

U.S. Customs and Border Protection

Slip Op. 14–154

OTTER PRODUCTS, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Judge
Court No. 14–00328

[The court denies Plaintiff’s Motion for a Preliminary Injunction; dissolves the previously issued temporary restraining order; dismisses the case insofar as Plaintiff asserts jurisdiction under 28 U.S.C. § 1581(h) and (i); denies Defendant’s Motion to Partially Dismiss the Amended Complaint as moot; and denies Speculative Product Design, LLC’s Motion to Appear as Amicus Curiae.]

Dated: December 23, 2014

Louis S. Mastriani, Munford Page Hall, II, Paul M. Bartkowski, Beau A. Jackson, Dana L. Watts, Adduci, Mastriani, & Schaumberg LLP of Washington, D.C., and Garret A. Leach, P.C., Kirkland & Ellis LLP of Chicago, Illinois, for Plaintiff Otter Products, LLC.

Joyce R. Branda, Acting Assistant Attorney General, Jeanne E. Davidson, Director, Amy M. Rubin, Assistant Director, Justin R. Miller, Senior Trial Counsel, Guy Eddon, Trial Attorney, Civil Division, Department of Justice, Commercial Litigation Branch, International Trade Field Office, of New York, New York, for Defendant United States. Of counsel on the briefs was Michael W. Heydrich, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

Christian E. Samay and Robert E. Colletti, Frommer Lawrence & Haug LLP of New York, New York, for proposed Amicus Curiae or Intervenors Speculative Product Design, LLC.

OPINION AND ORDER

Barnett, Judge:

Plaintiff, Otter Products, LLC (“Otter”), moves pursuant to USCIT Rules 7 and 65 for a preliminary injunction enjoining U.S. Customs and Border Protection (“Customs”) from enforcing the General Exclusion Order (“GEO”) issued by the U.S. International Trade Commission (“ITC”) in *Certain Cases for Portable Electronic Devices*, Inv. No. 337-TA-861/867, against Otter’s Symmetry Series (“Symmetry”) products. (*See generally* Pl.’s Mot. for TRO & Prelim. Inj. (“Pl.’s Mot.”) (ECF No. 6).) For the reasons provided below, the court denies Otter’s motion and dissolves the previously issued temporary restraining order (“TRO”).

BACKGROUND

On September 6, 2012, and December 26, 2012, Speculative Product Design, LLC (“Speck”), owner of U.S. Patent No. 8,204,561 (“the ‘561 Patent”), filed complaints with the ITC, pursuant to section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (2012),¹ alleging the importation of products that violated its patent. *Certain Cases for Portable Electronic Devices*, 78 Fed. Reg. 6834–02 (ITC Jan. 31, 2013) (Institution of Investigation); *Certain Cases for Portable Electronic Devices*, 77 Fed. Reg. 68,828 (ITC Nov. 16, 2012) (Institution of Investigation). The ITC consolidated the complaints into one investigation on January 31, 2013. (Pl.’s Mot. Ex. 1 at 2.) Speck did not name Otter as a respondent in either complaint. *See Certain Cases for Portable Electronic Devices*, 78 Fed. Reg. at 6835; *Certain Cases for Portable Electronic Devices*, 77 Fed. Reg. at 68,829. Over the course of the investigation, numerous respondents were found in default, while all active respondents were terminated from the investigation. (Pl.’s Mot. Ex. 1 at 2.) On February 21, 2014, an Administrative Law Judge (“ALJ”) issued a final initial determination and recommended the issuance of a GEO and imposition of a bond of 100 percent of entered value during the period of Presidential review. (Pl.’s Mot. Ex. 1 at 2.) The ALJ’s determination did not address whether the ‘561 Patent was invalid. On April 11, 2014, the ITC determined not to review the ALJ’s finding. *Certain Cases for Portable Electronic Devices*, 79 Fed. Reg. 20,228 (ITC Apr. 11, 2014) (Determination Not to Review Initial Determination).

On June 20, 2014, the ITC issued a GEO, which covers claims 4, 5, 9, and 11 of the ‘561 Patent. (Pl.’s Mot. Ex. 1 at 4–7 (GEO).) It states, in relevant part:

Cases for portable electronic devices covered by one or more of claims 4, 5, 9, and 11 of the ‘561 patent are excluded from entry into the United States for consumption, entry for consumption from a foreign-trade zone, or withdrawal from a warehouse for consumption, for the remaining term of the patent, except under license of the patent owner or as provided by law.

