maverick Interrogatory Nos. 8, 9, 19; Gateway Status Report at Gateway Interrogatory Nos. 8, 9, 19. Maverick and Gateway also request that Plaintiff "specify in detail every term and condition 'in the contract' which [the government] contends evinces 'control' and how that term or condition evinces such control." Maverick Status Report at Maverick Interrogatory No. 11; Gateway Status Report at Gateway Interrogatory No. 11. Finally, Good Times asks whether Plaintiff contends "that there were any common owners, directors, officers, employees, [etc.] . . . between Maverick and Good Times[.]" and, if so, to "state with specificity the nature of the sharing and/ or the common relationship and [to] identify every fact and document which supports [the government's] contention." Good Times Status Report at Good Times Interrogatory No. 19.

Unlike *United States v. Rachel*, 289 F. Supp. 2d 688 (D. Md. 2003), which Plaintiff purports to be directly applicable,¹⁶ *see* Pl.'s Opp'n Br. at 10, Defendants' interrogatories seek evidence that supports specific allegations and contentions raised by Plaintiff. Plaintiff's responses to these requests do not appear to take issue with the breadth of the interrogatory. Defendants' interrogatories, however, were met, in a number of instances, with a general response that leads with the statement "[t]he evidence shows" followed by an assertion, followed a string of apparently non-exhaustive examples which are prefaced by have deemed them proper. *See, e.g., id.* ; *see also Ayers v. Continental Cas. Co.*, 240 F.R.D. 216, 227–228 (N.D.W. Va. 2007).

¹⁶ Plaintiff's reliance on *United States v. Rachel*, is misplaced. The starting point for the Rule 33(d) analysis in that case was the understanding that the movant's "document requests were . . . extremely broad." *Rachel*, 289 F. Supp. 2d at 693. From there, the court determined that it was appropriate for the government to respond by providing "access to all available documents" as long as such documents "were maintained in the ordinary course of business in the government investigation." *Id.*

the phrase “[r]elevant documents include . . .” *See, e.g.*, Maverick Status Report at Maverick Interrogatory Nos. 8, 9, 11; Gateway Status Report at Gateway Interrogatory Nos. 8, 9, 11. Moreover, Plaintiff has not included a privilege log, has referenced unspecified emails or documents, and has used language such as “includes” to suggest that its answer is not complete. Thus, this court, in its discretion, determines that these interrogatories were specific enough to warrant relatively specific and conclusive responses.

Similarly, Plaintiff in certain instances references categories of documents, and concludes by referring Defendants to “documents produced by the Government in this litigation.” *See, e.g.*, Maverick Status Report at Maverick Interrogatory Nos. 19, 24; Gateway Status Report at Gateway Interrogatory Nos. 19, 24. This phrase is a catch-all that serves to obscure the response. By employing this phrase, Plaintiff is effectively stating that the answer to this question is or may be somewhere among the documents produced. A response of this nature is no response at all. Plaintiff must identify those documents, by Bates number or another label, or provide Defendants with sufficient information so that it can identify and find those documents. Therefore, the Defendants motion to compel with respect to the following interrogatories is granted:

- Maverick Interrogatory Nos. 8, 9, 11, 19, 24;
- Gateway Interrogatory Nos. 8, 9, 11, 19, 24; and,
- Good Times Interrogatory No. 19.

A number of interrogatories, and their respective responses, do not fall within the ambit of Rule 33(d), because Plaintiff responds with an answer, rather than by referring the parties to the ESI. To the extent that such interrogatories are not objected to, they must be “answered separately and fully in writing under oath.” USCIT R. 33(b)(3). For purposes of a motion to compel, USCIT Rule 37(a)(3) provides that evasive or incomplete answers shall be treated as a failure to respond. *See also NEC America, Inc., v. United States*, 10 CIT 323, 325, 636 F. Supp. 476, 479 (1986). Ultimately, the court has discretion to decide whether Plaintiff’s response is satisfactory. *See id.*

The court, in its discretion, determines that Plaintiff’s responses to the interrogatories listed are sufficient because they illustrate a legal dispute over the framing of this case.¹⁷ These interrogatories, and

¹⁷ Plaintiff objects to Maverick Interrogatory No. 15, Gateway Interrogatory No. 15, and Good Times Interrogatory Nos. 7, 9, 10, as requiring a legal conclusion. *See* Maverick Status Report at Maverick Interrogatory No. 15; Gateway Status Report at Gateway Interrogatory No. 15; Good Times Status Report at Good Times Interrogatory Nos. 7, 9, 10. “An interrogatory is not objectionable merely because it asks for an opinion or contention that relates

their responses, demonstrate that Plaintiff and Defendants have differing theories of how the pertinent statutes, regulations, and case law operate, and what obligations flow therefrom. Defendants obviously believe that Plaintiff cannot support many of its claims with “specificity”, including its claim that Defendants operated pursuant to a “special arrangement.” However, as this court has already ruled, Plaintiff has sufficiently raised a claim upon which relief can be granted. *See Maverick I*, 42 CIT at ___, 295 F. Supp. 3d at 1379. The court declines to require Plaintiff to litigate the issue before trial. No further response is warranted, save for any subsequent obligations to disclose pursuant to USCIT Rule 26(e). Therefore, Defendants’ motion to compel is denied with respect to:

- Maverick Interrogatory Nos. 15, 20, 21, 25;
- Gateway Interrogatory Nos. 15, 20, 21, 25; and,
- Good Times Interrogatory Nos. 7, 9, 10, 22, 23.

Privilege log

In many instances, Plaintiff refers to privileged information but has failed to furnish a privilege log. When a party withholds allegedly privileged but otherwise discoverable information, that party “must expressly make the claim; and describe the nature of the documents . . . not produced or disclosed – and do so in a manner that, without revealing information itself privileged . . . , will enable the other parties to assess the claim.” USCIT R. 26(b)(5)(A). That party must provide a privilege log explaining the contents of the documents in question and the reason why those documents merit privilege. *See United States v. Optrex Am., Inc.*, 28 CIT 1231, 1231–32, Slip Op. 04–92 at 2–3 (2004) (citing *Burns v. Imagine Films Entm’t, Inc.*, 164 F.R.D. 589, 594 (W.D.N.Y. 1996)).

To the extent that Plaintiff asserts that it has produced all non-privileged documents in its responses to RFPs and interrogatories, it implies that there are privileged yet discoverable documents that it has not produced. Therefore, Plaintiff must produce a privilege log that expressly makes and explains each claim of privilege and that conforms to the requirements of USCIT R. 26(b)(5)(A).

to fact or the application of law to fact[.]” USCIT R. 33(a)(2). Plaintiff’s objection is thus unavailing. The court may, however, order that the interrogatory “need not be answered until designated discovery is complete, or until a pretrial conference or some other time.” *Id.* Nonetheless, for the reasons that follow, the court determines that Plaintiff’s responses are sufficient to satisfy the purposes of discovery in this proceeding.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Defendants' motion to compel discovery is granted; and it is further

ORDERED that Plaintiff will provide complete responses to the following requests for production: Maverick RFP Nos. 4, 10, 11, 12, 13, 14, 15, 16, 19, 20, 22, 24, 26, 27, 28, 29; Gateway RFP Nos. 4, 5, 11, 12, 13, 14, 15, 16, 17, 19, 20, 22, 24, 27, 28, 29, 30; Good Times RFP Nos. 1, 3, 9, 10, 13, 23; and, it is further

ORDERED that Plaintiff will provide all documents, information, and other evidence related to the following interrogatories: Maverick Interrogatory Nos. 8, 9, 11, 19, 24; Gateway Interrogatory Nos. 8, 9, 11, 19, 24; Good Times Interrogatory No. 19; and it is further

ORDERED that, notwithstanding the Amended Scheduling Order at ¶ 7, May 30, 2019, ECF No. 64, Plaintiff shall file its responses no later than April 13, 2020; and it is further

ORDERED that Defendants' motion for sanctions is denied.

Dated: February 7, 2020

New York, New York

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

Slip Op. 20–18

SHANDONG JINXIANG ZHENGYANG IMPORT & EXPORT CO., LTD. AND JINING SHUNCHANG IMPORT & EXPORT CO. LTD., Plaintiffs, and QINGDAO SEA-LINE INTERNATIONAL TRADING CO., LTD. AND SHENZHEN BAINONG CO., LTD., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and FRESH GARLIC PRODUCERS ASSOCIATION, et al., Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Court No. 18–00156

[Denying Plaintiffs' motion for judgment on the agency record.]

Dated: February 11, 2020

John J. Kenkel, J. Kevin Horgan, Gregory S. Menegaz, and Alexandra H. Salzman, deKieffer & Horgan, of Washington, DC, for Plaintiffs Shandong Jinxiang Zhengyang Import & Export Co., Ltd. and Jining Shunchang Import & Export Co. Ltd. With them on the brief was *Judith L. Holdsworth*.

Irene H. Chen, Chen Law Group LLC, of Rockville, MD, for Plaintiff-Intervenor Qingdao Sea-Line International Trading Co., Ltd.

Meen Geu Oh, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was

Emma T. Hunter, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Michael J. Coursey, *John M. Herrmann*, and *Joshua R. Morey*, Kelley Drye & Warren LLP, of Washington, DC, for Defendant Intervenors Fresh Garlic Producers Association, Christopher Ranch L.L.C., The Garlic Company, Valley Garlic, and Vessey and Co., Inc.

