

# U.S. Customs and Border Protection



## **ACCREDITATION AND APPROVAL OF SGS NORTH AMERICA, INC. (DEER PARK, TX) AS A COMMERCIAL GAUGER**

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of accreditation and approval of SGS North America, Inc. (Deer Park, TX), as a commercial gauger.

**SUMMARY:** Notice is hereby given, pursuant to CBP regulations, that SGS North America, Inc. (Deer Park, TX), has been approved to gauge petroleum and certain petroleum products for customs purposes for the next three years as of October 04, 2019.

**DATES:** GS North America, Inc. (Deer Park, TX) was approved as a commercial gauger as of October 04, 2019. The next triennial inspection date will be scheduled for October 2022.

**FOR FURTHER INFORMATION CONTACT:** Mrs. Allison Blair, Laboratories and Scientific Services, U.S. Customs and Border Protection, 4150 Interwood South Parkway, Houston, TX 77032, tel. 281-560-2924.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given pursuant to 19 CFR 151.13, that SGS North America Inc., 900B Georgia Avenue, Deer Park, TX 77536, has been approved to gauge petroleum and certain petroleum products for customs purposes, in accordance with the provisions of 19 CFR 151.13.

SGS North America, Inc. (Deer Park, TX) is approved for the following gauging procedures for petroleum and certain petroleum products from the American Petroleum Institute (API):

API chapters	Title
3 .....	Tank Gauging.
7 .....	Temperature Determination.
8 .....	Sampling.
12 .....	Calculations.
17 .....	Maritime Measurement.

Anyone wishing to employ this entity to conduct laboratory analyses and gauger services should request and receive written assurances from the entity that it is accredited or approved by the U.S. Customs and Border Protection to conduct the specific test or gauger service requested. Alternatively, inquiries regarding the specific test or gauger service this entity is accredited or approved to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344-1060. The inquiry may also be sent to *CBPGaugersLabs@cbp.dhs.gov*. Please reference the website listed below for a complete listing of CBP approved gaugers and accredited laboratories. <http://www.cbp.gov/about/labsscific/commercial-gaugers-andlaboratories>.

Dated: October 4, 2021.

JAMES D. SWEET,  
*Laboratory Director,*  
*Southwest Regional Science Center,*  
*Laboratories and Scientific Services.*

[Published in the Federal Register, November 3, 2021 (85 FR 60636)]

**ACCREDITATION AND APPROVAL OF BUREAU VERITAS  
COMMODITIES AND TRADE, INC. (SAVANNAH, GA) AS A  
COMMERCIAL GAUGER AND LABORATORY**

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of accreditation and approval of Bureau Veritas Commodities and Trade, Inc. (Savannah, GA) as a commercial gauger and laboratory.

**SUMMARY:** Notice is hereby given, pursuant to CBP regulations, that Bureau Veritas Commodities and Trade, Inc. (Savannah, GA), has been approved to gauge petroleum and certain petroleum products and accredited to test petroleum and certain petroleum products for customs purposes for the next three years as of February 25, 2020.

**DATES:** Bureau Veritas Commodities and Trade, Inc. (Savannah, GA) was approved and accredited as a commercial gauger and laboratory as of February 25, 2020. The next triennial inspection date will be scheduled for February 2023.

**FOR FURTHER INFORMATION CONTACT:** Mrs. Allison Blair, Laboratories and Scientific Services, U.S. Customs and Border Protection, 4150 Interwood South Parkway, Houston, TX 77032, tel. 281-560-2900.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given pursuant to 19 CFR 151.12 and 19 CFR 151.13, that Bureau Veritas Commodities and Trade, Inc., 151 East Lathrop Avenue, Savannah, GA 31415, has been approved to gauge petroleum and certain petroleum products and accredited to test petroleum and certain petroleum products for customs purposes, in accordance with the provisions of 19 CFR 151.12 and 19 CFR 151.13.

Bureau Veritas Commodities and Trade, Inc. (Savannah, GA) is approved for the following gauging procedures for petroleum and certain petroleum products from the American Petroleum Institute (API):

API chapters	Title
3 .....	Tank Gauging.
7 .....	Temperature Determination.
8 .....	Sampling.
11 .....	Physical Properties Data.
12 .....	Calculation of Petroleum Quantities.
17 .....	Maritime Measurement.

Bureau Veritas Commodities and Trade, Inc. (Savannah, GA) is accredited for the following laboratory analysis procedures and methods for petroleum and certain petroleum products set forth by the U.S. Customs and Border Protection Laboratory Methods (CBPL) and American Society for Testing and Materials (ASTM):

CBPL No.	ASTM	Title
27-03 .....	D4006	Standard Test Method for Water in Crude Oil by Distillation.
27-04 .....	D95	Standard test Method for Water in Petroleum Products and Bituminous Materials by Distillation.
27-06 .....	D473	Standard Test Method for Sediment in Crude Oils and Fuel Oils by the Extraction Method.

CBPL No.	ASTM	Title
27-08 .....	D86	Standard Test Method for Distillation of Petroleum Products at Atmospheric Pressure.
27-11 .....	D445	Standard Test Method for Kinematic Viscosity of Transparent and Opaque Liquids (and Calculation of Dynamic Viscosity).
27-13 .....	D4294	Standard Test Method for Sulfur in Petroleum and Petroleum Products by Energy-Dispersive X-Ray Fluorescence Spectrometry.
27-48 .....	D4052	Standard Test Method for Density, Relative Density, and API Gravity of Liquids by Digital Density Meter.
27-54 .....	D1796	Standard Test Method for Water and Sediment in Fuel Oils by the Centrifuge Method (Laboratory Procedure).
27-58.....	D5191	Standard Test Method for Vapor Pressure of Petroleum Products (Mini Method).

Anyone wishing to employ this entity by the U.S. Customs and Border or approved to perform may be directed to conduct laboratory analyses and Protection to conduct the specific test or to the U.S. Customs and Border gauger services should request and gauger service requested. Alternatively, Protection by calling (281) 560-2900. receive written assurances from the inquiries regarding the specific test or The inquiry may also be sent to entity that it is accredited or approved gauger service this entity is accredited *CBPGaugersLabs@cbp.dhs.gov*. Please reference the website listed below for a complete listing of CBP approved gaugers and accredited laboratories. <http://www.cbp.gov/about/labs-scientific/commercial-gaugers-and-laboratories>.

Dated: October 6, 2021.

JAMES D. SWEET,  
*Laboratory Director,  
 Southwest Regional Science Center,  
 Laboratories and Scientific Services  
 Directorate.*

[Published in the Federal Register, November 3, 2021 (85 FR 60635)]

**COPYRIGHT, TRADEMARK, AND TRADE NAME  
RECORDATIONS**

**(No. 09 2021)**

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**SUMMARY:** The following copyrights, trademarks, and trade names were recorded with U.S. Customs and Border Protection in September 2021. A total of 162 recordation applications were approved, consisting of 9 copyrights and 153 trademarks.

Corrections or updates may be sent to: Intellectual Property Enforcement Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, 90 K Street, NE., 10th Floor, Washington, D.C. 20229-1177, or via email at *iprrquestions@cbp.dhs.gov*.

**FOR FURTHER INFORMATION CONTACT:** Christopher Hawkins, Paralegal Specialist, Intellectual Property Enforcement Branch, Regulations and Rulings, Office of Trade at (202) 325-0295.

ALAINA VAN HORN

*Chief,*

*Intellectual Property Enforcement Branch  
Regulations and Rulings, Office of Trade*

## CBP IPR RECORDATION — SEPTEMBER 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 02-00342	09/27/2021	12/27/2021	DEVIL RAYS	TAMPA BAY RAYS BASEBALL LTD.	No
TMK 02-00403	09/10/2021	09/12/2031	RIRI (STYLIZED)	Riri SA	No
TMK 02-01030	09/15/2021	01/22/2032	GIANTS	SAN FRANCISCO GIANTS BASEBALL CLUB LLC	No
TMK 02-01064	09/15/2021	02/06/2032	C REDS & DESIGN	The Cincinnati Reds, LLC	No
TMK 03-00438	09/03/2021	06/13/2031	H. UPMANN	CUBAN CIGAR BRANDS B.V. PRIVATE LTD.	No
TMK 03-00584	09/10/2021	09/11/2031	BORDER WITH LEAVES (DESIGN)	REPUBLIC BRANDS L.P.	No
TMK 05-00484	09/29/2021	11/29/2031	BRNCOS	PDB Sports, Ltd. DBA Denver Broncos	No
TMK 05-00749	09/03/2021	11/08/2031	LANGE	LANGE UHREN GmbH CORPORATION GERMANY	No
TMK 05-01002	09/14/2021	10/03/2031	Design of Dagger and Heart	Chrome Hearts LLC	No
TMK 06-00014	09/03/2021	07/25/2031	ND (STYLIZED)	UNIVERSITY OF NOTRE DAME DU LAC	No
TMK 06-00279	09/01/2021	11/27/2031	W (STYLIZED)	WASHINGTON NATIONALS BASEBALL CLUB, LLC	No
TMK 07-00852	09/13/2021	09/26/2031	SPEED STICK	Colgate-Palmolive Company	No
TMK 07-01310	09/24/2021	09/27/2031	PRINCE ALBERT (STYLIZED)	JOHN MIDDLETON CO.	No
TMK 08-00600	09/24/2021	01/03/2031	M & DESIGN	MICROCHIP TECHNOLOGY INCORPORATED	No
TMK 10-00817	09/13/2021	11/15/2031	EDIFICE	Casio Keisanki Kabushiki Kaisha DBA Casio Computer Co., Ltd.	No
TMK 11-00893	09/27/2021	01/14/2022	WELLBUTRIN	GLAXOSMITHKLINE LLC	No
TMK 11-01060	09/27/2021	08/28/2031	DR. MARIO	Nintendo of America Inc.	No
TMK 11-01383	09/01/2021	08/08/2031	CREST	Procter & Gamble Company, The	No

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Recordation No.	Effective Date	Expiration Date	Name of Cop/TmK/TmM	Owner Name	GM Restricted
TMK 11-01396	09/15/2021	09/23/2031	GG (STYLIZED)	GUCCI AMERICA, INC.	No
TMK 11-01410	09/01/2021	06/20/2031	SATURN Logo	GENERAL MOTORS LLC	No
TMK 11-01489	09/13/2021	09/12/2031	LATEX FREE & DESIGN	EXELINT International, CO.	No
TMK 11-01511	09/15/2021	09/14/2031	NARCISO RODRIGUEZ	NR CLASS 3, LLC	No
TMK 12-00053	09/17/2021	01/11/2032	GLOCK	GLOCK, Inc.	No
TMK 12-00082	09/03/2021	08/19/2031	DEPEND	KIMBERLY-CLARK WORLDWIDE, INC.	No
TMK 12-00105	09/17/2021	01/11/2032	GLOCK & DESIGN	GLOCK, Inc.	No
TMK 12-00354	09/24/2021	08/17/2031	HALAVEN	Eisai R&D Management Co., Ltd.	No
TMK 12-00851	09/27/2021	12/20/2031	SWEETANGO & Design	Regents of the University of Minnesota CORPORATION	No
TMK 12-01364	09/07/2021	09/21/2031	RAG & BONE	Rag & Bone Holdings, LLC	No
TMK 12-01444	09/09/2021	03/21/2031	SUPERDRY	DKH RETAIL LIMITED	No
TMK 13-00314	09/01/2021	09/14/2031	ACCUPIN	Trijicon, Inc	No
TMK 13-00940	09/01/2021	06/08/2031	DEXOS	GENERAL MOTORS LLC	No
TMK 13-00990	09/24/2021	06/22/2031	CREE	Cree, Inc.	No
TMK 13-01005	09/24/2021	06/22/2031	CREE	Cree, Inc.	No
TMK 14-00120	09/13/2021	10/12/2031	RSA	MAGPUL INDUSTRIES CORP.	No
TMK 14-00642	09/10/2021	10/04/2031	GRANITE GEAR	GRANITE GEAR, LLC	No
TMK 16-00101	09/29/2021	12/16/2027	TED BAKER	No Ordinary Designer Label	No
TMK 16-00119	09/29/2021	10/07/2029	TED BAKER	No Ordinary Designer Label Ltd. TATeD Baker	No
TMK 16-00410	09/09/2021	09/07/2031	RØDE	FREEDMAN ELECTRONICS PTY LTD	No
TMK 16-00565	09/20/2021	09/07/2031	GXP	SRAM, LLC	No
TMK 16-00680	09/07/2021	01/02/2032	APC	Landing Products, Inc.	No