(Pl.’s Mot. Ex. 1 at 5.) The GEO became final on August 20, 2014. *See* 19 U.S.C. § 1337(j).

In January 2014, six months before the ITC issued the GEO, Otter announced its Symmetry Series cases, and by March 3, 2014, the products were available for purchase throughout the United States.

¹ Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

(See Pl.'s Mot. 4, Ex. 4.) On August 15, 2014, Customs Port of Long Beach alerted Otter that Customs was examining whether the GEO encompassed the Symmetry cases. (Pl.'s Mot. 5.) Otter soon thereafter took the following steps:

- In late August 2014, Otter met with Customs representatives to explain why it believed that the Symmetry cases did not infringe the '561 Patent and, on September 2, 2014, filed a Request for Internal Advice with Customs. (Pl.'s Mot. Ex. 6.)
- On September 3, 2014, Otter filed a Petition for *Inter Partes* Review of the '561 Patent with the U.S. Patent and Trademark Office, which is still pending. (Pl.'s Mot. Ex. 7.)
- On September 4, 2014, Otter filed with the ITC a Request for an Advisory Opinion that Otter's products fall outside the scope of the GEO.² (Pl.'s Mot. Ex. 8.)
- On September 16, 2014, Otter filed a motion with the ITC to stay enforcement of the GEO with respect to Otter's Symmetry cases. (Pl.'s Mot. Ex. 9.) The court is not aware of any action having been taken on that motion.
- On September 17, 2014, Otter appealed the final determination of the ITC, *Certain Cases for Portable Electronic Devices*, 79 Fed. Reg. 20,228, which led to the issuance of the GEO, to the Federal Circuit. See generally *Otter Prods., LLC v. ITC*, No. 14-1840 (Fed. Cir. filed Sept. 17, 2014).

On September 19, 2014, Customs issued Notices of Redelivery, directing Otter to redeliver imported Symmetry cases covered by sixteen separate entries. (Pl.'s Mot. Ex. 11.) On September 24, 2014, Otter moved the Federal Circuit to stay the enforcement of the GEO as to imports of Otter's products. (Pl.'s Mot. Ex. 12.) That same day, Otter filed protests of Customs' Notices of Redelivery. (Pl.'s Mot. Ex. 14.) On September 26, 2014, before the ITC had filed a responsive brief at the Federal Circuit to Otter's motion to stay, Customs issued a ruling, in response to Otter's September 2, 2014, Request for Inter-

² On October 22, 2014, the ITC determined to institute an advisory proceeding to determine whether Otter's Symmetry Series products infringe one or more of claims 4, 5, 9, and 11 of the '561 Patent. *Certain Cases for Portable Electronic Devices*, 79 Fed. Reg. 64,214 (ITC Oct. 28, 2014) (Institution of Advisory Opinion Proceeding). Two days later, Plaintiff filed a motion to withdraw its request for an advisory opinion, which the ITC granted on November 7, 2014. *Certain Cases for Portable Electronic Devices*, 79 Fed. Reg. 68,299 (ITC Nov. 7, 2014) (Termination of Advisory Opinion Proceeding).

nal Advice. In the ruling, Customs stated that, pursuant to 19 C.F.R. § 177.7,³ it would not respond to Otter's Internal Advice Request and would not enforce the GEO against Otter because Otter's appeal, *Otter Prods., LLC*, No. 14–1840 (Fed. Cir. filed Sept. 17, 2014), was pending before the Federal Circuit and “concerns the claim construction of the ‘561 patent and whether [cases for] portable electronic devices imported by [Otter] are covered by the claims of the ‘561 patent such that they are subject to exclusion from entry.” HQ H257012 (Sept. 26, 2014) (“the 012 Ruling”). On September 29, 2014, Customs canceled the Notices of Redelivery and, the following day, at Customs' request, Otter withdrew its protest. (Pl.'s Mot. Exs. 16–17.)

In opposition to Otter's motion to stay before the Federal Circuit, the ITC cited the 012 Ruling and argued that Otter faced no imminent harm or, in the alternative, that the motion was moot. (Pl.'s Mot. Ex. 18.) On October 20, 2014, the Federal Circuit denied Otter's motion to stay, simply stating that Otter “failed to carry its burden in seeking a stay.” *Otter Prods., LLC*, No. 14–1840 (Fed. Cir. Oct. 20, 2014).