OPINION

Barnett, Judge:

Plaintiffs Shandong Jinxiang Zhengyang Import & Export Co., Ltd. and Jining Shunchang Import & Export Co. Ltd. (together, “Zhengyang”) commenced this action to challenge certain aspects of the U.S. Department of Commerce’s (“Commerce” or “the agency”) final results and partial rescission of the twenty-second administrative review (“AR22”) of the antidumping duty order on fresh garlic from the People’s Republic of China (“China”). See Summons, ECF No. 1; Compl. ECF No. 6; *Fresh Garlic From the People’s Republic of China*, 83 Fed. Reg. 27,949 (Dep’t Commerce June 15, 2018) (final results and partial rescission of the 22nd antidumping duty admin. review and final result and rescission, in part, of the new shipper reviews; 2015–2016) (“*Final Results*”). Qingdao Sea-Line International Trading Co., Ltd. (“Sea-Line”) and Shenzhen Bainong Co., Ltd. timely intervened as Plaintiff-Intervenors in this case. Order (July 25, 2018), ECF No. 23; Order (July 31, 2018), ECF No. 29.¹ Fresh Garlic Producers Association and its individual members (collectively, “the FGPA”) timely intervened as Defendant-Intervenors. Order (July 13, 2018), ECF No. 15. Thereafter, the court consolidated this action under lead Court No. 18–00137, which also addresses a challenge to the *Final Results*. Order (July 31, 2018), ECF No. 31. Upon subsequent review, however, in accordance with U.S. Court of International Trade Rule 21 and following consideration of the relevant factors, the court severed this action from lead Court No. 18–00137. Order (Feb. 10, 2020), ECF No. 32.²

This matter is now before the court on Zhengyang’s motion for judgment on the agency record pursuant to USCIT Rule 56.2.³ Consol. Pls. [Zhengyang’s] Rule 56.2 Mot. For J. Upon the Agency R., ECF

¹ Shenzhen Bainong Co., Ltd. did not participate further in this case.

² Following consolidation, the parties and the court docketed all relevant filings in the lead action. Thus, hereinafter, citations to filings in CM/ECF refer to documents filed in *Coalition for Fair Trade in Garlic, et al. v. United States, et al.*, Court No. 18-cv-00137.

³ The administrative record for this case is divided into a Public Administrative Record (“PR”), ECF No. 24–4, and a Confidential Administrative Record, ECF Nos. 24–5, 24–6. Parties submitted joint appendices containing record documents cited in their briefs. See Public J.A. (“PJA”), ECF Nos. 61 (Vol. I), 62 (Vol. II), 63 (Vol. III), 64 (Vol. IV), 65 (Vol. V); Confidential J.A., ECF No. 66.

No. 32, and Consol. Pls. [Zhengyang’s] Mem. in Supp. of Mot. For J. (“Zhengyang’s Mem.”), ECF No. 32–1; Reply by Consol. Pls. [Zhengyang], to the Resps. by the United States and Def.-Ints. in Opp’n to Consol. Pl.’s Rule 56.2 Mot. For J. Upon the Admin. R. (“Zhengyang’s Reply”), ECF No. 53; *see also* Pl.-Int. [Sea-Line’s] Br. in Supp. of Consol. Pls. [Zhengyang] Rule 56.2 Mot. For J. (“Sea-Line’s Br.”), ECF No. 33; Pl.-Int. [Sea-Line’s] Br. in Supp. of Reply by Consol. Pls. [Zhengyang], to the Resps. by the United States and Def.-Ints. in Opp’n to Consol. Pl.’s Rule 56.2 Mot. For J. Upon the Admin. R., ECF No. 54.⁴ Zhengyang contests Commerce’s (1) rejection of its case brief from the record of the administrative review; (2) selection of Romania over Mexico as the primary surrogate country for valuing its factors of production; and (3) selection of Romanian data to value its garlic bulbs. Zhengyang’s Mem. at 11–47. Defendant United States (“the Government”) and the FGPA argue, in supplemental briefing, that Zhengyang failed to exhaust its administrative remedies with respect to its arguments concerning surrogate country and surrogate value selection and, thus, the court should not reach the merits of those arguments. Def.’s Suppl. Br. in Resp. to the Court’s Aug. 30, 2019 Request for Further Briefing from the Parties (“Gov’t’s Suppl. Br.”), ECF No. 91; FGPA’s Suppl. Resp. Br. (“FGPA’s Suppl. Br.”), ECF No. 94.⁵

For the reasons discussed herein, the court finds that Zhengyang failed to exhaust its administrative remedies with respect to all arguments it seeks to present to the court. Thus, the court denies Zhengyang’s and Sea-Line’s motions for judgment on the agency record.