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Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 16-01224	09/10/2021	09/30/2031	ASPECTS (STYLIZED)	Aspects, Inc.	No
TMK 17-00106	09/15/2021	09/30/2031	ESPE	3M DEUTSCHLAND GMBH	No
TMK 18-00875	09/01/2021	09/06/2031	WUSTHOF (STYLIZED)	ED. WUSTHOF DREIZACKWERK KG	No
TMK 19-00237	09/15/2021	12/06/2031	BOSTON (STYLIZED)	Boston Red Sox Baseball Club Limited Partnership	No
TMK 19-00263	09/01/2021	11/30/2031	COLORADO (STYLIZED)	Colorado Rockies Baseball Club, Ltd.	No
TMK 19-01196	09/17/2021	10/16/2031	DITRA	SCHLUTER-SYSTEMS KG	No
TMK 20-00094	09/23/2021	10/05/2031	VIRTUAL USA & DESIGN	United States Department of Homeland Security	No
TMK 20-00103	09/21/2021	09/21/2031	E-VERIFY & DESIGN	United States Department of Homeland Security	No
TMK 20-01100	09/15/2021	02/08/2032	ARIZONA (STYLIZED)	AZPB Limited Partnership	No
TMK 20-01133	09/01/2021	11/30/2031	SPRING TRAINING	Major League Baseball Properties, Inc.	No
TMK 20-01135	09/01/2021	01/25/2032	tampa bay rays Design	Tampa Bay Rays Baseball Ltd.	No
TMK 20-01212	09/15/2021	12/20/2031	REDS (STYLIZED)	The Cincinnati Reds LLC	No
TMK 21-00048	09/14/2021	09/28/2031	HOLSET VGT	CUMMINS TURBO TECHNOLOGIES	No
TMK 21-00807	09/01/2021	06/28/2027	PURELINE	Inyo Pool Products Inc. CORPORATION	No
TMK 21-00808	09/01/2021	02/22/2027	PURELINE	Inyo Pool Products Inc.	No
TMK 21-00809	09/01/2021	12/03/2029	NAKED COLLAGEN	Naked Whey, Inc.	No
TMK 21-00810	09/01/2021	11/13/2029	NAKED BAR	Naked Whey Inc.	No
TMK 21-00811	09/01/2021	11/07/2028	NAKED ENERGY	Naked Whey Inc.	No
TMK 21-00812	09/01/2021	04/23/2028	NAKED CREATINE	Naked Whey Inc.	No
TMK 21-00813	09/01/2021	04/16/2028	NAKED GLUTAMINE	Naked Whey Inc.	No
TMK 21-00814	09/01/2021	04/08/2023	URBAN REPUBLIC UR	J.C.S. Apparel Group, Inc.	No

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TMK 21-00815	09/01/2021	10/27/2031	VIP Power & DESIGN	VIP DISTRIBUTION SERVICES LLC	No
TMK 21-00816	09/01/2021	12/08/2028	MARLIN	Trek Bicycle Corporation	No
TMK 21-00817	09/01/2021	04/02/2028	NAKED PB	Naked Whey Inc. CORPORATION	No
TMK 21-00818	09/01/2021	07/30/2029	NAKED MEAL	Naked Whey Inc. CORPORATION	No
TMK 21-00819	09/01/2021	01/09/2029	NAKED BCAAS	Naked Whey Inc. CORPORATION	No
TMK 21-00820	09/01/2021	09/26/2028	LUXTURNA	Spark Therapeutics, Inc.	No
TMK 21-00821	09/01/2021	11/17/2031	BAM BAM	ALL CAPS INC DBA BAM BAM CHEST-NUTS CORPORATION	No
TMK 21-00822	09/01/2021	08/16/2027	NAKED RICE	Naked Whey Inc. DBA Naked Nutrition	No
TMK 21-00823	09/01/2021	08/16/2027	NAKED GOAT	Naked Whey Inc. DBA Naked Nutrition	No
TMK 21-00824	09/01/2021	11/17/2031	MEDITEDDI	HealthPositive LLC	No
TMK 21-00825	09/01/2021	08/16/2027	NAKED EGG	Naked Whey Inc.	No
TMK 21-00826	09/01/2021	11/16/2026	NAKED PEA	Naked Whey Inc.	No
TMK 21-00827	09/01/2021	06/08/2026	NAKED PROTEIN	Naked Whey, Inc.	No
TMK 21-00828	09/01/2021	01/10/2028	NAKED CASEIN	Naked Whey Inc	No
TMK 21-00829	09/03/2021	09/30/2030	DESIGNDC	Design DC, LLC	No
TMK 21-00830	09/03/2021	04/02/2028	LESS NAKED	Naked Whey Inc. DBA Naked Nutrition	No
TMK 21-00831	09/03/2021	02/05/2030	NAKED	Naked Whey, Inc.	No
TMK 21-00832	09/03/2021	11/24/2031	LA FAVORITA ACHIOTE VEGETABLE OIL WITH ANNATTO & DESIGN	La Fabril S.A.	No
TMK 21-00833	09/03/2021	01/10/2028	NAKED NUTRITION	Naked Whey Inc	No
TMK 21-00834	09/03/2021	06/02/2031	PS5 (STYLIZED)	Sony Interactive Entertainment Inc. CORPORATION	No

**CBP IPR RECORDATION — SEPTEMBER 2021**

<b>Recordation No.</b>	<b>Effective Date</b>	<b>Expiration Date</b>	<b>Name of Cop/Tmk/Tnm</b>	<b>Owner Name</b>	<b>GM Restricted</b>
TMK 21-00835	09/03/2021	09/01/2031	DUALSENSE	Sony Interactive Entertainment Inc. CORPORATION	No
TMK 21-00836	09/03/2021	01/10/2028	NAKED WHEY	Naked Whey Inc DBA Naked Nutrition	No
TMK 21-00837	09/03/2021	08/05/2029	GUAYAKI	Guayaki Sustainable Rainforest Products, Inc. CORPORATION	No
TMK 21-00838	09/03/2021	09/26/2028	NAKED MASS	Naked Whey Inc.	No
TMK 21-00839	09/07/2021	05/14/2027	Guayaki Wreath and Planet Logo	Guayaki Sustainable Rainforest Products, Inc.	No
TMK 21-00840	09/07/2021	02/06/2029	BLUE OTTER POLARIZED & DESIGN	Blue Otter LLC	No
TMK 21-00841	09/07/2021	11/14/2028	CLEARLY LOVED PETS	Clearly Loved Pets, LLC	No
TMK 21-00842	09/08/2021	11/24/2031	CBD LIFE	Rowe's CBD	No
TMK 21-00843	09/09/2021	07/21/2030	LUXTURNA & Design	Spark Therapeutics, Inc.	No
TMK 21-00844	09/09/2021	10/21/2025	SUPERDRY & DESIGN	DKH RetailUNITED KINGDOM	No
TMK 21-00845	09/09/2021	11/24/2031	SEEUS95	Chun, Alice M INDIVIDUAL	No
TMK 21-00846	09/09/2021	01/17/2028	AMBUSH	Industrias Tres Americas GUATEMALA	No
TMK 21-00847	09/09/2021	11/19/2024	UTAS & DESIGN	UTAS-USA AKA UTAS	No
TMK 21-00848	09/10/2021	06/30/2031	SUPERDRY & DESIGN	DKH Retail Limited	No
TMK 21-00849	09/10/2021	06/11/2024	AUDIOQUEST	The Quest Group	No
TMK 21-00850	09/10/2021	12/16/2028	AQ	The Quest Group	No
TMK 21-00851	09/10/2021	11/14/2028	Clearly Loved Pets Dog Logo	Clearly Loved Pets, LLC	No
TMK 21-00852	09/10/2021	09/23/2027	ALYSSA ASHLEY	HARRY'S CORPORATION NETHERLANDS	No
TMK 21-00853	09/10/2021	09/21/2026	B & DESIGN	JHO INTELLECTUAL PROPERTY HOLDINGS, LLC	No

## CBP IPR RECORDATION — SEPTEMBER 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 21-00854	09/10/2021	01/15/2030	BANG	JHO Intellectual Property Holdings, LLC	No
TMK 21-00855	09/10/2021	03/11/2029	BRUIN	Industrias Tres Americas GUATEMALA	No
TMK 21-00856	09/10/2021	09/28/2026	B & DESIGN	JHO INTELLECTUAL PROPERTY HOLDINGS, LLC	No
TMK 21-00857	09/10/2021	11/03/2031	B & DESIGN	Entourage IP Holdings, LLC	No
TMK 21-00858	09/10/2021	11/24/2031	AMERICAN MONEY CLOTHING	Christie, Sally G. INDIVIDUAL	No
TMK 21-00859	09/10/2021	10/06/2031	SARAH FLINT	Sarah Flint, Inc.	No
TMK 21-00860	09/10/2021	11/24/2031	NAKED C	Naked Whey Inc.	No
TMK 21-00861	09/10/2021	02/05/2024	SARAH FLINT	Sarah Flint, Inc.	No
TMK 21-00862	09/10/2021	03/09/2029	BANG	JHO INTELLECTUAL PROPERTY HOLDINGS, LLC	No
TMK 21-00863	09/13/2021	11/17/2031	TINA'S PLANET VODKA	TINA'S PLANET VODKA, INC.	No
TMK 21-00864	09/13/2021	11/24/2031	Huria & DESIGN	Ahmed, Humeira INDIVIDUAL	No
TMK 21-00865	09/14/2021	01/29/2030	CHEF IQ	RJ Brands LLC	No
TMK 21-00866	09/15/2021	02/12/2030	7777 HILLZ (Stylized)	7 Hillz Productions	No
TMK 21-00867	09/15/2021	08/12/2030	REELBACK FILM SUMMIT	Breton Moses	No
TMK 21-00868	09/15/2021	12/07/2031	VYSA GAMING	Virginia Youth Soccer Association, Inc.	No
TMK 21-00869	09/15/2021	11/28/2028	CHEFMAN	RJ Brands LLC	No
TMK 21-00870	09/15/2021	11/30/2031	TORQZILLA	Cookeville Converter Company, LLC	No
TMK 21-00871	09/15/2021	07/26/2026	NICOLE LEE U.S.A. (on Oval Nameplate)	Nicole, Inc.	No
TMK 21-00872	09/17/2021	06/13/2031	SKUNK BRAND	BBK TOBACCO & FOODS, LLP	No
TMK 21-00873	09/17/2021	10/21/2025	FUM	Partes Mundo Ltd.	No
TMK 21-00874	09/17/2021	07/06/2031	COMIRNATY	BioNTech SE	No