That same day, Speck requested a ruling from Customs as to whether Otter's Symmetry cases are subject to exclusion from entry pursuant to the GEO. Notwithstanding its decision in the 012 Ruling, this time Customs found that it was “not precluded by 19 C.F.R. § 177.7(b) from ruling on the instant [Otter] ‘Symmetry’ electronic device cases because the issue of whether these products infringe the ‘561 patent is not before the CAFC” in Otter's appeal. HQ H258492 (Nov. 4, 2014) (“the 492 Ruling”). After determining that Otter's Symmetry products infringed certain claims in the ‘561 Patent, Customs ruled that Otter's Symmetry products fell “within the scope of the ITC's general exclusion order . . . and may not be entered for consumption into the United States.” *Id.* Customs subsequently issued a new series of Notices of Redelivery⁴ to Otter covering twenty separate entries of Symmetry portable electronic device cases on November 6, 2014. (Pl.'s Mot. Ex. 23.)

Otter filed a protest against the Notices of Redelivery on November 7, 2014. (Pl.'s Mot. Ex. 24.) In its protest, Otter presented three arguments: (1) Otter's Symmetry cases are not covered by the GEO because they do not infringe the relevant claims of the ‘561 Patent; (2) the claims of the ‘561 Patent listed in the GEO are invalid; and (3)

³ Section 177.7 states, in relevant part, that “[n]o ruling letter will be issued with respect to any issue which is pending before the United States Court of International Trade, the United States Court of Appeals for the Federal Circuit, or any court of appeal therefrom.” 19 C.F.R. § 177.7(b).

⁴ The Notices of Redelivery do not expressly indicate that Customs issued them in reliance on the 492 Ruling. (See generally Pl.'s Mot. Ex. 23.)

Customs' ruling is inappropriate because infringement and the validity of the '561 Patent are currently at issue in Otter's appeal before the Federal Circuit. (Pl.'s Mot. Ex. 24 at 7–9.) That same day, Otter filed another motion to stay before the Federal Circuit, which the court construed as a motion for reconsideration and denied on November 11, 2014. *Otter Prods., LLC*, No. 14–1840 (Fed. Cir. Nov. 11, 2014).

On November 10, 2014, Otter requested that Customs immediately withdraw the 492 Ruling and filed a Request for Reconsideration of the ruling on November 14, 2014. (Pl.'s Mot. Exs. 25–26.) Customs affirmed the ruling on December 10, 2014. HQ H259071 (Dec. 10, 2014) (“the 071 Ruling”). In the 071 Ruling, Customs found that 19 C.F.R. § 177.7(b) did not preclude Customs from issuing a ruling because Customs' review of the Federal Circuit docket and its view of the “statutory interplay and relevant precedent does not establish that the court will adjudicate the infringement issue during the appeal or whether [Otter] even has standing to raise this issue or bring the appeal.” *Id.* at 9. Moreover, Customs determined that it did not possess authority to determine the validity of the '561 Patent. *Id.* at 15. Finally, Customs limited its infringement analysis to Otter's Symmetry cases for iPhones, even though it has excluded and demanded redelivery of all Symmetry cases.⁵ *See id.*

Otter's protest was deemed denied, pursuant to 19 CFR § 174.21(b), on December 8, 2014, and Otter filed suit to challenge the denied protest on December 10, 2014. Concurrent with the summons and complaint, Otter filed motions for a TRO and preliminary injunction. (ECF Nos. 1, 4–6.) On December 12, 2014, the court conducted a telephonic hearing on the TRO, which the court granted that day. (ECF No. 19, 21.) In the TRO, the court ordered Customs to suspend enforcement of the Notices of Redelivery subject to the protest at issue in this matter. (ECF No. 21 at 11.) On December 14, 2014, Otter filed a motion to clarify, in which it asked the court to alter the TRO to prohibit Customs from excluding future imports of Otter's Symmetry cases. (*See generally* Pl.'s Mot. Clarify (ECF No. 23).) The court denied the motion. (ECF No. 24.)

On December 15, 2014, Otter filed a First Amended Complaint, in which it invoked the court's subject matter jurisdiction under 28 U.S.C. § 1581(h) and (i) (2012),⁶ in addition to subsection (a). (Am.

⁵ At the hearing, neither party was able to state definitively whether non-iPhone cases were included in the twenty entries subject to the Notices of Redelivery identified in the underlying protest. Based upon a review of the entry papers forwarded to the court, the court has confirmed that the entries in question do include quantities of non-iPhone cases. *See, e.g.*, Entry No. 799–6650944–4.