BACKGROUND

In 1994, Commerce issued an order imposing antidumping duties on fresh garlic from China. *See Antidumping Duty Order: Fresh Garlic From the People’s Republic of China*, 59 Fed. Reg. 59,209 (Dep’t

⁴ Sea-Line adopts Zhengyang’s arguments and does not present additional substantive arguments. Sea-Line’s Br. at 1. Accordingly, the court does not reference Sea-Line’s filings.

⁵ The Government initially urged the court to sustain the *Final Results* on the merits. Def.’s Corrected Resp. in Opp’n to Pl.’s, Consol. Pls.’, and Pl.-Ints’ Rule 56.2 Mots. For J. on the Agency R. (“Gov’t’s Resp.”) at 10–27, ECF No. 74. The FGPA argued that Zhengyang failed to exhaust its administrative remedies and, alternatively, that the court should sustain the *Final Results* on the merits. [FGPA’s] Resp. in Opp’n to Pls.’ Mot. For J. on the Agency R. at 5–18, ECF No. 47. The court ordered additional briefing on whether Commerce’s rejection of Zhengyang’s case brief means that Zhengyang failed to exhaust its administrative remedies with respect to the arguments it has presented to the court. Order (Aug. 30, 2019), ECF No. 86. Parties timely responded to the Order. *See* Def.’s Suppl. Br.; FGPA’s Suppl. Br.; Consol.-Pl. Jingxiang Zhengyang Imp. & Exp. Co., Ltd.’s Suppl. Br. in Resp. to the Court’s Request for Suppl. Briefing of Aug. 30, 2019 (“Zhengyang’s Suppl. Br.”), ECF No. 95.

Commerce Nov. 16, 1994) (“*AD Order*”). On November 4, 2016, Commerce published a notice informing interested parties of the opportunity to request an administrative review of the *AD Order* for the period of review (“POR”) November 1, 2015, through October 31, 2016. *Antidumping or Countervailing Duty Order; Finding, or Suspended Investigation; Opportunity to Request Admin. Review*, 81 Fed. Reg. 76,920 (Dep’t Commerce Nov. 4, 2016), PR 2, PJA Vol. I. Zhengyang requested to be included in the review. Request for Review (Nov. 9, 2016), PR 4, PJA Vol. I. Zhengzhou Harmoni Spice Co., Ltd (“Harmoni”), the FGPA, and the Coalition for Fair Trade in Garlic (“the CFTG”) each requested a review of Harmoni. See Request for Admin. Review of the Antidumping Duty Order on Fresh Garlic from the People’s Republic of China (Nov. 7, 2016), PR 1, PJA Vol. I; CFTG’s Request for 22nd Antidumping Admin. Review of Fresh Garlic from the People’s Republic of China (Nov. 28, 2016), PR 8, PJA Vol. I; Pet’rs’ Requests for Admin. Review (Nov. 30, 2016), PR 12, PJA Vol. I.

On January 13, 2017, Commerce initiated AR22. See *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 82 Fed. Reg. 4,294, 4,296–97 (Dep’t Commerce Jan. 13, 2017), PR 22, PJA Vol. I. The review covered 35 exporters and producers. Selection of Respondents for Individual Examination (Mar. 7, 2017) at 3, PR 82, PJA Vol. I. After finding that it would be impracticable to review every named exporter or producer, Commerce selected Zhengyang and Harmoni—“the two exporters/producers with the largest volume of imports during the POR”—as mandatory respondents in the review. *Id.* at 4. After Commerce initiated AR22 but before it published its preliminary results, Harmoni and the FGPA withdrew their requests for a review of Harmoni. Harmoni Withdrawal of Review Request (Apr. 13, 2017), PR 123, PJA Vol. I; Pet’rs’ Withdrawal of Certain Requests for Admin. Review (Apr. 13, 2017) at 2, PR 124, PJA Vol. I.

On May 12, 2017, Zhengyang submitted surrogate country and surrogate value comments for Commerce’s consideration. See *Surrogate Country Comments and Surrogate Values for the Prelim. Results* (May 12, 2017) (“Zhengyang’s SC/SV Cmts.”) at 1–2, PR 173–178, PJA Vols. II–III. As part of its submission, Zhengyang provided information regarding garlic grown in Mexico. *Id.* at 2, Ex. SV-6. The information consisted of two articles in English⁶ and several more in Spanish accompanied by English translations. See *id.*, Ex. SV-6. The translations, at least some of which were prepared

⁶ One of those articles, “Garlic Productivity and Profitability as Affected by Seed Clove Size, Planting Density and Planting Method,” was included twice. See Zhengyang’s SC/SV Cmts., Ex. SV-6 (ECF No. 62 at ECF pp. 569, 638).

using an online translation generator, suffered from errors that rendered them substantially illegible. *See id.*, Ex. SV-6 (ECF No. 62 at ECF pp. 587–97, 607–15, 627–37; ECF No. 63 at ECF pp. 74–113, 145–77, 187–95, 210–27).