## CBP IPR RECORDATION — SEPTEMBER 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tnm	Owner Name	GM Restricted
TMK 21-00875	09/17/2021	09/03/2023	ALDACTONE	PHARMACIA & UPJOHN COMPANY LLC	No
TMK 21-00876	09/17/2021	09/04/2029	RETACRIT	Hospira, Inc.	No
TMK 21-00877	09/17/2021	04/17/2027	VIBRAMYCIN	PFIZER INC. CORPORATION	No
TMK 21-00878	09/21/2021	04/23/2029	FELDENE	PFIZER INC.	No
TMK 21-00879	09/21/2021	10/31/2028	MYLOTARG	Wyeth LLC	No
TMK 21-00880	09/21/2021	07/09/2029	NIVESTYM	Hospira, Inc.	No
TMK 21-00881	09/21/2021	09/21/2025	PROVERA	Pharmacia & Upjohn Company LLC	No
TMK 21-00882	09/21/2021	01/13/2031	UBER	Uber Technologies, Inc.	No
TMK 21-00883	09/21/2021	05/16/2026	CUDDLE	Shannon Fabrics, Inc. CORPORATION	No
TMK 21-00884	09/21/2021	07/27/2031	LUXE CUDDLE	Shannon Fabrics, Inc. CORPORATION	No
TMK 21-00885	09/21/2021	10/29/2023	MONGOOSE	M-1 L.L.C.	No
TMK 21-00886	09/21/2021	01/21/2029	MEERKAT	M-1 L.L.C.	No
TMK 21-00887	09/21/2021	09/08/2025	SWECO	M-1, L.L.C.	No
TMK 21-00888	09/21/2021	10/27/2031	VENICEKUSH	Moreno Olivera, Hugo	No
TMK 21-00889	09/22/2021	12/14/2031	GWEN & LOKI	Gwen & Loki LLC	No
TMK 21-00890	09/22/2021	01/06/2026	GLADIATOR JOE	Mercaldi, Joseph	No
TMK 21-00891	09/24/2021	03/05/2027	THINSWITCH	Burger & Brown Engineering, Incorporated	No
TMK 21-00892	09/24/2021	01/06/2026	G J (STYLIZED)	Mercaldi, Joseph	No
TMK 21-00893	09/24/2021	10/30/2029	AMI ALEXANDRE MATTIUSI (STYLIZED)	AMI PARIS	No
TMK 21-00894	09/24/2021	07/13/2031	HIVE	AramSCO, Inc.	No

## CBP IPR RECORDATION — SEPTEMBER 2021

Recordation No.	Effective Date	Expiration Date	Name of Cop/Tmk/Tm	Owner Name	GM Restricted
TMK 21-00895	09/27/2021	11/24/2031	LEAGUE OF INDIAN NATIONS OF NORTH AMERICA	EI, AI	No
TMK 21-00896	09/27/2021	11/08/2027	RESHMA BEAUTY	Reshma Beauty, Inc. CORPORATION	No
TMK 21-00897	09/27/2021	11/03/2031	CACAMAMIE	Quality Innovation Leader, L.L.C.	No
TMK 21-00898	09/27/2021	11/03/2031	CACAMAMIE THE #2 GAME IN AMERICA	Quality Innovation Leader, L.L.C.	No
TMK 21-00899	09/27/2021	12/07/2031	INERT PRODUCTS	Inert Products, LLC	No
TMK 21-00900	09/27/2021	11/03/2031	ABSOLUTE HOME MORTGAGE CORPORATION	Absolute Home Mortgage Corporation	No
TMK 21-00901	09/27/2021	11/03/2031	A & DESIGN	Absolute Home Mortgage Corporation	No
TMK 21-00902	09/27/2021	11/03/2031	CROWN HOME MORTGAGE WHERE THE CUSTOMER IS ROYALTY & DESIGN	Absolute Home Mortgage Corporation	No
TMK 21-00903	09/28/2021	07/06/2031	CONFIGURATION OF PADDLE AND SPOUT FOR WATER COOLER	BHRS Group, LLC	No
TMK 21-00904	09/29/2021	03/08/2031	ALL THINGS INTUITIVE	All Things Intuitive LLC	No
TMK 21-00905	09/29/2021	11/30/2031	FIRSTIME & CO.	FirsTime Design Ltd	No
TMK 89-00470	09/14/2021	07/08/2029	VICKS	THE PROCTER & GAMBLE COMPANY	Lever
COP 21-00058	09/01/2021	09/01/2041	College Girl Artwork	NICOLE, INC.	No
COP 21-00059	09/01/2021	09/01/2041	TRAVEL IN FASHION artwork	NICOLE, INC. DBA NICOLE LEE.	No
COP 21-00060	09/03/2021	09/02/2041	Nintendo Entertainment System Controllers Webpage	Nintendo of America Inc., Transfer	No
COP 21-00061	09/03/2021	09/02/2041	HYRULE WARRIORS	Nintendo of America Inc.	No
COP 21-00062	09/03/2021	09/03/2041	SUPER MARIO 3D WORLD + BOWSER'S FURY.	Nintendo of America Inc.	No

**CBP IPR RECORDATION — SEPTEMBER 2021**

<b>Recordation No.</b>	<b>Effective Date</b>	<b>Expiration Date</b>	<b>Name of Cop/Tm/Trm</b>	<b>Owner Name</b>	<b>GM Restricted</b>
COP 21-00063	09/13/2021	09/10/2041	Cognitive Behavior Therapy, Third Edition	Judith S. Beck	No
COP 21-00064	09/13/2021	09/10/2041	Villa Das Rainhas Label Design	Hoerber Media, LLC	No
COP 21-00065	09/13/2021	09/10/2041	Villa Das Rainhas Label Design	Hoerber Media, LLC	No
COP 21-00066	09/24/2021	09/23/2041	Graphic and Sculptural Features of a T-Rex Costume	Rubie's Costume Company, Inc.,	No

# U.S. Court of Appeals for the Federal Circuit

KENT INTERNATIONAL, INC., Plaintiff-Appellant v. UNITED STATES,  
Defendant-Appellee

Appeal No. 2021–1065

Appeal from the United States Court of International Trade in No. 1:15-cv-00135-LMG, Senior Judge Leo M. Gordon.

Decided: November 3, 2021

PATRICK CRAIG REED, Simons & Wiskin, New York, NY, argued for plaintiff-appellant. Also represented by PHILIP YALE SIMONS, JERRY P. WISKIN, South Amboy, NJ.

MONICA PERRETTE TRIANA, International Trade Field Office, United States Department of Justice, New York, NY, argued for defendant-appellee. Also represented by AIMEE LEE, JUSTIN REINHART MILLER; BRIAN M. BOYNTON, JEANNE DAVIDSON, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC.

Before LOURIE, LINN, and DYK, *Circuit Judges*.

LINN, *Circuit Judge*.

Kent International, Inc. (“Kent”) appeals the affirmance by the Court of International Trade (“Trade Court”) of the decision by U.S. Customs and Border Protection (“Customs”) denying Kent’s claims that the classification of its imported merchandise under Harmonized Tariff Schedule of the United States (“HTSUS”) heading 8714 violated 19 U.S.C. § 1625(c) by departing from a “treatment previously accorded” and was contrary to a de facto “established and uniform practice” (“EUP”) under 19 U.S.C. § 1315(d). Because the Trade Court erred in approving Customs’ use of bypass entries to show the absence of a treatment previously accorded, we reverse that ruling and remand. Because the Trade Court did not err in finding no de facto EUP, we affirm that part of the Trade Court’s decision.

## BACKGROUND

Kent is an importer of bicycle-related products, including, as relevant here, children’s bicycle seats. In 2005, Customs, in response to a request by Kent, issued a ruling letter (“2005 Ruling”) stating that Kent’s bicycle seats would be classified as “accessories of bicycles” under HTSUS heading 8714. Under that heading, Kent’s bicycle seats would be subject to a 10% ad valorem duty. See *Kent Int’l. Inc. v.*

*United States*, 466 F. Supp. 3d 1361, 1363 (Ct. Int'l Trade 2020) (“*Kent II*”) (describing 2005 Ruling). The 2005 Ruling thereafter obligated Kent to initially enter its bicycle seats through Customs under heading 8714.

Between August 2008 and November 2010, Kent made 44 entries of its bicycle seats through the Port of New York/Newark, each time listing the subject merchandise under heading 8714 (“New York entries”). Starting in April 2008, after Customs classified a competitor’s children’s bicycle seats as “seats” under duty-free heading 9401, Kent filed several protests, post-entry amendments and a first application for further review (collectively “New York protests”) for its previously liquidated New York entries. Between August 2008 and November 2010, Customs approved the New York protests and reliquidated Kent’s merchandise under heading 9401. Based on the favorable grants by Customs of Kent’s New York protests, Kent, in April 2011, filed a second application for further review seeking to revoke the 2005 Ruling as inconsistent with Customs’ subsequent treatment of its New York entries. Kent continued to make entries of its bicycle seats through the Port of New York/Newark after December 2010 and again lodged protests for each. Customs, however, stopped granting those protests and instead suspended them pending further review.

During the pendency of the New York protests, Kent began to import the same merchandise through the Port of Long Beach (“Long Beach entries”). Between December 4, 2008 and November 2010, Kent made eight entries of its bicycle seats through that port. Between November 2010 and March 31, 2014, Kent made an additional 37 entries through that port. Acting in compliance with the 2005 Ruling, Kent listed all of these entries under heading 8714. Long Beach Customs treated these entries as bypass entries and liquidated them under heading 8714 without examination or Customs officer review.

Kent protested the treatment of its Long Beach entries at the Port of Long Beach (“Long Beach protests”), contesting the classification of the subject merchandise under heading 8714 and seeking reclassification under heading 9401. Four of its protests were filed specifically for merchandise imported within the December 4, 2008, through November 2010 time frame. At Kent’s request, these four protests were suspended pending resolution of its New York protests. Although the New York protests were granted, all of Kent’s Long Beach protests were denied after November 2010. *Kent II*, 466 F.Supp.3d at 1363–64.

In June 2014, Customs, through notice and comment, revoked its earlier decisions classifying three of Kent’s competitors’ merchandise

under heading 9401, and concluded that the competitors' merchandise would be classified under heading 8714, effective September 22, 2014. *Id.* at 1364. On February 11, 2015, in response to Kent's April 2011 application for further review, Customs declined to revoke the 2005 Ruling and reaffirmed the classification of Kent's bicycle seats under HTSUS heading 8714.

Kent appealed the denial of its Long Beach protests to the Trade Court, alleging: (1) that the proper classification of its bicycle seats was under heading 9401; and (2) that the denials modified a treatment previously accorded by Customs and departed from a de facto EUP. The Trade Court bifurcated the classification issue from the treatment previously accorded and EUP issues. On the first issue, the Trade Court held that the merchandise was properly classified under heading 8714. *Kent Int'l, Inc. v. United States*, 393 F.Supp.3d 1218, 1225 (Ct. Int'l Trade 2019) (*Kent I*). Kent does not appeal that determination.

On the second issue, the Trade Court denied Kent's treatment previously accorded and EUP claims, finding no consistent treatment of Kent's bicycles seats under heading 9401 on a national basis over any two-year period in light of the liquidation of the Long Beach bypass entries under heading 8714. *Kent II*, 466 F.Supp.3d at 1367. The Trade Court specifically noted that 19 C.F.R. § 177.12(c)(1)(i) "does not limit the consideration of the court to only 'final Customs actions'" and held that Kent's pending protests of its Long Beach entries did not make those entries ineligible for consideration in the treatment analysis. *Kent II*, 466 F.Supp.3d at 1367–68. The Trade Court also considered and denied Kent's claim of treatment based on the entries of third parties for the same reason—the liquidation of Kent's Long Beach bypass entries under HTSUS 8714. The Trade Court did not directly address the propriety of considering bypass entries not subjected to examination or Customs officer review in the treatment analysis. The Trade Court also expressly declined to address the applicable two-year time period in the treatment analysis. *Kent II*, 466 F.Supp.3d at 1368 n.1.