⁶ Further citations to Title 28 of the U.S. Code are to the 2012 edition.

Compl. ¶¶ 3–4.) On December 16, 2014, Speck filed a motion to appear as amicus curiae, (ECF No. 26), and Defendant filed a motion to partially dismiss the First Amended Complaint for lack of subject matter jurisdiction, (ECF No. 29). The court conducted a hearing on Otter’s motion for a preliminary injunction on December 17, 2014. (ECF No. 31.)

SUBJECT MATTER JURISDICTION

Before addressing the merits of Otter’s motion for a preliminary injunction, the court must determine the extent of its subject matter jurisdiction over the case. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006). A court has “an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party,” *id.*; *see also Ford Motor Co. v. United States*, 38 CIT __, __, 992 F. Supp. 2d 1346, 1354 (2014), and “the plaintiff bears the burden of demonstrating that jurisdiction exists,” *Ford*, 38 CIT at __, 992 F. Supp. 2d at 1354 (citing *E & S Express, Inc. v. United States*, 37 CIT __, __, 938 F. Supp. 2d 1316, 1320 (2013)).

It is without dispute that the court has subject matter jurisdiction in this case pursuant to 28 U.S.C. § 1581(a). Moreover, for purposes of considering the preliminary injunction issues, it is not necessary to determine whether the court has jurisdiction pursuant to § 1581(h) because that subsection provides only declaratory relief. 28 U.S.C. § 2643(c)(4); *Manufacture de Machines du Haut-Rhin v. Von Raab*, 6 CIT 60, 64 n.5, 569 F. Supp. 2d 877, 882 n.5 (1983).⁷ The court therefore turns to whether it may exercise subject matter jurisdiction pursuant to § 1581(i).

Subject matter jurisdiction under § 1581(i), the court’s residual jurisdiction provision, “may only be invoked when another subsection of § 1581 is unavailable or the remedy provided by another subsection is ‘manifestly inadequate.’” *Am. Frozen Food Inst., Inc. v. United States*, 18 CIT 565, 569 n.9, 855 F. Supp. 388, 392 n.9 (1994) (citing *Nat’l Corn Growers Ass’n v. Baker*, 840 F.2d 1547, 1557 (Fed. Cir. 1988); *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987)). “Such residual jurisdiction is available if Congress has not defined another avenue for judicial review or if Congress has not precluded it entirely.” *Techsnabexport, Ltd. v. United States*, 16 CIT 420, 423, 795 F. Supp. 428, 434 (1992) (citing *Macmillan Bloedel Ltd. v. United States*, 16 CIT 331, 332 (1992)). Although neither Congress nor the courts have precisely defined manifest inadequacy, “mere

⁷ As discussed *infra*, the court’s resolution of the irreparable harm factor for purposes of Otter’s preliminary injunction motion, and Otter’s reliance on the same evidence to establish irreparable harm for its assertion of (h) jurisdiction, allows the court to resolve (h) jurisdiction within this opinion.

allegations of financial harm, or assertions that an agency failed to follow a statute, do not make the remedy established by Congress manifestly inadequate.” *Gov’t of the PRC v. United States*, 31 CIT 451, 459, 483 F. Supp. 2d 1274, 1281 (2007) (quotation marks omitted) (quoting *Int’l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006)).

Otter asserts that the remedies available under other subsections of § 1581 are manifestly inadequate because, with jurisdiction restricted to § 1581(a), Otter will have to repeatedly enter Symmetry cases “in contradiction of Ruling 071, wait for [Customs] to exclude those cases, protest the exclusion, wait for the protest to be denied or ‘deemed denied’ 30 days later, and then file a Summons on each such protest as it must do to meet the jurisdictional requirements of 28 U.S.C. § 1581(a).” (Pl.’s Supplemental Submission in Supp. of Mot. for Prelim. Inj. (“Pl.’s Supplement”) 8 (ECF No. 27).) Otter goes so far as to characterize Customs’ anticipated actions in this scenario as “preordained outcomes” that warrant (i) jurisdiction. (Pl.’s Supplement 8–9.) Otter finally contends that the court has jurisdiction under § 1581(i) because Otter “is entitled to a preliminary injunction . . . , and such a remedy is not available under 28 U.S.C. § 1581(h).” (Pl.’s Supplement 9.)