On June 28, 2017, Commerce aligned concurrent new shipper reviews associated with the *AD Order* with AR22. Decision Mem. for the Prelim. Results., Prelim. Rescission, and Final Rescission, in Part, of the 2015–2016 Antidumping Duty Admin. Review and Prelim. Results of the New Shipper Reviews (Nov. 28, 2017) (“Prelim. Mem.”) at 6 & n.42, PR 315, PJA Vol. IV (citation omitted).⁷

Commerce published its preliminary results on December 7, 2017. *Fresh Garlic From the People’s Republic of China*, 82 Fed. Reg. 57,718 (Dep’t Commerce Dec. 7, 2017) (prelim. results, prelim. rescission, and final rescission, in part, of the 22nd antidumping duty admin. review and prelim. results of the new shipper reviews; 2015–2016) (“*Prelim. Results*”). Commerce “preliminarily rescind[ed] the review with respect to seven companies,” including Harmoni.⁸ Prelim. Mem. at 7 & n.48. Additionally, Commerce preliminarily selected Romania as the primary surrogate country. *Id.* at 32. Commerce concluded that although Mexico and Romania were both economically comparable to China and significant producers of comparable merchandise, *id.* at 24–28, the quality of the available data favored selecting Romania, *id.* at 28, 31–32. Commerce selected data from the National Institute of Statistics of Romania (“NISR”) to value Zhengyang’s garlic bulbs. *Id.* at 38. Commerce preliminarily calculated a weighted-average dumping margin for Zhengyang in the amount of 2.69 percent. *Prelim. Results*, 82 Fed. Reg. at 57,719.

On April 25, 2018, Zhengyang filed its administrative case brief. Case Br. (Apr. 25, 2018), PR 419, PJA Vol. V. Zhengyang’s case brief contained tables that Zhengyang claims were excerpted for Commerce’s convenience from earlier filed articles. *Id.* at 18–21. Commerce subsequently rejected the case brief on the basis that it contained “untimely new factual information” that “re-translates and revises information originally in Spanish and submitted to Commerce on May 12, 2017.” Request for Removal of Untimely New Factual

⁷ Commerce had initiated new shipper reviews in accordance with requests from Qingdao Joinseafoods Co. Ltd., Join Food Ingredient Inc., and Zhengzhou Yudi Shengjin Agricultural Trade Co. Ltd. (“Yudi”). Prelim. Mem. at 1, 5.

⁸ Commerce determined that the CFTG’s review request was invalid *ab initio* and, thus, rescinded the review with respect to companies for which another valid review request was not made or maintained. Prelim. Mem. at 7–13. Commerce’s treatment of the CFTG’s review request is the subject of the complaint filed in *Coalition for Fair Trade in Garlic, et al. v. United States, et al.*, Court No. 18-cv-00137. Any reference to that proceeding or the review of Harmoni is without prejudice to the court’s resolution of the motion for judgment on the agency record pending in that case.

Information (May 15, 2018) (“1st Rejection Mem.”), PR 429, PJA Vol. V. Commerce permitted Zhengyang to submit a revised case brief by May 17, 2018. *Id.* Commerce directed Zhengyang to resubmit its case brief “without new factual information” or “modified, re-translated, or reorganized exhibits/tables with new headings or titles.” *Id.*

Zhengyang timely submitted a revised case brief that “conformed certain English translations to those in the original documents on the record,” Revised Case Br. (May 17, 2018) (“Rev. Case Br.”) at cover page, PR 433, PJA Vol. V, but retained modified and re-translated tables, *id.* at 19–21. Commerce rejected the revised case brief in its entirety on the basis that it contained “untimely new factual information” and Commerce did not allow Zhengyang another opportunity to revise its brief given the impending deadline for issuance of the final results. Request for Removal of Untimely New Factual Information (May 21, 2018) (“2nd Rejection Mem.”), PR 435, PJA Vol. V. No other interested party filed an affirmative case brief on the AR22 record. *See* Issues and Decision Mem., A-570–831 (June 8, 2018) (“I&D Mem.”) at 4 n.15, ECF No. 24–3 (declining to consider rebuttal arguments placed on the AR22 record because the AR22 record lacked “affirmative arguments . . . concerning surrogate values”).

Commerce issued its *Final Results* on June 15, 2018. Commerce affirmed its preliminary decision to rescind Harmoni’s review and made no changes to Zhengyang’s margin. *Final Results*, 83 Fed. Reg. at 27,949–50. Commerce continued to select Romania as the primary surrogate country and Romanian data as the surrogate value for the respondents’ garlic bulbs. I&D Mem. at 34, 40–42. Because Commerce had rejected Zhengyang’s case brief, Commerce analyzed arguments submitted in affirmative and rebuttal briefs on the record of the new shipper review—not the administrative review—in connection with its selection of a primary surrogate country and surrogate values. *See id.* at 34–42.⁹ This appeal followed. *See* Summons.