The Trade Court also rejected Kent's argument that Customs' liquidation of Kent's New York entries and third-party entries under heading 9401 created a de facto EUP. The Trade Court held that Kent's claim would have the court disregard the 2005 Ruling, which was never revoked, classifying Kent's bicycles seats under heading 8714. It concluded that that ruling, as well as the classification of the Long Beach entries under 8714, "demonstrate[d] that Customs did not engage in an established and *uniform* practice of classifying child safety seats under heading 9401." *Id.* at 1369 (emphasis in original).

Kent appeals. We have jurisdiction over a final decision by the Trade Court under 28 U.S.C. § 1295(a)(5).

## ANALYSIS

### I.

#### A.

“We review the [Trade Court’s] grant of summary judgment *de novo*, applying ‘the same standard used by the [Trade Court] in reviewing Customs’ classification determination.” *Apple Inc. v. United States*, 964 F.3d 1087, 1092 (Fed. Cir. 2020) (*quoting Otter Prods., LLC v. United States*, 834 F.3d 1369, 1374–75 (Fed. Cir. 2016)). We review the Trade Court’s conclusions on legal issues *de novo*. *Mid Continent Steel & Wire, Inc. v. United States*, 940 F.3d 662, 667 (Fed. Cir. 2019).

#### B.

19 U.S.C. § 1625(c)(2) mandates that any duty classification decision that would “have the effect of modifying the *treatment previously accorded* by the Customs Service to substantially identical transactions,” (emphasis added) must be made by notice and comment. In explaining what is meant by “*treatment previously accorded*,” Customs regulations provide:

- (1) . . . The following rules will apply for purposes of determining under this section whether a treatment was previously accorded by Customs to substantially identical transactions of a person:
  - (i) There must be evidence to establish that:
    - (A) There was an actual determination by a Customs officer regarding the facts and issues involved in the claimed treatment;
    - (B) The Customs officer making the actual determination was responsible for the subject matter on which the determination was made; and
    - (C) Over a 2–year period immediately preceding the claim of treatment, Customs consistently applied that determination on a national basis as reflected in liquidations of entries or reconciliations or other Customs actions with respect to all or substantially all of that person’s Customs transactions involving materially identical facts and issues.
  - (ii) The determination of whether the requisite treatment occurred will be made by Customs on a case-by-case basis and will involve an assessment of all relevant factors.

In particular, Customs will focus on the past transactions to determine whether there was an examination of the merchandise (where applicable) by Customs or the extent to which those transactions were otherwise reviewed by Customs to determine the proper application of the Customs laws and regulations.

*For purposes of establishing whether the requisite treatment occurred . . . Customs will give no weight whatsoever to informal entries and to other entries or transactions which Customs, in the interest of commercial facilitation and accommodation, processes expeditiously and without examination or Customs officer review.*

37 C.F.R. § 177.12(c)(1) (emphases added).

Kent argues that Customs' denial of its Long Beach protests violated 19 U.S.C. § 1625(c)(2) by modifying the treatment previously accorded Kent's New York entries without the necessary notice and comment. According to Kent, during the two-plus year period between August 2008 and November 2010, the only determinations made by actual Customs officials—the approval of protests with respect to the New York entries—placed Kent's merchandise under heading 9401. Kent argues that 37 C.F.R. § 177.12(c)(1)(ii) prohibits consideration of the automatically liquidated Long Beach entries in the determination of whether there was a treatment previously accorded. Kent further argues that the Long Beach entries could not be considered in determining whether there was a treatment previously accorded because they were subject to Kent's protest, and were therefore non-final.

The government responds that while Customs is prohibited under 19 C.F.R. § 177.12(c)(1)(ii) from considering bypass entries for purposes of determining whether an importer has *established* the requisite treatment, a separate part of the regulation, 19 C.F.R. § 177.12(c)(1)(i)(C), authorizes Customs to consider "liquidations" generally, for purposes of analyzing whether the agency consistently applied a determination on a nationwide basis over a two-year period. Appellee's Br. at 14 and 22. The government notes that in subparagraph (c)(1)(ii) the regulation uses the word "establishing" when prohibiting the use of bypass entries, but in subparagraph (c)(1)(i)(C) the regulation uses the word "determining" when requiring Customs to take into account "liquidations" without limitation.

A plain reading of the regulation supports Kent's position. The touchstone of the treatment previously accorded inquiry is the consistency of *Customs* decisions with respect to the subject merchandise. 37 C.F.R. § 177.12(c)(1)(ii) ("Customs will focus on the past transactions to determine whether there was an examination of the

merchandise (where applicable) by Customs or the extent to which those transactions were otherwise reviewed by Customs.”). The requirement for examination or Customs officer review is wholly consistent with the limitation in § 177.12(c)(1)(ii) that “Customs will give no weight” to unexamined entries, without regard to whether those unexamined entries are used as positive or negative evidence of treatment.

In *Motorola*, we deferred to Customs’ position that bypass entries “do[] not constitute ‘treatment’ within the meaning of section 1625(c)(2).” *Motorola, Inc. v. United States*, 436 F.3d 1357, 1366–67 (Fed. Cir. 2006). We explained that “[i]t is reasonable to conclude that goods which are admitted pursuant to representations by the importer and are not independently examined or reviewed by the importer are not ‘treated’ by Customs.” *Id.* at 1366. *Motorola* addressed the circumstance where an importer was citing its bypass entries as affirmative evidence of a treatment, unlike here, where Customs is citing bypass entries to deny a claim of treatment. But that is a distinction without a difference. The bypass entries in both circumstances are made without examination or Customs officer review and do not reflect “treatment” by Customs.

The government argues that a Federal Register notice in 2002 makes clear that the regulation only limits the use of bypass entries as affirmative evidence of a treatment. *See* 67 Fed. Reg. 53483, 53491 (Aug. 16, 2002) (“Therefore, the proposed regulatory text stands for the proposition that, in order for a person to be *eligible for the protection* afforded under 19 U.S.C. 1625(c)(2), that person must be able to make a showing that Customs took a conscious, intentional and knowledgeable action that created an impression that could give rise to an expectation as regards future action by Customs.” (emphasis added)). The government’s reliance on the Federal Registrar notice, however, is misplaced and begs the question. Determining whether an importer is “eligible for protection” is most naturally read to limit the use of bypass entries as both positive and negative evidence of a treatment previously accorded.

The government also argues that the regulations require consistent treatment of “*all or substantially all* of that person’s Customs transactions,” meaning that bypass entries inconsistent with that treatment can and should inform that determination. This argument fails for the same reason as noted above: the regulation expressly assigns zero weight to bypass entries liquidated without Customs review.

Finally, the government argues that consideration of the Long Beach entries was proper because their liquidation under HTSUS 8714 merely implemented Customs’ 2005 Ruling. The fact of the 2005

Ruling, however, does not render the bypass entries any more appropriate for consideration than if the 2005 Ruling had never been made. Nor does it undermine Kent's assertion of a treatment previously accorded. The Long Beach entries were not the only entries in play. The New York entries, which were *also* liquidated initially under HTSUS 8714 pursuant to the 2005 Ruling, were subject to approved protests and Amendments that reliquidated those entries under HTSUS 9401. The approved protests and Amendments were "actual determinations" that are proper for consideration in assessing the treatment previously accorded.

In conclusion, the Trade Court erred in its construction of § 177.12(c)(1)(ii) as allowing consideration of bypass entries in the determination of whether there was a treatment previously accorded.<sup>1</sup> Because Customs improperly gave weight to the Long Beach entries in determining whether there was a treatment previously accorded, we vacate that part of the Trade Court decision and remand for consideration of whether there was a treatment previously accorded without considering those entries.<sup>2</sup>

### C.

The government also argues that the two-year period Kent identifies, August 2008 through November 2010, is not the correct time period, because that is not the "2-year period immediately preceding the claim of treatment" as required by the regulation. *See* 37 C.F.R. § 177.12(c)(1)(i)(C). The government argues that the date of the "claim of treatment" is the date of Kent's first affected entry, i.e., "the first entry that does not receive the anticipated, relied on treatment." *See Am. Fiber & Finishing v. United States*, 121 F.Supp.3d 1273, 187 (Ct. Int'l Trade 2015). The government thus identifies the applicable period as the two years preceding December 4, 2008, the date of the first Long Beach entries. Kent argues that its Long Beach entries were under a suspended protest, and that the grant of the New York protests gave Kent the right for a disposition of the Long Beach protests in accordance with the New York protest. In other words, Kent argues that, unlike *American Fiber & Finishing*, where the claim of treatment was based on a consistent treatment of *entries*, Kent's claim of treatment is based on the New York protest approvals,

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<sup>1</sup> Because we conclude that the Long Beach entries, as bypass entries, should not have been considered in determining treatment previously accorded, we need not and do not consider whether Customs properly may consider determinations subject to protest or suspended protest.

<sup>2</sup> We also leave to the Trade Court to determine whether Customs may or should consider Customs' treatment of the third-party importers here in determining whether there was a treatment previously accorded.

and that the “claim of treatment” date is thus November 2010, when the New York protests were approved and the merchandise reliquidated under heading 9401.

We leave this question to the Trade Court for its determination in the first instance on remand.

### III.

Kent also argues that the Trade Court erred in finding no de facto established and uniform practice (“EUP”) under 19 U.S.C. § 1315(d) and *Heraeus-Amersil, Inc. v. United States*, 795 F.2d 1575 (Fed. Cir. 1986). We may overturn Customs’ determination that an EUP did not exist only for “a clear abuse of discretion.” *Heraeus-Amersil*, 795 F.2d at 1580 n.7. There was no clear abuse of discretion here.

A so-called de facto EUP arises when Customs consistently classifies a particular type of merchandise under a specific HTSUS heading prior to some distinct point in time. *Kent II*, 466 F.Supp.3d. at 1368. The requirements for establishing a de facto EUP are stringent. See *Jewelpak Corp. v. United States*, 297 F.3d 1326, 1332 (Fed. Cir. 2002). In denying Kent’s claim that the agency violated a de facto EUP, Customs relied on the fact that the 2005 Ruling was never revoked, that the Long Beach entries were classified under heading 8714, that hundreds of entries at 14 ports of entry over a 10-year period classified the same goods under heading 9401 and that similar goods imported by three of Kent’s competitors were initially classified under heading 9401 and later reclassified under heading 8714. *Kent II*, 466 F.Supp.3d at 1369. The Trade Court ultimately decided that under these facts, it could not reasonably conclude that Customs engaged in a uniform practice of classifying these goods or that there was a lack of uncertainty regarding classification.

Kent has failed to show a clear abuse of discretion in denying its claim of a de facto EUP.

### CONCLUSION

For the foregoing reasons, we vacate-in-part the Trade Court’s determination of no treatment previously accorded and remand for a determination of whether there was such a treatment, excluding consideration of the bypass entries. We also remand for a determination in the first instance of the proper time period in which to consider the treatment previously accorded question. Finally, we affirm-in-part the Trade Court’s determination that there was no de facto EUP.

**AFFIRMED-IN-PART, VACATED-IN-PART, AND  
REMANDED.**

### COSTS

Costs are awarded to Kent.

# U.S. Court of International Trade

Slip Op. 21–152

ROYAL BRUSH MANUFACTURING, INC., Plaintiff, v. UNITED STATES,  
Defendant, and DIXON TICONDEROGA Co., Defendant-Intervenor.

Before: Mark A. Barnett, Chief Judge  
Court No. 19–00198

[Sustaining U.S. Customs and Border Protection’s finding of evasion under the Enforce and Protect Act, as amended by its Final Remand Redetermination.]