Otter has not demonstrated that the court has subject matter jurisdiction under subsection (i). That the legal regime established by Congress may require Otter to attempt to enter its goods, suffer an exclusion, protest that exclusion, and then appeal Customs’ denial of the protest, pursuant to § 1581(a), does not make the remedies available under subsection (a) manifestly inadequate. Case law has long held that “section 1581(i) cannot be used to circumvent the procedures set forth by section 1581(a).” *Manufacture de Machines du Haut-Rhin*, 6 CIT at 65, 569 F. Supp. at 882 (citing *United States v. Uniroyal*, 687 F.2d 467 (C.C.P.A. 1982)); accord *Connor v. United States*, 24 CIT 195, 200 (2000); see also *Inner Secrets / Secretly Yours, Inc. v. United States*, 18 CIT 1028, 1035, 869 F. Supp. 959, 965–66 (1994) (“Congress did not intend the Court of International Trade to have jurisdiction over appeals concerning completed transactions when the appellant had failed to utilize an avenue for effective protest before the Customs Service.”) (citation and quotation marks omitted). That Otter may suffer “delays inherent in the protest procedures do[es] not render these procedures manifestly inadequate.” *Inner Secrets / Secretly Yours*, 18 CIT at 1036, 869 F. Supp. at 966.

Otter’s argument that Customs’ actions amount to “preordained outcomes,” which render the protest process futile, also misses the mark. Although the courts have recognized that, in certain circum-

stances, the § 1581(a) protest process may be futile, as leading to a series of preordained rulings, these scenarios have involved Customs regulations which bound the agency and “unmistakably” indicated how it would determine the issue in dispute.” *Int’l Custom Prods.*, 467 F.3d at 1328; *accord Kairali Decan, Inc. v. United States*, 789 F. Supp. 2d 1372, 1379 (2011). There is no such regulation constraining Customs’ discretion in this case. The court also is not persuaded by Otter’s argument that jurisdiction exists under § 1581(i) because Otter cannot secure a preliminary injunction under subsection (h). As previously noted, the court has subject matter jurisdiction over this matter pursuant to § 1581(a). Under this subsection, Otter may obtain a preliminary injunction and, in fact, the court has granted Otter a TRO. That any preliminary injunction that the court may issue will be limited in effect to the entries subject to Otter’s denied protest, *Corning Gilbert Inc. v. United States*, 37 CIT __, __, 896 F. Supp. 2d 1281, 1297 n.4 (2013), and not have the breadth Otter would prefer, does not render the remedies available under § 1581(a) and (h) manifestly inadequate. Moreover, Otter may obtain declaratory relief following the court’s review of the merits, and, consistent with USCIT Rule 3(g)(3), such review will be conducted on an expedited basis.

Otter has failed to demonstrate that the remedies available to it under 28 U.S.C. § 1581(a) are manifestly inadequate. Consequently, the court finds that it does not have subject matter jurisdiction over this case pursuant to § 1581(i). The court therefore dismisses the First Amended Complaint to the extent that it relies on subsection (i) as a basis for subject matter jurisdiction. The court now turns to whether Otter has met the requirements for obtaining a preliminary injunction.

LEGAL STANDARD FOR PRELIMINARY INJUNCTION

“A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To obtain a preliminary injunction, a party must demonstrate “(1) that it will be immediately and irreparably injured; (2) that there is a likelihood of success on the merits; (3) that the public interest would be better served by the relief requested; and (4) that the balance of hardship on all the parties favors the [movant].” *Qingdao Taifa Grp. Co. v. United States*, 581 F.3d 1375, 1378 (Fed. Cir. 2009) (citations omitted); *accord Kwo Lee, Inc. v. United States*, 38 CIT __, __, 2014 WL 5369391, at *2 (Oct. 16, 2014). Although “[n]o one factor is dispositive,” the likelihood of success and irreparable harm factors are “[c]entral to the movant’s burden.” *Kwo Lee*, 38 CIT at __, 2014 WL 5369391, at *2 (second brackets in original) (citing

FMC Corp. v. United States, 3 F.3d 424, 427 (Fed. Cir. 1993) (quoting *Sofamor Danek Grp., Inc. v. DePuy-Motech, Inc.*, 74 F.3d 1216, 1219 (Fed. Cir. 1996)). “The court evaluates a request for a preliminary injunction on a ‘sliding scale,’ where ‘the more the balance of irreparable harm inclines in the [movant]’s favor, the smaller the likelihood of prevailing on the merits [it] need show in order to get the injunction.” *Id.* (quoting *Qingdao Taifa Grp.*, 581 F.3d at 1378–79).