⁹ Yudi, one of the respondents in the new shipper review, challenged Commerce’s surrogate country and surrogate value selections. I&D Mem. at 34–35, 38–39. Commerce found that “fresh garlic produced in Romania is more physically similar than the garlic produced in Mexico, to the subject merchandise, garlic produced in China.” *Id.* at 37. Commerce further found that wholesale Romanian NISR data are representative of the prices paid by Yudi because “Yudi purchases its garlic in the latter part of the POR” and Yudi’s price includes further processing, such as cold storage or costs associated with controlled atmosphere facilities. *Id.* at 41. Commerce rejected Yudi’s arguments that the Romanian NISR data are tainted by tariff quotas imposed by the European Union or the smuggling of garlic into Romania. *Id.* at 42. Although Yudi commenced an action challenging Commerce’s determination in the new shipper review, shortly thereafter, Yudi voluntarily dismissed the action. *See Zhengzhou Yudi Shengjin Agricultural Trade Co., Ltd. v. United States, et al.*, Court No. 18-cv-00158 (USCIT July 25, 2018). The agency record currently before the court pertains solely to the administrative review. *See* Decl. of Alexander Cipolla, ECF No. 24–1 (averring

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii)(2012),¹⁰ and 28 U.S.C. § 1581(c). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Commerce’s Rejection of Zhengyang’s Case Brief is Sustained

Zhengyang challenges Commerce’s rejection of its revised case brief in its entirety as arbitrary, capricious, and an abuse of discretion. Zhengyang’s Mem. at 45–47; Zhengyang’s Reply at 4–6. However, Commerce’s determination that Zhengyang’s revised case brief contained untimely new factual information on pages 19 through 21 is supported by substantial evidence; thus, Commerce acted within its discretion when it rejected the case brief.

The burden of creating an adequate record before Commerce lies with interested parties. *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011). Compiling an adequate record requires interested parties to submit English translations of documents written in a foreign language within the timeframe allowed for the submission of factual information. 19 C.F.R. § 351.301(c)(3)(ii) (setting the deadline for the submission of factual information to value a respondent’s factors of production); *id.* § 351.303(e) (requiring translations). Filing an administrative case brief affords interested parties an opportunity to present relevant arguments but is not an opportunity to correct factual information for Commerce’s renewed consideration. *See id.* §§ 351.309(c)(2), 351.302(d)(1)(i). Substantial record evidence demonstrates that Zhengyang failed to provide legible translations of its surrogate value information before the deadline for submission of factual information and instead attempted to make an untimely submission of factual information “in the form of modified,

that all documents pertaining to “the *administrative review* of the antidumping duty order on fresh garlic from [China]” are contained in the administrative record submitted to the court) (emphasis added).

¹⁰ All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are to the 2012 edition, unless otherwise stated.

re-translated, or reorganized exhibits and tables” in its revised administrative case brief. 2nd Rejection Mem.¹¹

On page 19 of its revised case brief, Zhengyang presented a table of garlic size specifications. Rev. Case Br. at 19. The table is not contained in Zhengyang’s factual submissions in the form submitted in the revised case brief; rather, Zhengyang appears to have placed the English headings originally appended to the translated (but unformatted) version on the original, formatted Spanish version. *Compare id.*, with Zhengyang’s SC/SV Cmts., Ex. SV-6 (ECF No. 63 at ECF pp. 205 (Spanish), 221 (English)). Page 20 of the revised case brief contains two tables, the second of which Zhengyang altered by inserting the English headings in place of the Spanish counterparts.¹² *Compare* Rev. Case Br. at 20, with Zhengyang’s SC/SV Cmts., Ex. SV6 (ECF No. 62 at ECF pp. 580 (Spanish), 591 (English)). Page 21 contains one table and one bar graph. Rev. Case Br. at 21. Regarding the table, Zhengyang altered the formatted Spanish version to include English headings and added new English translations of the Spanish garlic categories for both bulbs and bulbils. *Compare id.*, with Zhengyang’s SC/SV Cmts., Ex. SV-6 (ECF No. 62 at ECF pp. 600 (Spanish), 609 (English)). Regarding the bar graph, Zhengyang replaced the Spanish label with an English label that does not appear in the English version of the source article, which instead contains an illegible jumble of letters where the label (and bar graph) should be. *Compare* Rev. Case Br. at 21, with Zhengyang’s SC/SV Cmts., Ex. SV-6 (ECF No. 62 at ECF pp. 621 (Spanish), 632 (English)).