Dated: October 29, 2021

*Ronald A. Oleynik*, Holland & Knight LLP, of Washington, D.C., argued for Plaintiff. With him on the brief were *Antonia I. Tzinova*, *Dariya V. Golubkova*, and *Libby K. Bloxom*.

*Ashley Akers*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Joseph F. Clark*, Attorney, Office of the Chief Counsel, U.S. Customs and Border Protection.

*Felicia Nowels*, Akerman LLP, of Tallahassee, FL, argued for Defendant-Intervenor.

## OPINION

### Barnett, Chief Judge:

This matter is before the court on U.S. Customs and Border Protection’s (“Customs” or “CBP”) first remand redetermination in connection with EAPA Case No. 7238. *See* Final Remand Redetermination (“Remand Results”), ECF No. 55.<sup>1</sup> CBP issued the Remand Results pursuant to *Royal Brush Manufacturing, Inc. v. United States* (“*Royal Brush I*”), 44 CIT \_\_\_, 483 F. Supp. 3d 1294 (2020), which addressed certain challenges to CBP’s affirmative determination of evasion of the antidumping duty order on certain cased pencils from the People’s Republic of China (“China”) brought by Plaintiff

<sup>1</sup> The administrative record for the underlying proceeding is contained in a Confidential Administrative Record (“CR”), ECF Nos. 24–1 (CR 1–12), 24–2 (CR 13–14), 24–3 (CR 15–19), 24–4 (CR 20–27), 24–5 (CR 28–34), 24–6 (CR 35–37), 24–7 (CR 38–41), 24–8 (CR 42–44), 24–9 (CR 45–47), 24–10 (CR 48–50), 24–11 (CR 51), 24–12 (CR 52–54), 24–13 (CR 55–57), 24–14 (CR 58–69), 24–15 (CR 70–86), 24–16 (CR 87–122), 24–17 (CR 123–24), 24–18 (CR 125–26), 24–19 (CR 127–32), and a Public Administrative Record (“PR”), ECF Nos. 23–1 (PR 1–35), 23–2 (PR 36–43), 23–3 (PR 44–64). The administrative record for the Remand Results is likewise contained in a Confidential Remand Record (“CRR”), ECF No. 60–1 (CRR 1–4), and a Public Remand Record (“PRR”), ECF Nos. 59–1 (PRR 1–18), 59–2 (PRR 19–32), 59–3 (PRR 33–39), 59–4 (PRR 40–47), 59–5 (PRR 48–54), and 59–6 (PRR 55–80). The court references the confidential version of the record document, unless otherwise specified.

Royal Brush Manufacturing, Inc. (“Royal Brush”). CBP issued its evasion determination pursuant to its authority under the Enforce and Protect Act (“EAPA”), 19 U.S.C. § 1517 (2018).<sup>2</sup>

Royal Brush opposes the Remand Results. Confidential Pl. [Royal Brush’s] Opp’n Cmts. to Agency Final Remand Redetermination Pursuant to Court Remand (“Pl.’s Opp’n Cmts.”), ECF No. 64. Defendant United States (“the Government”) responded in support of the Remand Results. Def.’s Resp. to Cmts. on Remand Redetermination (“Def.’s Reply Cmts.”), ECF No. 68.

For the following reasons, the court sustains CBP’s final evasion determination, as amended by the Remand Results.

## BACKGROUND

### I. Factual and Procedural Background

The court summarized the legal framework for EAPA investigations and the factual and procedural history of this case in *Royal Brush I*, 483 F. Supp. 3d at 1297–1301. While familiarity with *Royal Brush I* is presumed, the court recounts the background relevant to resolving the remaining issues in this case.

Royal Brush is a domestic importer of pencils exported to the United States from a company located in the Republic of the Philippines (“the Philippines”).<sup>3</sup> *Id.* at 1298. On February 27, 2018, Defendant-Intervenor Dixon Ticonderoga Co. (“Dixon”)<sup>4</sup> “lodged an allegation with CBP in which it averred that Royal Brush was transshipping pencils made in China—and subject to an antidumping duty order on certain cased pencils from China—through the Philippines.” *Id.* (citations omitted); *see also Certain Cased Pencils from the People’s Republic of China*, 59 Fed. Reg. 66,909 (Dep’t Commerce Dec. 28,

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<sup>2</sup> “Evasion” is defined as “entering covered merchandise into the customs territory of the United States by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and that results in any cash deposit or other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise.” 19 U.S.C. § 1517(a)(5)(A). Congress enacted EAPA as part of the Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114–125, § 421, 130 Stat. 122, 161 (2016). On August 22, 2016, CBP promulgated final interim regulations to guide Customs’ implementation of the EAPA framework. *See Investigation of Claims of Evasion of Antidumping and Countervailing Duties*, 81 Fed. Reg. 56,477 (CBP Aug. 22, 2016) (interim regulations; solicitation of comments); 19 C.F.R. pt. 165 (2017).

<sup>3</sup> To avoid disclosing confidential information, the court will refer to the alleged manufacturer as “the Philippine Shipper.”

<sup>4</sup> Dixon did not submit comments on the Remand Results.

1994) (antidumping duty order) (“*Pencils Order*”); *Certain Cased Pencils From the People’s Republic of China*, 82 Fed. Reg. 41,608 (Dep’t Commerce Sept. 1, 2017) (continuation of antidumping duty order).<sup>5</sup>

Customs initiated an investigation into the transshipment allegation on March 27, 2018, and, following a site visit by a CBP Attaché to the Philippine Shipper’s facility, imposed interim measures<sup>6</sup> suspending liquidation of entries made on or after March 27, 2018, and extending the liquidation of pre-initiation entries. *Royal Brush I*, 483 F. Supp. 3d at 1298–99.<sup>7</sup>

Then, “[f]rom November 14, 2018, through November 17, 2018, Customs conducted a scheduled verification at the Philippine Shipper’s facility.” *Id.* at 1299–1300 (citing On-Site Verification Report (Feb. 11, 2019) (“Verification Report”) at 2, CR 129).<sup>8</sup> Prior to conducting the verification, CBP informed the Philippine Shipper that the verification could cover any “information in the United States or foreign countries collected under [19 C.F.R.] § 165.23 as is necessary to make [CBP’s] determination.”<sup>9</sup> Site Verification Engagement Letter (Nov. 7, 2018) (“Verification Agenda”) at 1, CR 121, PR 33–34. CBP also explained that the Philippine Shipper should “be prepared to walkthrough [its] production process in detail using [five identified invoices].” *Id.* at 2.

The Verification Report summarized CBP’s attempts to verify production information associated with the five invoices plus two additional invoices and included as attachments 32 photographs taken inside the Philippine Shipper’s facility. *See generally* Verification Report. In the report, Customs explained that the Philippine Shipper

<sup>5</sup> The *Pencils Order* covers “certain cased pencils . . . that feature cores of graphite or other materials encased in wood and/or man-made materials, whether or not decorated and whether or not tipped (e.g., with erasers, etc.) in any fashion, and either sharpened or unsharpened.” 59 Fed. Reg. at 66,909.

<sup>6</sup> CBP may impose interim measures within 90 days of initiation of an investigation when the agency determines “there is a reasonable suspicion that such covered merchandise was entered into the customs territory of the United States through evasion.” 19 U.S.C. § 1517(e).

<sup>7</sup> CBP’s Attaché prepared a report documenting certain findings. *See* EAPA 7238–Site Visit Report: [Philippine Shipper], Subic Bay, Philippines (June 15, 2018) (“Attaché Report”) at CBP0002540, CR 5, PR 8. The Attaché concluded that the Philippine Shipper has “the capacity to finish some product, but the on-site evidence clearly reveals the repackaging of completely finished products from China.” *Id.* The Attaché observed “staff . . . making minor alterations or simply sharpening pencils” and “repacking China origin products into boxes labeled, ‘Made in Philippines.’” *Id.* at CBP0002541. The Attaché noted that manufacturing equipment was covered in dust or cobwebs; the “manufacturing warehouse did not indicate production of any products for some time”; they did not observe any raw materials; and the storage area contained “boxes with Chinese characters and English language boxes stating, ‘Made in the Philippines.’” *Id.*

<sup>8</sup> CBP subsequently released a public version of the Verification Report. *See* On-Site Verification Report (Feb. 25, 2019) (“Public Verification Report”), PRR 61.

<sup>9</sup> Section 165.23 addresses the submission of factual information.

was unable to provide inventory receipt records for pencils purchased from Chinese suppliers and, at times, handwrote “pencils” with inventory receipts ostensibly related to the purchase of raw materials. *Id.* at 5. CBP was unable to fully verify the production of pencils sold pursuant to the identified invoices as a result of the Philippine Shipper’s failure to provide certain documents, deletion of documents such as emails, and provision of documents that had been altered or redacted. *Id.* at 6–8. CBP then attempted to verify the Philippine Shipper’s overall production capacity using the payroll records associated with the seven Royal Brush invoices. *Id.* at 9. CBP found that the Philippine Shipper’s volume of exports to the United States exceeded its production capacity as calculated by CBP’s verification team. *Id.* at 8–9. Lastly, “[e]vidence obtained during the verification” indicated that the Philippine Shipper’s previously-submitted payroll documents “were unsupported,” *id.* at 9, such that CBP was “unable to verify that the stated employees were, in fact, paid and/or that there was production during those time periods,” *id.* at 10.

On May 6, 2019, Customs issued an affirmative evasion determination. Notice of Final Determination as to Evasion, EAPA Case No. 7238 (May 6, 2019) (“May 6 Determination”), CR 131, PR 57. Pursuant to section 1517(c), Customs’ determination as to whether covered merchandise entered the United States through evasion must be “based on substantial evidence.” 19 U.S.C. § 1517(c)(1)(A). However, when the person alleged to have engaged in evasion, or the person that is the foreign producer or exporter of the covered merchandise, “fail[s] to cooperate by not acting to the best of the party or person’s ability to comply with a request for information,” Customs may “use an inference that is adverse to the interests of” that person when “selecting from among the facts otherwise available.” *Id.* § 1517(c)(3)(A). Consistent with these authorities, CBP concluded “that substantial evidence, in conjunction with an assumption of adverse inferences related to information requested but not provided, indicates [that] Royal Brush’s imports were merchandise entered through evasion.” May 6 Determination at 5; *see also id.* at 8 (finding substantial evidence to support a finding of evasion based on the available evidence “and the absence of information due to [the] Philippine [ ] Shipper’s failure to cooperate and comply to the best of its ability”).

Royal Brush requested an administrative review of Customs’ May 6 Determination pursuant to 19 U.S.C. § 1517(f). *See Royal Brush I*, 483 F. Supp. 3d at 1301. On September 24, 2019, CBP completed its *de novo* Administrative Review. *See Decision on Request for Admin. Review*, EAPA Case No. 7238 (Sept. 24, 2019) (“Admin. Review”), PR 64. In its review, CBP found that there was substantial evidence to

support a finding that the pencils imported by Royal Brush during the period of investigation were manufactured in China—not the Philippines. *Id.* at 11–19. CBP explained that, in response to its requests for information, Royal Brush had provided quality compliance certifications that listed China as the country of origin for the tested pencils. *Id.* at 12. CBP also summarized the Attaché’s findings indicating the absence of production activity by the Philippine Shipper and the repackaging of pencils made in China into boxes labeled “Made in Philippines” for export to the United States. *Id.* at 13; *see also id.* at 14 (discussing the Attaché Report).