DISCUSSION

I. Irreparable Harm

To satisfy the standard to obtain a preliminary injunction, Otter must show that it faces an “immediate and viable” threat of irreparable harm. *Kwo Lee*, 38 CIT at __, 2014 WL 5369391, at *2 (citing *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983)). Harm is irreparable when “‘no damages payment, however great,’ can address it.” *Id.* (citations omitted) (quoting *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012)). Generally, financial loss alone is not irreparable. *Id.* at *3 (citing *Sampson v. Murray*, 415 U.S. 61, 90 (1974)). However, the ability to calculate a financial loss may not preclude a finding of irreparable harm, because accompanying harm from “[p]rice erosion, loss of goodwill, damage to reputation, and loss of business opportunities” may be irreparable. *Id.* (citations omitted).

Critically, irreparable harm may not be speculative. *See Am. Inst. for Imported Steel, Inc. v. United States*, 8 CIT 314, 318, 600 F. Supp. 204, 209 (1984). “It is not enough to establish ‘a mere possibility of injury, even where prospective injury is great. A presently existing, actual threat must be shown.’” *Shree Rama Enters. v. United States*, 21 CIT 1165, 1167, 983 F. Supp. 192, 194–95 (1997) (quoting *Zenith Radio*, 710 F.2d at 809). The threat of irreparable harm must be “demonstrated by probative evidence,” *Am. Inst. for Imported Steel*, 8 CIT at 318, 600 F. Supp. at 209 (citation and quotation marks omitted), and “cannot be determined by surmise,” *Elkem Metals Co. v. United States*, 25 CIT 186, 192, 135 F. Supp. 2d 1324, 1331 (2001) (citation omitted); *see also Techsnabexport*, 16 CIT at 428, 795 F. Supp. at 437 (“The court may not grant preliminary relief based upon unsupported allegations. . . . Allegations of harm to potential future business relations are too speculative to constitute irreparable harm.”). The court must deny a preliminary injunction where the plaintiff fails to present evidence that the alleged injuries are likely to occur. *See Nat’l Hand Tool Corp. v. United States*, 14 CIT 61, 66 (1990).

Otter has proffered the following evidence to support its claim that it faces irreparable harm absent a preliminary injunction. Otter has asserted that, since the market debut of the Symmetry cases, they have continuously grown to become a significant portion of its sales, producing millions of dollars in revenue in a highly competitive, cyclical market. (Kreutzfeldt Decl. ¶¶ 4–8, Nov. 25, 2014.) Without a preliminary injunction, Otter claims it would lose out on sales during the increased demand of the holiday season, which it will not be able to recover once the holiday season is over. Moreover, Otter has stated that it would not be able to recover monetary damages in this suit if the exclusion of its products is ultimately determined to be unlawful. In addition, Otter has expended great efforts to establish relationships with numerous “big box” retailers and other large customers. (See Lecy Decl. ¶¶ 18, 22–23, Dec. 1, 2014.) It asserts that the maintenance and strength of these relationships depends significantly on Otter’s “strong reputation of durability and dependability.” (Lecy Decl. ¶ 23.) Since the GEO has come into force, Otter has received multiple inquiries and statements of concern from some of these customers about the availability of Symmetry cases, particularly during the upcoming holiday season, and these customers have suggested that they may need to source cases from Otter’s competitors if the GEO remains in place. (Lecy Decl. ¶¶ 18–21, 25.) Otter also fears that the inability to provide its customers with its current products in a timely fashion will tarnish its reputation as a reliable vendor and damage its relationships with its customers. (Lecy Decl. ¶¶ 24–25.) Without a preliminary injunction, Otter insists that it also may lose market share, as customers purchase its competitors’ products with their purchase of the recent release of the latest phone models. (Lecy Decl. ¶¶ 30, 33.)