Zhengyang cites no authority specifically supporting its argument that Commerce should have excised or otherwise disregarded the offending portions of the revised case brief and accepted the remaining parts. *See* Zhengyang’s Mem. at 46 (citing cases discussing the substantial evidence standard generally). As the Government points out, Gov’t’s Resp. at 25 n. 12, Commerce provided Zhengyang an opportunity to correct its first case brief, 1st Rejection Mem., and Zhengyang failed to do so. Accordingly, Commerce was within its discretion to reject Zhengyang’s revised case brief in its entirety. *See* 19 C.F.R. § 351.302(d)(1)(i).

¹¹ In accordance with Commerce’s regulation governing the composition of the administrative record, Commerce retained a copy of the rejected case brief on the record “for purposes of establishing and documenting the basis for rejecting the document.” 19 C.F.R. § 351.104(a)(2)(ii)(A).

¹² Regarding the first table, Zhengyang omitted the title of the table indicating that the garlic classifications listed therein pertain solely to the “Tacatzcaro” garlic variety and not Mexican garlic generally. *Compare* Rev. Case Br. at 20, with Zhengyang’s SC/SV Cmts., Ex. SV-6 (ECF No. 62 at ECF p. 569).

II. Zhengyang Failed to Exhaust Its Administrative Remedies

The court next addresses whether Commerce’s rejection of Zhengyang’s case brief means that Zhengyang failed to exhaust its administrative remedies with respect to its arguments concerning surrogate country and surrogate value selection, and, if so, whether any exception applies to excuse this failure.

“[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies.” 28 U.S.C. § 2637(d). While exhaustion is not a jurisdictional requirement, *Weishan Hongda Aquatic Food Co. v. United States*, 917 F.3d 1353, 1363–64 (Fed. Cir. 2019), the statute “indicates a congressional intent that, absent a *strong* contrary reason, the [USCIT] should insist that parties exhaust their remedies before the pertinent administrative agencies,” *id.* at 1362 (quoting *Boomerang Tube LLC v. United States*, 856 F.3d 908, 912 (Fed. Cir. 2017)) (emphasis added). Administrative exhaustion generally requires a party to present all arguments in its administrative case brief before raising those issues before this court. *See* 19 C.F.R. § 351.309(c)–(d); *Zhongce Rubber Grp. Co. v. United States*, 42 CIT ___, ___, 352 F. Supp. 3d 1276, 1280 (2018) (finding a failure to exhaust administrative remedies when the plaintiff did not file an administrative case brief); *Home Prods. Int’l, Inc. v. United States*, 36 CIT 33, 36, 810 F. Supp. 2d 1373, 1377 (2012) (same). There are exceptions to the exhaustion requirement, such as when “the record indicates that—either as a result of other parties’ arguments or the agency’s decision-making process—the agency in fact thoroughly considered the issue in question.” *Pakfood Public Co. v. United States*, 34 CIT 1122, 1145, 724 F. Supp. 2d 1327, 1351 (2010) (citations omitted); *see also Jacobi Carbons AB v. United States*, 42 CIT ___, ___, 313 F. Supp. 3d 1308, 1330–31 (2018).

The Government argues that exhaustion should be required because Commerce never considered competing arguments concerning surrogate country and surrogate value selection in light of evidence on the AR22 record. Gov’t’s Suppl. Br. at 6–8. Instead, the Government contends, Commerce considered competing arguments in relation to evidence placed on the record of the new shipper review that was, at least in part, specific to Yudi’s factors of production. *Id.* at 6. The Government also argues that permitting Zhengyang to litigate arguments contained in its stricken case brief would override “Commerce’s enforcement prerogative” and “encourage misconduct.” *Id.* at 10.

The FGPA argues likewise that Commerce’s selection of surrogate values “is necessarily company- and segment-specific” and Commerce did not address Zhengyang’s arguments “in light of the specific factors

reported by Zhengyang, or the company's specific production process." FGPA's Suppl. Br. at 5. Addressing Zhengyang's arguments, the FGPA argues, would place the court in the position of deciding certain issues before Commerce had the opportunity to do so. *Id.* at 6.

Zhengyang argues that Commerce erred in rejecting its case brief and, thus, "exhaustion of the remedies is not an issue to be addressed." Zhengyang's Suppl. Br. at 3.¹³

The court has no trouble concluding that Commerce's rejection of Zhengyang's case brief means that Zhengyang failed to exhaust its administrative remedies with respect to its arguments concerning surrogate country and surrogate value selection and is thereby precluded from presenting those arguments to the court. *See Zhongce Rubber*, 352 F. Supp. 3d at 1280; *Home Prods. Int'l*, 36 CIT at 36, 810 F. Supp. 2d at 1377. The doctrine of administrative exhaustion serves the twin purposes of "protecting administrative agency authority and promoting judicial efficiency." *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007) (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)). Zhengyang's failure to submit a compliant case brief to Commerce and obtain an agency decision on the merits of its arguments has left the court without a decision to review. It is not the court's role to consider Zhengyang's arguments based on AR22 record evidence in the first instance—that is Commerce's province. *See Boomerang Tube*, 856 F.3d at 913 (holding that "an argument [that] was not exhausted before Commerce [] should not have been considered by the Trade Court").