According to CBP, “[t]he question for further development thus became the capacity of the Philippine [Shipper] to manufacture at the level described, given the lack of resources observed during the first on-site visit.” *Id.* at 13. CBP explained that verification was conducted in order “to determine whether the Philippine [Shipper] could show that it was capable of producing the amount of pencils allegedly manufactured for Royal Brush, as well as to clarify the country of origin for pencils imported by Royal Brush.” *Id.* at 14. CBP noted the Verification Report’s summary of the association between the Philippine Shipper and “certain trading companies in China,” including that certain officers held positions with both the Philippine Shipper and the Chinese trading companies. *Id.* at 15. CBP also pointed to the inability of the Philippine Shipper to satisfactorily account for the production of the pencils associated with the seven Royal Brush invoices and the verification team’s findings regarding overall production capacity. *Id.* at 15, 17. CBP concluded that “[t]he production in the Philippines for Royal Brush’s imports remains unsubstantiated, as amply demonstrated in the verification report by trained CBP auditors.” *Id.* at 16.

CBP additionally found that “adverse inferences were warranted, inasmuch as the importer, as well as the alleged foreign producer and exporter, *failed* to provide sufficient evidence to demonstrate that the pencils imported by Royal Brush were manufactured in the Philippines.” *Id.* at 18. CBP thus “reasonably filled those evidentiary gaps with some adverse inferences.” *Id.*

CBP’s finding of evasion in the Administrative Review precipitated this appeal. *See* Summons, ECF No. 1; Compl., ECF No. 2; *see also* 19 U.S.C. § 1517(g) (providing for judicial review following CBP’s completion of an administrative review pursuant to subsection (f)).

In due course, Royal Brush moved for judgment on the agency record pursuant to U.S. Court of International Trade (“USCIT” or “CIT”) Rule 56.2. Confidential Pl. [Royal Brush’s] Mot. for J. on the Agency R., ECF No. 33. Royal Brush raised four challenges to Cus-

toms' evasion determination, arguing that Customs: (1) improperly rejected Royal Brush's filing seeking to rebut purportedly new factual information contained in Customs' verification report; (2) deprived Royal Brush of due process and redacted or withheld material evidence in an arbitrary and capricious manner; (3) improperly applied adverse inferences; and (4) drew irrational conclusions from the evidence concerning production capacity. Confidential Pl. [Royal Brush's] Mem.in Supp. of its Mot. for J. on the Agency R. ("Pl.'s 56.2 Mem.") at 9–26, ECF No. 33–1; *see also* Confidential Reply Br. of Pl. [Royal Brush] ("Pl.'s 56.2 Reply"), ECF No. 43. The court held a closed hearing on Royal Brush's Rule 56.2 motion on October 6, 2020. *See* Confidential Oral Arg. (Oct. 6, 2020) ("56.2 Hr'g") (on file with the court); Docket Entry, ECF No. 49.

In *Royal Brush I*, the court remanded CBP's determination with respect to issues (1) and (2) and deferred addressing issues (3) and (4) pending CBP's Remand Results. 483 F. Supp. 3d at 1297. The court held that CBP failed to provide a reasoned explanation for its rejection of Royal Brush's rebuttal information because CBP had not identified "the standard CBP used to define 'new factual information'" or explained how it applied any such standard to the Verification Report. *Id.* at 1303. The court further held that a remand was required for CBP to comply with its regulation requiring public summaries of confidential filings. *Id.* at 1305; *see also* 19 C.F.R. § 165.4(a)(2), (e).<sup>10</sup> The court explained that although "EAPA does not require or establish a procedure for the issuance of an administrative protective order ('APO') akin to the procedure used in antidumping and countervailing duty proceedings or otherwise address Customs' management of confidential information," *Royal Brush I*, 483 F. Supp. 3d at 1306, CBP must comply with the requirements in the regulation and CBP's failure to do so deprived Royal Brush the process to which it was entitled, *id.* at 1306–07. The court clarified, however, that it did "not hold that Royal Brush is entitled to receive business confidential information," noting that "Congress has not mandated that Royal Brush be afforded such access and Royal Brush has not shown that due process requires it." *Id.* 1308.

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<sup>10</sup> CBP's regulation permits interested parties to request confidential treatment for information that "consists of trade secrets and commercial or financial information obtained from any person, which is privileged or confidential in accordance with 5 U.S.C. [§] 552(b)(4)." 19 C.F.R. § 165.4(a). A party seeking confidential treatment "must also file a public version of the submission" that "contain[s] a summary of the bracketed information in sufficient detail to permit a reasonable understanding of the substance of the information." *Id.* § 165.4(a)(2); *see also id.* § 165.4(e) (extending the public summary requirement to confidential information placed on the record by CBP).

As discussed in more detail below, CBP has now issued its remand results in which it documents the addition of revised public summaries to the administrative record and explains its continued rejection of Royal Brush's rebuttal submission based on the absence of new factual information in the verification report. *See generally* Remand Results.

Oral argument on Royal Brush's opposition to the Remand Results took place on October 6, 2021. *See* Confidential Oral Arg. (Oct. 6, 2021) ("Remand Hr'g") (on file with the court); Docket Entry, ECF No. 71.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 517(g) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1517(g) (2018), and 28 U.S.C. § 1581(c) (2018).

EAPA directs the court to determine whether a determination issued pursuant to 19 U.S.C. § 1517(c) or an administrative review issued pursuant to 19 U.S.C. § 1517(f) was "conducted in accordance with those subsections." 19 U.S.C. § 1517(g)(1). In so doing, the court "shall examine . . . whether [CBP] fully complied with all procedures under subsections (c) and (f)" and "whether any determination, finding, or conclusion is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 1517(g)(2).

## DISCUSSION

The court first addresses the issues discussed on remand before turning to the issues the court deferred in *Royal Brush I*.

### I. Public Summaries

On remand, CBP required the submission of public summaries to accompany confidential documents when necessary for compliance with 19 C.F.R. § 165.4(a)(2) and (e). Remand Results at 15–16. Royal Brush, Dixon, the Philippine Shipper and CBP all placed revised public summaries on the record. *Id.* at 16–17, 20–22. CBP allowed parties to the investigation "to submit rebuttal information pertinent to the revised public versions of the administrative record documents." *Id.* at 17. CBP also allowed the submission of written arguments responsive to the public summaries. *Id.* at 19. Royal Brush submitted such arguments; Dixon did not. *Id.*

In its written comments, Royal Brush presented several arguments concerning the adequacy of the public summaries accompanying the Attaché Report and Verification Report, including the summaries of

the photographs attached to the reports. *Id.* at 22–26. CBP responded that it was precluded from revealing the contested information because it was confidential or, in the case of the photographs, would reveal confidential information. *Id.* at 22–26, 30–33. CBP further noted that it did not rely on the Attaché Report for its final evasion determination. *Id.* at 24. CBP also rejected Royal Brush’s challenges to the adequacy of the public summaries of the Allegation and its exhibits. *Id.* at 27, 33–34.

Before the court, Royal Brush contends that the revised public summaries “continue to deprive Royal Brush of due process.” Pl.’s Opp’n Cmts. at 4. Royal Brush argues that due process requires that it “be apprised of all the evidence against it and have a meaningful opportunity to respond to that evidence.” *Id.* at 8. According to Royal Brush, CBP’s revised public summaries—which contain descriptors such as “country name(s),” “date,” and “number” in lieu of precise data—fail to convey the substance of the information as required by the regulation and deny Royal Brush due process. *Id.* at 9; *see also id.* at 5 n.6. Royal Brush’s arguments are unpersuasive.

The court previously recognized that “an importer participating in an administrative proceeding has a procedural due process right to ‘notice and a meaningful opportunity to be heard.’” *Royal Brush I*, 483 F. Supp. 3d at 1305 (quoting *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 761–62 (Fed. Cir. 2012)). “Such opportunity must occur ‘at a meaningful time and in a meaningful manner.’” *Id.* at 1306 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). What that means as a practical matter depends on the circumstances of each case: “[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Mathews*, 424 U.S. at 334 (citation omitted) (alteration in original). In order to determine “whether the administrative procedures provided [in a given case] are constitutionally sufficient,” the court typically undertakes a fact-based inquiry focused on the following three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.* at 335; *see also Engdahl v. Dep’t of Navy*, 900 F.2d 1572, 1575–77 (Fed. Cir. 1990) (applying the *Mathews* balancing test to determine

whether the process afforded the appellant before he was suspended without pay complied with due process).

Royal Brush does not frame its argument in terms of the *Mathews* balancing test and makes no argument as to the first and third factors. Instead, Royal Brush raises arguments only on the second factor, asserting that CBP violated its due process rights by relying on “secret” information to reach its decision. Pl.’s Opp’n Cm’ts. at 4 (citing *Greene v. McElroy*, 360 U.S. 474, 492–97 (1959), *Robbins v. U.S. R.R. Retirement Bd.*, 594 F.2d 448 (5th Cir. 1979), and *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, 1069 (9th Cir. 1995) (“AAADC”). However, none of the cited cases compel the conclusion that CBP was required to grant Royal Brush access to confidential information during the EAPA investigation.

In *Greene v. McElroy*, 360 U.S. 474 (1959), the petitioner asserted a due process violation when the U.S. Department of Defense (“DOD”) revoked his security clearance based on statements made by confidential informants to investigators. 360 U.S. at 492, 475–90. In relevant part, the Court held that without “explicit authorization from either the President or Congress the respondents were not empowered to deprive [the] petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination.” *Id.* at 508. While the Court remanded the case for further consideration without deciding whether the procedures afforded complied with the Fifth Amendment, the Court acknowledged that the right that was ultimately at stake, “the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference[,] comes within the ‘liberty’ and ‘property’ concepts of the Fifth Amendment.” *Id.* at 492. *Greene* is inapposite for at least two reasons. First, as noted above, Royal Brush failed to make any argument as to the nature of the private right that it seeks to protect and, in particular, has not established that it seeks the confidential information in order to protect a right comparable to the liberty and property interests at stake in *Greene*. See *Royal Brush I*, 483 F. Supp. 3d at 1305 (noting that Royal Brush lacks a fundamental right to engage in foreign commerce); *Mathews*, 424 U.S. at 334 (explaining that the requirements of due process are situation-specific). Second, CBP’s authority to provide public summaries of business proprietary information, rather than the information itself, is more established than was the DOD’s authority to rely on confidential information to revoke petitioner’s security clearance in *Greene*, and Royal Brush has not shown that greater access to confidential information is otherwise constitutionally required.

Royal Brush fares no better with its reliance on *Robbins v. U.S. R.R. Retirement Bd.*, 594 F.2d 448 (5th Cir. 1979). There, the U.S. Railroad Retirement Board (“the Board”) denied a claim for unemployment benefits; however, the U.S. Court of Appeals for the Fifth Circuit held that the Board’s consideration of evidence withheld from the claimant failed to meet the statutory requirements for a “fair hearing” embodied in the relevant statute. *Id.* at 450. As this court did in *Royal Brush I*, 483 F. Supp. 3d at 1306–07, the appellate court considered whether the plaintiff received the process he was due pursuant to the statute, *id.* at 451–52. Unlike the plaintiff in *Robbins*, Royal Brush has now received public summaries of the information collected by CBP and has had an opportunity to respond to that information before the agency. Remand Results at 15. *Robbins* does not suggest that more is required. *See* 594 F.2d at 451–53.

In *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045 (9th Cir. 1995), the court held that the Immigration and Naturalization Service (“INS”) violated due process when it relied on undisclosed classified information in legalization proceedings. 70 F.3d at 1052, 1068–70. However, like *Robbins*, *AAADC* is distinguishable from this case because the information relied on by INS was withheld *in toto* from the petitioners. *See id.* at 1070.