Otter’s evidence, however, fails to account for the breadth of injunctive relief available under § 1581(a). The scope of the court’s subject matter jurisdiction in (a) cases is limited to those entries subject to the challenged protest, *Corning Gilbert*, 37 CIT at __ n.4, 896 F. Supp. 2d at 1297 n.4; see also *Int’l Custom Prods.*, 467 F.3d at 1327 (noting that § 1581(a) does not offer prospective relief). In this case, Otter challenges Customs’ deemed denial of a protest against Notices of Redelivery covering twenty specific entries. (Am. Compl. ¶¶ 1–2, 5–7.) The court therefore may provide injunctive relief only with respect to those twenty entries. After the court issued the TRO, Otter provided additional information in its motion for clarification of the TRO. In particular, Otter indicated that it had not redelivered the entries in question and, in fact, had already informed Customs that it had no intention of redelivering the entries in question because they

had already been distributed to Otter's customers. (Pl.'s Mot. Clarify at 3–4.) Otter has further acknowledged that it is Customs' policy "not to assess liquidated damages for failure to redeliver goods that are subject to a protest or civil action until after a final decision on that protest or in that civil action." (Pl.'s Mot. Clarify at 2, 5.) Therefore, Otter has effectively conceded that it will not suffer irreparable harm in the absence of a preliminary injunction enjoining the enforcement of the twenty Notices of Redelivery.

Otter has failed to demonstrate that it will suffer irreparable harm absent a preliminary injunction and, therefore, the court need not address the three remaining factors prior to denying Otter's motion. See *Qingdao Taifa Grp.*, 581 F.3d at 1378 (citations omitted). Moreover, based on this additional information demonstrating an absence of irreparable harm, the court hereby dissolves the TRO of December 12, 2014.

SUBJECT MATTER JURISDICTION UNDER 28 U.S.C. § 1581(h)

Otter's failure to demonstrate irreparable harm in its motion for a preliminary injunction raises questions about its invocation of subject matter jurisdiction under 28 U.S.C. § 1581(h). Review under this subsection is available "only under exceptional circumstances." *Connor*, 24 CIT at 199 (citation omitted). Subsection (h) states, in relevant part, that:

The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to . . . restricted merchandise, entry requirements, . . . or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

28 U.S.C. § 1581(h). A plaintiff must fulfill four requirements to establish jurisdiction under subsection (h): "1) review must be sought prior to importation; 2) review sought must be for a ruling; 3) the ruling must relate to certain subject matter; and 4) the importer must show that irreparable harm will result unless judicial review prior to importation is obtained." *Am. Frozen Food Inst.*, 18 CIT at 569, 855 F. Supp. at 393 (citation omitted). "[T]he standard for proving irreparable harm [in a § 1581(h) case] is essentially identical to that used to determine irreparable injury in cases where injunctive relief is

sought.” *Connor*, 24 CIT at 199 (second brackets in original) (citation and quotation marks omitted). The moving party must demonstrate, by “clear and convincing evidence,” that “there is an immediate threat that the harm *will* occur, not just an immediate threat that the harm *could* occur,” i.e., “that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to importation.” *Id.* at 196, 198 (first emphasis added) (citations omitted); *accord* 28 U.S.C. § 2639(b).

Although the standard for proving irreparable harm is the same as in the case of the preliminary injunction, in this case, the entries at issue arguably differ between the court’s analysis pursuant to its jurisdiction under § 1581(a) and Plaintiff’s allegation of jurisdiction under § 1581(h). As discussed above, the irreparable harm considered under the court’s (a) jurisdiction related to the twenty entries covered by the Notices of Redelivery. For purposes of the court’s § 1581(h) jurisdiction, the court must concern itself with any irreparable harm, demonstrated by clear and convincing evidence, resulting from the Customs rulings that would exclude future entries of Otter’s Symmetry cases.

Notwithstanding these differences, Otter’s counsel stated that the evidence it provided to demonstrate irreparable harm in its preliminary injunction motion was the same evidence it proffered to support its claim for § 1581(h) jurisdiction. During the hearing on Otter’s motion for a preliminary injunction, the court reminded all parties of the court’s need to resolve jurisdictional matters as a threshold issue and, among other things, inquired as to Otter’s intent to provide clear and convincing evidence of irreparable harm specifically for purposes of establishing jurisdiction pursuant to § 1581(h). Otter declined to provide any additional evidence or witness testimony to support its jurisdictional claim under § 1581(h), instead choosing to rest on its submitted papers, and, at no time, did Otter request that the court defer resolving the jurisdictional issue pending receipt of additional evidence. (Mot. Hr’g 10:32-:35, Dec. 17, 2014.)

Restated briefly, by means of the declarations, Otter asserts that it will lose out on sales during the increased demand of the holiday season, which it will not be able to recover once the holiday season is over; it will not be able to recover monetary damages if the exclusion of its products is ultimately determined to be unlawful; its relationships with its customers will erode, as will its reputation of durability and dependability; and it may lose market share, as customers purchase its competitors’ products in conjunction with their purchase of the recent release of the latest phone models. (Lecy Decl. ¶¶ 18–25, 30, 33.)