Commerce's consideration of the issues of surrogate country and surrogate value selection based on arguments and evidence on the record of the new shipper review does not excuse Zhengyang's failure to exhaust its administrative remedies. "An administrative review and new shipper review are separate and independent segments of a proceeding," *Weishan Hongda*, 917 F.3d at 1361 (citations omitted), with separate administrative records, *Cerro Flow Prods., LLC v. United States*, Slip Op. 14–84, 2014 WL 3539386, at *6 (CIT July 18, 2014). Simply put, the evidentiary record before the court is not the record that was considered by Commerce when it rendered its decisions on surrogate country and surrogate value selection in response to arguments made by Yudi in the new shipper review. I&D Mem. at

¹³ Zhengyang's failure to present substantive arguments on this issue means that it has impliedly waived its right to contest this issue. *See, e.g., United States v. Great Am. Ins. Co. of New York*, 738 F.3d 1320, 1328 (Fed. Cir. 2013) ("It is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived."). Nevertheless, the court considers the issue in full.

34–42; *see also* Prelim. Mem. at 21 & n.128 (noting differences in the factors of production used by Zhengyang as compared to Yudi).¹⁴ This fact distinguishes this case from others where the court has not required administrative exhaustion on the basis that Commerce nevertheless considered an issue and supplied a judicially reviewable determination. *Cf., e.g., Jacobi Carbons AB*, 313 F. Supp. 3d at 1330–31 (declining to require exhaustion when the respondent presented arguments to Commerce regarding the agency’s use of a 2010 financial statement to value financial ratios, Commerce addressed those arguments in relation to 2010 and 2011 financial statements, and the respondent subsequently appealed Commerce’s use of the 2011 financial statement to the court).

The only way for the court to sensibly apply its standard of review to the merits of Zhengyang’s arguments would be to remand the matter to the agency. A remand, however, would undermine the interest in judicial efficiency that administrative exhaustion is intended to protect and nullify the court’s conclusion that Commerce was within its discretion to reject Zhengyang’s case brief. *See Corus Staal BV*, 502 F.3d at 1379. A remand, therefore, is inappropriate.

In sum, Commerce acted within its discretion when it rejected Zhengyang’s revised case brief and did not consider it in the *Final Results* of AR22. Accordingly, Zhengyang failed to exhaust its administrative remedies with respect to the arguments it seeks to present to the court and that failure is not excused.

¹⁴ Zhengyang argues that the AR22 record is incomplete “because it does not include *all submissions* made by [counsel for Zhengyang and Yudi] *on behalf of Yudi*, including its surrogate value comments, case brief and revised case brief, etc.” Zhengyang’s Mem. at 10 (emphasis added). According to Zhengyang, “the administrative record for [Zhengyang and Yudi] should be combined” so that if the court sustains Commerce’s rejection of Zhengyang’s case brief, Yudi’s arguments may be “applied to Zhengyang.” *Id.* at 47.

“Except in very limited circumstances, this court’s review of Commerce’s determination is limited to the record before it.” *Assoc. of Am. School Paper Suppliers v. United States*, 34 CIT 31, 33, 683 F. Supp. 2d 1317, 1320 (2010) (citing 19 U.S.C. § 1516a(b)(2)(A) (describing the contents of the record)); *see also* 19 U.S.C. § 1516a(b)(1)(B)(i) (providing for record review). The rule is intended to prevent courts from conducting what would amount to a *de novo* review. *Assoc. of Am. School Paper Suppliers*, 34 CIT at 34, 683 F. Supp. 2d at 1321 (citation omitted). Supplementation may, however, be permitted “when at the time that supplementation of the record is sought, there is new, changed, or extraordinary information available that was not available during the investigation,” or “when the party makes a strong showing of bad faith or improper behavior by agency decision makers.” *Id.* at 36, 683 F. Supp. 2d at 1322–23 (citations omitted). Zhengyang has not shown (or, for that matter, attempted to show) that any of the requirements for supplementation have been met. Rather, Zhengyang’s attempt to supplement the administrative record with documents placed on the record of the new shipper review “is tantamount to seeking *de novo* review through the back door.” *Beker Indus. v. United States*, 7 CIT 313, 317 (1984) (denying supplementation of the record with evidence submitted on the record of a separate administrative review of the same antidumping duty order).

CONCLUSION

For the foregoing reasons, Zhengyang's motion for judgment on the agency record is denied. Judgment will enter accordingly.

Dated: February 11, 2020
New York, New York

/s/ Mark A. Barnett

MARK A. BARNETT, JUDGE