Here, CBP has shared information with Royal Brush consistent with its regulation and in a manner that balances the need to disclose evidence against an importer with the need to protect certain information from unauthorized disclosure. Royal Brush does not argue that CBP’s regulation, on its face, unreasonably limits Royal Brush’s ability to defend itself. Indeed, CBP’s regulation, which requires “a summary of the bracketed information in sufficient detail to permit a reasonable understanding of the substance of the information,” 19 C.F.R. § 165.4(a)(2), provides importers such as Royal Brush an “adequate opportunity . . . to respond to the evidence used against them,” *Royal Brush I*, 483 F. Supp. 3d at 1306.<sup>11</sup>

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<sup>11</sup> Royal Brush appears to suggest that the court should impose an extra-statutory requirement akin to the APO procedure used in Commerce proceedings. Pl.’s Opp’n Cmts. at 8 (citing *Huzhou Muyun Wood Co. v. United States*, 41 CIT \_\_, \_\_, 279 F. Supp. 3d 1215, 1224–25 (2017), and *Al Haramain Islamic Foundation, Inc. v. U.S. Dept. of Treasury*, 686 F.3d 965, 982–84 (9th Cir. 2012)). Those cases were decided based on their respective facts and do not compel a particular outcome here. *See Huzhou Muyun*, 279 F. Supp. 3d at 1224–25 (holding that Commerce’s placement of information on the administrative record shortly before the record closed and corresponding inability to permit an extension of time to respond to the new information was unreasonable); *Al Haramain*, 686 F.3d at 979–84, 988–90 (finding that government office erred in withholding classified information as part of its determination to classify the plaintiff as a terrorist organization when the office could have mitigated the use of classified information by providing an unclassified summary of the evidence, but that such error was harmless in that case).

Royal Brush does, however, contest the adequacy of the public summaries with respect to discrete categories of information in this case. Pl.'s Opp'n Cmts. at 5–9. It contends that CBP's refusal "to disclose the numerical data it used to calculate the Philippine [Shipper's] overall production capacity or the results of its calculation" rendered Royal Brush unable to respond to this "critical quantitative evidence." *Id.* at 5.<sup>12</sup> Upon examination of the confidential record made available on judicial review, Royal Brush argues that "CBP relied on an unrepresentative sample of data to construct the equation it used to calculate overall production capacity," and CBP's public summaries did not permit Royal Brush the opportunity to present this argument. *Id.* at 5–6. Royal Brush thus suggests that this is a due process violation because it impacted Royal Brush's response to the evidence against it. *Id.*<sup>13</sup>

Royal Brush does not contest the confidential nature of the information, which CBP is precluded from disclosing by statute and regulation. *See* 19 C.F.R. § 165.4(a); Remand Results at 25 & n.113 (citing 18 U.S.C. § 1905).<sup>14</sup> Thus, conveying the "substance of the information" in public summaries within the meaning of CBP's regulation must be understood as nevertheless allowing for the protection of the confidential information. Royal Brush fails to identify how CBP could convey the substance (but not the specifics) of the information other than describing it as "number" or "no."<sup>15</sup> Instead, Royal Brush simply complains that it needed the actual figures. However, as previously noted, Royal Brush has not demonstrated that due process requires such access. It requires notice and a meaningful opportunity to be heard, *Royal Brush I*, 483 F. Supp. 3d at 1305 (citing *Avisma*, 688 F.3d at 761–62), which were provided here in the form of public summaries and comment procedures.

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<sup>12</sup> CBP summarized the values as "number" or "no." Public Verification Report at 9–10.

<sup>13</sup> Royal Brush appears to base this argument on evidence demonstrating that CBP calculated the Philippine Shipper's overall production capacity to be less than its total U.S. shipments in 2018, yet in excess of Royal Brush's orders in that same year. Pl.'s Opp'n Cmts. at 5 & nn.9–10 (citing Verification Report at 9). Royal Brush cross-references its argument that CBP's determination on remand was arbitrary and capricious. *Id.* at 6 & n.11 (citation omitted). Royal Brush asserts that CBP used information specific to Royal Brush's orders to "extrapolate the Philippine [Shipper's] overall production capacity." *Id.* at 13.

<sup>14</sup> Pursuant to 18 U.S.C. § 1905, a CBP official's disclosure of certain business confidential information could expose that official to a fine or imprisonment of not more than one year.

<sup>15</sup> CBP rejected Royal Brush's contention that CBP should have provided a numerical range of the data used to calculate the Philippine Shipper's overall production capacity. Remand Results at 32–33. Royal Brush does not contest that determination specifically but objects generally that designations such as "number" do not comport with the regulatory requirement. Pl.'s Opp'n Cmts. at 5 n.6

Further, the Public Verification Report disclosed that CBP relied on invoices specific to Royal Brush to calculate the Philippine Shipper's overall production capacity; the source of CBP's information was not redacted. *See* Public Verification Report at 8–9. Thus, Royal Brush was not precluded from making an argument regarding the unrepresentativeness of its purchases from the Philippine Shipper in its written submission. Accordingly, Royal Brush has not shown that it was prejudiced by CBP's preparation of the public version of the Verification Report. *Cf., e.g., Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (“[T]he burden of showing that an error is harmful normally falls upon the party attacking the agency's determination.”).

Royal Brush also contends that CBP failed “to disclose certain *non*-confidential information it relied on to conclude that the Philippine [Shipper] was ‘unequivocally’ repackaging Chinese-origin pencil products” for export to the United States. Pl.'s Opp'n Cm'ts. at 6 (citing Admin. Review at 13–14). Such allegedly non-confidential information from photographs taken during the Attaché's site visit included (1) the destination country “for boxes containing the ‘Made in China’ pencils;” (2) “the type of ‘completed pencil product’ contained in the boxes;” and (3) the condition of those boxes. *Id.* (citing Remand Results at 23–24, 30–31, 35–36). In response, CBP explained that providing the photographs would reveal the Philippine Shipper's customers, which “information is generally considered as confidential.” Remand Results at 31. CBP also explained that the Philippine Shipper had not given “any indication . . . that [such information] is not [confidential].” *Id.*

While Royal Brush argues that this information is “crucial” in order to know whether (1) “the repackaged pencils were of the same type as exported to Royal Brush;” (2) the Chinese characters on the boxes “identify a company name, a type of raw material used in pencil-production, or a color;” (3) “the contents of a given box match the label affixed thereto;” and (4) the destination for the boxes, Royal Brush does not explain why that information is crucial to undermining CBP's final determination. Pl.'s Opp'n Cm'ts. at 7–8. Instead, Royal Brush speaks only in generalities about its desire to have access to this information. *See id.*

As CBP explained, “the type of pencils the CBP Attaché witnessed being repackaged at the Philippine[] Shipper's facility was not relevant to the CBP determination of evasion and CBP has never stated that they were the same type of pencil exported to Royal Brush.” Remand Results at 38. Rather, the Attaché's observations were “consistent with the Philippine[] Shipper engaging in a scheme to transship Chinese-origin pencils to the United States” and “[e]vidence that

the Philippine[] Shipper was engaging in an overall transshipment scheme was plainly relevant to whether the Philippine[] Shipper transshipped the specific pencils exported to Royal Brush.” *Id.* Thus, Royal Brush has not shown that due process required CBP to disclose the requested information in order to rebut the allegation of evasion that is specific to Royal Brush.

Accordingly, the court finds that CBP has complied with 19 C.F.R. § 165.4 by providing necessary public summaries of the confidential information and that Royal Brush has not established that CBP has failed to provide Royal Brush the process that it is due.

## II. Verification Report

In the Remand Results, CBP described the scope and purpose of the verification process, explaining that “[a] verification report documents the verification process and therefore is not itself ‘new factual information’ and as a matter of CBP practice should not contain ‘new factual information.’” Remand Results at 6. CBP further explained that if “information outside the scope of the verification and unrelated to the verification of information on the record [is] discovered during a verification . . . , such information could be ‘new factual information’” and, under that scenario, “CBP would not discuss the information in the verification report but instead would place it on the record pursuant to 19 C.F.R. 165.25(b)” and would permit rebuttal information. *Id.*; *see also id.* at 11.

CBP re-examined the verification report at issue here and again concluded that it did not contain new factual information. *Id.* at 7. CBP therefore concluded that it had properly rejected Royal Brush’s rebuttal submission. *Id.* CBP explained that the findings in the report did not constitute new factual information but instead identified “discrepancies in the information that was placed on the record,” or, in other words, represented “[t]he results of the verification of that information.” *Id.* at 8. Similarly, CBP explained that “calculations based on the data submitted in response to [requests for information (“RFIs”)]” were not new factual information but instead represented “CBP using and verifying the factual data on the record.” *Id.* at 9. Further, with respect to the Philippine Shipper’s overall production capacity, CBP noted that “all entries from the Philippine Shipper, from [fiscal year (“FY”)]2014 to FY2018, were placed on the record and therefore [were] within the scope of verification.” *Id.* at 13. CBP also rejected the argument that interviews with the Philippine Shipper’s employees constituted new factual information, explaining that those interviews were necessary to verify the Philippine Shipper’s responses regarding operations and recordkeeping. *Id.* at 9–10.

Royal Brush contends that CBP's consideration of the Philippine Shipper's overall production capacity constituted a new issue; Royal Brush lacked sufficient notice of the issue; and Royal Brush did not have an adequate opportunity to respond to this information. Pl.'s Opp'n Cmts. at 9–11, 14.

In general, “notice [must be] reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Royal Brush does not provide authority for the proposition that adequate notice of the evasion investigation required CBP to provide advance notice regarding each aspect of the inquiry that CBP might find relevant to its investigation and determination. In particular, with respect to the Philippine Shipper's overall production capacity, CBP noted that all of the Philippine Shipper's entries for the period of investigation were on the record, not just Royal Brush's entries. Remand Results at 9 n.35 (citing CBP NTAG Data, CR 7).<sup>16</sup> Thus, Royal Brush should not be surprised that CBP's “investigation could potentially consider the Philippine[] Shipper's overall production capacity” given the relevance of a manufacturer's production capacity to a transshipment investigation. *Id.* at 14.

In support of its argument that CBP was required to give advance notice of the relevance of overall production, Royal Brush relies on *Huzhou Muyun*, 41 CIT \_\_, \_\_, 279 F. Supp. 3d 1215, 1224–25 (2017). See Pl.'s Opp'n Cmts. at 10. In *Huzhou Muyun*, Commerce placed detailed information on the record close to the deadline for submission of factual information, with only a brief description of the nature of the information, leaving the plaintiff “not clearly apprised of what, specifically, it was meant to rebut.” 279 F. Supp. 3d at 1224–25. Here, by contrast, Royal Brush was provided an opportunity to respond to CBP's Verification Report. See Remand Results at 14–18. Furthermore, the Verification Agenda apprised the Philippine Shipper, in advance, that the verification could cover any information provided in its responses to CBP's requests for information. See Verification Agenda at 1 (citing 19 C.F.R. § 165.23). While CBP emphasized the verification of information associated with five Royal Brush invoices, *id.* at 2, CBP's verification was not limited thereto. See *id.* at 1–3. Royal Brush's assertion that overall production capacity constituted a new issue requiring some additional form of notice is, thus, unpersuasive.

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<sup>16</sup> CBP incorrectly cites this as CR 6. See Remand Results at 9 n.35.

Royal Brush also contends that CBP’s assertion that only information beyond the scope of verification may constitute new factual information merely “reprises the discredited argument that information within the scope of the verification cannot be ‘new.’” Pl.’s Opp’n Cmts. at 11. Royal Brush further asserts that information in the Verification Report regarding overall production capacity constitutes new factual information because, before verification, “CBP had not sought, nor had the Philippine [Shipper] provided, data about its overall production capacity.” *Id.*; see also *id.* at 11–12 (stating that CBP “generate[d] such data—for the first time—by extrapolating from the information produced about Royal Brush’s seven orders”). CBP explained that the calculations it used were not “new factual information” because they were “simply CBP using and verifying the factual data on the record” and were “a natural part of CBP’s investigation as to whether evasion occurred.”<sup>17</sup> Remand Results at 8.

As CBP explained, “[v]erification is the process by which CBP checks, reviews, and corroborates factual information” previously placed on the record. *Id.* at 5. The Verification Report documents CBP’s inability to verify that the pencils exported to Royal Brush in the United States were manufactured by the Philippine Shipper, see Verification Report at 5–8 (describing various issues with the documents provided), which led CBP reasonably to attempt to verify information provided by the Philippine Shipper regarding its overall production capacity, see *id.* at 9 (citing Resp. to CBP Importer Request for Information (Oct. 3, 2018), Ex. 31, CR 14.). To that end, CBP attempted to use the available payroll records to assess whether sufficient personnel worked the number of shifts required to meet the purported production capacity. See *id.* at 10. CBP explained that it found “discrepancies” in the record and documented those discrepancies in its report. Remand Results at 8. According to CBP, the calculations in the Verification Report represented “CBP using and verifying the factual data on the record and therefore are a natural part of CBP’s investigation.” *Id.* at 9.

<sup>17</sup> During Oral Argument, counsel for Royal Brush suggested that using the data in this way constituted “expert analysis,” and, thus, new factual information. Remand Hr’g, 0:41:52–0:42:30 (time stamp from the closed hearing). In that vein, in *Apex Frozen Foods Private Ltd. v. United States*, 40 CIT \_\_\_, 144 F. Supp. 3d 1308 (2016), *aff’d*, 862 F.3d 1337 (Fed. Cir. 2017), the court recognized that certain expert analysis may assume the weight of evidence and, thereby, amount to “[d]ata or statements of fact in support of allegations, i.e., factual information.” *Id.* (citing *PSC VSMPO–Avisma Corp.*, 688 F.3d at 760–61). Here, however, CBP used the data to identify discrepancies and perform basic calculations for the purposes of verification—not expert analysis that “assumes the weight of evidence” by making determinations about the reliability or importance of the data. *Cf. Coal. for Pres. of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States*, 23 CIT 88, 9944 F. Supp. 2d 229, 241 (1999) (finding that calculations and analysis gleaned from the record are not new factual information).

CBP also noted that allowing post-verification submissions to address discrepancies identified at verification, as Royal Brush calls for, would result in “an endless cycle of attempts to verify those post-verification submissions.” *Id.* at 5. The court finds that CBP’s interpretation of its regulations with regard to “new factual information,” in a manner consistent with completing its investigation and meeting its statutory deadlines, is reasonable. In view of the foregoing, the court finds that CBP has provided “a reasoned analysis [and] explanation” for its decision to reject Royal Brush’s rebuttal submission. *See Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369 (Fed. Cir. 1998).

Royal Brush also contends that CBP’s evasion determination was arbitrary and capricious because the record fully demonstrates that the Philippine Shipper had the capacity to fulfill Royal Brush’s orders. Pl.’s Opp’n Cmts. at 12–13. Royal Brush further argues that “it is impossible for a reasonable mind to conclude that the agency chose the best available information and that its conclusion about the overall production capacity is supported by substantial evidence” when CBP relied on extrapolations drawn from information about Royal Brush’s orders and failed to request evidence about overall production capacity from the Philippine Shipper. *Id.* at 14.

CBP did not base its finding of evasion solely on its conclusion that the Philippine Shipper lacked the capacity to produce all the pencils it shipped to the United States. In fact, as CBP’s Remand Results make clear, CBP only turned to the Philippine Shipper’s overall capacity after the agency was unable to verify the Royal Brush-specific production information that the Philippine Shipper submitted to CBP. Remand Results at 8–9. Thus, CBP made two independent but mutually supportive verification findings, both of which supported its evasion determination. Additionally, Royal Brush’s assertion to the court that the Philippine Shipper can “increase or decrease production on demand” such that CBP unreasonably extrapolated from Royal Brush-specific data lacks citation to any record evidence. Pl.’s Opp’n Cmts. at 14. Thus, the court finds that this argument lacks merit.

For these reasons, the court sustains CBP’s decision to reject Royal Brush’s rebuttal submission.

### **III. Deferred Issues**

Royal Brush’s remaining challenges relate to CBP’s use of adverse inferences and its conclusions with respect to the Philippine Shipper’s overall production capacity. The court addresses the issue of production capacity first because CBP claimed that finding was based

on substantial evidence and any adverse inferences were only made in the alternative. Royal Brush acknowledges that if the court affirms CBP's findings with respect to production capacity, the court need not reach the question of adverse inferences.

Royal Brush contends that CBP's affirmative finding of evasion based on the Philippine Shippers' purported insufficient production capacity is irrational. Pl.'s 56.2 Mem. at 24–25; Pl.'s 56.2 Reply at 11–13.<sup>18</sup> Royal Brush argues that record evidence demonstrates that the Philippine Shipper's production capacity—as quantified by CBP's verification team—exceeded Royal Brush's orders, Pl.'s 56.2 Mem. at 25; Pl.'s 56.2 Reply at 12.<sup>19</sup> According to Royal Brush, CBP's calculations regarding overall production capacity create only the “mere possibility” that Royal Brush's pencils “were not manufactured in the Philippines,” which Royal brush claims falls short of the substantial evidence required for CBP's determination pursuant to 19 U.S.C. § 1517(c)(1)(A). Pl.'s 56.2 Reply at 12.<sup>20</sup>

With respect to the court's standard of review, “[a]n abuse of discretion occurs whe[n] the decision is based on . . . factual findings that are not supported by substantial evidence . . .” *Consol. Bearings Co. v. United States*, 412 F.3d 1266, 1269 (Fed. Cir. 2005) (citation omitted); see also 19 U.S.C. § 1517(g)(2). Royal Brush does not, however, specifically contest CBP's factual findings; rather, Royal Brush challenges the legal conclusion that CBP reached on the basis of those findings. “The scope of review under the “arbitrary and capricious” standard is narrow,” however, “and a court is not to substitute its judgment for that of the agency.” *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). To survive judicial review, Customs “must examine the relevant data and articulate a satisfactory explanation for its action[,] including a ‘rational connection between the facts found and the choice made.’”

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<sup>18</sup> Royal Brush also asserts that “CBP's conclusion that the Philippine [Shipper] did not have the capacity to produce enough pencils to fulfill Royal Brush's orders . . . is irrational.” Pl.'s 56.2 Mem. at 26. Royal Brush mischaracterizes CBP's determination, which found a lack of capacity to produce all the Philippine Shipper's orders for 2018. See Admin. Review at 15–17.

<sup>19</sup> Royal Brush alludes to other CBP conclusions that it contends are also arbitrary and capricious. Pl.'s 56.2 Mem. at 26. Royal Brush does not, however, develop those arguments and, thus, has waived the opportunity to do so. See, e.g., *United States v. Great Am. Ins. Co. of NY*, 738 F.3d 1320 (Fed. Cir. 2013) (“It is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived.”).

<sup>20</sup> Royal Brush claims that a “probability” of evasion is required. See Pl.'s 56.2 Reply at 12. While substantial evidence “requires more than a mere scintilla” of evidence, it may represent “less than the weight of the evidence.” *Nucor Corp. v. United States*, 34 CIT 70, 72, 675 F. Supp. 2d 1340, 1345 (2010) (quoting *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004)).

*Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Customs has done so here.

As discussed above, CBP was unable to verify the Philippine Shipper's production of pencils tied to the seven Royal Brush invoices reviewed at verification. Admin. Review at 15. CBP then looked to confirm whether the Philippine Shipper's overall production capacity was adequate to meet the company's total volume of exports to the United States. *See id.* at 17. The Philippine Shipper effectively failed verification on that issue as well, because although the company "*did* appear to have the capacity to produce pencils, it did not appear to be able to produce pencils in the quantities alleged for the company's 2018 operations." *Id.* at 15.

Royal Brush suggests, in effect, that CBP was required to assume that its pencils were among the orders that the Philippine Shipper had the capacity to produce. Pl.'s Opp'n Cmts. at 13–14. Royal Brush offers no support for requiring such an assumption. While Customs must carry its burden of issuing a determination that is supported by substantial evidence, 19 U.S.C. § 1517(c)(1)(A), interested parties bear the burden of supplying Customs with accurate information that withstands verification, *id.* § 1517(c)(2). That did not happen here. CBP's finding of evasion, based on its examination of the evidence gathered during the investigation and the well-documented failures at verification, including the Philippine Shipper's failure to verify the production of the pencils shipped to Royal Brush, *see* Admin. Review at 12–17, is supported by a reasoned explanation that contains "a 'rational connection between the facts found and the choice made,'" *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Thus, the court finds no reason to disturb it.

With respect to adverse inferences, while Customs must generally base its evasion determination on substantial evidence pursuant to 19 U.S.C. § 1517(c)(1)(A), Customs may "use an inference that is adverse to the interests of" the person alleged to have engaged in evasion or "a person that is a foreign producer or exporter" of the covered merchandise when "selecting from among the facts otherwise available" if that person "failed to cooperate by not acting to the best of the party or person's ability to comply with a request for information." 19 U.S.C. § 1517(c)(3)(A). An adverse inference "may include reliance on information derived from . . . (i) the allegation of evasion . . . ; (ii) a determination by [CBP] in another investigation, proceeding, or other action regarding evasion of the unfair trade laws; or (iii) any other available information." *Id.* § 1517(c)(3)(C).

Royal Brush directs its challenges to Customs' use of adverse inferences in the Administrative Review of Custom's Final Determina-

tion. Pl.'s 56.2 Mem. at 21–23; Pl.'s 56.2 Reply at 10–11. Therein, CBP found that substantial evidence supported the conclusion that Royal Brush imported pencils that were not made in the Philippines but were instead made in China. Admin. Review at 11–17. CBP also determined that “adverse inferences were warranted, inasmuch as the importer, as well as the alleged foreign producer and exporter, *failed* to provide sufficient evidence to demonstrate that the pencils imported by Royal Brush were manufactured in the Philippines.” *Id.* at 18. While CBP purported to “fill[] those evidentiary gaps with some adverse inferences,” CBP also stated that, “even without adverse inferences, the record as a whole adequately and reasonably supports a [finding of evasion].” *Id.* Thus, CBP relied on adverse inferences as an alternative basis for finding evasion that was otherwise based on substantial evidence. For this reason, at oral argument on Royal Brush’s Rule 56.2 motion, the court asked the Parties whether it needed to reach the challenge to CBP’s use of adverse inferences “if the court resolves Plaintiff’s challenges to the substantiality of the evidence regarding production capacity against Plaintiff.” Letter Order (Sept. 30, 2020) at 4, ECF No. 47. The Parties agreed that the court would not need to reach this issue. 56.2 Hr’g, 2:38:25–2:40:05, 2:50:10–2:51:30, 2:51:35–2:52:25 (time stamp from the closed hearing) (on file with the court); *see also* Remand Hr’g, 0:27:20–0:28:00 (confirming same).

Accordingly, because the court finds that Plaintiff’s challenges to CBP’s findings regarding overall production capacity lack merit, the court finds that Plaintiff’s challenge to CBP’s alternative reliance on adverse inferences is moot.

### CONCLUSION

Based on the foregoing, the court sustains CBP’s final determination of evasion as amended by the Remand Results. Judgment will enter accordingly.

Dated: October 29, 2021  
New York, New York

*/s/ Mark A. Barnett*

MARK A. BARNETT, CHIEF JUDGE



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