Otter has not demonstrated by clear and convincing evidence that it faces immediate irreparable harm absent judicial review prior to the Symmetry cases' importation. Otter's contention that it is imperative to release new cell phone case designs soon after a new cell phone model's launch is not supported by the evidence before the court. Otter's Symmetry cases are designed for, *inter alia*, the iPhone 5s and 5c, which debuted in September 2013. However, the Symmetry cases at issue here, including those for the iPhone 5s and 5c, were not released until six months later, on March 3, 2014. (Lecy Decl. ¶¶ 10, 28; *see also* Pl.'s Mot. 4.) Although the new Symmetry models went on sale six months after the release of the cell phone models, Otter reported a significant increase in sales, which then subsided to pre-launch levels the following month. (Lecy Decl. ¶ 28.) Consequently, the evidence suggests that delayed availability of the Symmetry cases may only delay when Otter will experience a boost in sales associated with the new product.

Otter also has not presented clear and convincing evidence that it will suffer *immediate* irreparable harm during the holiday season due to the application of the GEO to its products. The instant action covers twenty entries of Symmetry series cases which Otter entered throughout October 2014. Otter has informed Customs that it will not redeliver the merchandise covered by these entries. In its motion asking the court to clarify its TRO, Otter also indicated that there are, in fact, some ninety-one entries of Symmetry cases (presumably inclusive of the twenty entries at issue in this case) for which Customs has issued Notices of Redelivery and for which Otter has informed Customs that it will not redeliver the merchandise. (Pl.'s Mot. Clarify 5.) Moreover, the record makes it clear that Otter was importing Symmetry cases throughout the period between their introduction and early October 2014. At no point, however, has Otter indicated the extent of its U.S. inventory of the Symmetry cases, the extent to which its customers have established an inventory of these particular cases, or at what point the application of the GEO to Otter's imports of Symmetry cases will begin to impact Otter's ability to meet any customer obligations.

Absent information on these issues, the court cannot discern to what degree the eight months of imports may cover the number of units that Otter predicts it will sell during the last quarter of 2014. (*See* Kreutzfeldt Decl. ¶ 8). The court also cannot discern to what degree the ninety-one entries that Otter subsequently brought into the United States, now subject to Notices of Redelivery with which Otter will not comply, (*see* Pl.'s Mot. Clarify 5; Pl.'s Mot. Ex. 23), will enable it to meet its predicted sales. Otter also has not shown that it

faces immediate damage to its relationships with its customers, including damage to its reputation and loss of floor space, and to its market share. Otter has not produced any of the contracts that it has with its customers nor even described their contents; rather, it has made conclusory allegations, based mostly on conjecture, that Customs' actions will cause it harm. (*See, e.g.*, Lecy Decl. ¶¶ 11–14, 16–25, 33–35.) Moreover, Otter sells other cell phone cases, designed for the latest cell phone models, which could be expected to buffer any financial or market share losses that Otter might face. (Def.'s Opp'n (ECF No. 28) 29; *see* Lecy Decl. ¶ 4.) Because Otter has not shown, by clear and convincing evidence, that it faces immediate and irreparable harm, the court cannot exercise subject matter jurisdiction over this matter pursuant to § 1581(h). *See Am. Frozen Food Inst.*, 18 CIT at 571, 855 F. Supp. at 394. The court therefore dismisses the First Amended Complaint to the extent that it relies on this subsection as a basis of jurisdiction.⁸

DEFENDANT'S PARTIAL MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

On December 16, 2014, Defendant filed a partial motion to dismiss Plaintiff's First Amended Complaint for lack of subject matter jurisdiction under §§ 1581(h) and (i). (ECF No. 29.) As discussed above, in keeping with the need to resolve its jurisdictional authority as a threshold matter, the court has determined that it lacks jurisdiction

⁸ Even if Otter had demonstrated irreparable harm, the court would have to determine, among other things, whether jurisdiction under 1581(h) is, nevertheless, lacking because Otter is not seeking review "prior to importation." Subsection (h) applies only to "prospective entries." *Heartland By-Prods., Inc. v. United States*, 26 CIT 268, 280–81, 223 F. Supp. 2d 1317, 1330–31 (2002); *accord Inner Secrets / Secretly Yours*, 18 CIT at 1032, 869 F. Supp. at 963 ("[J]udicial review pursuant to 28 U.S.C. § 1581(h) is available only for prospective transactions. . . . transactions which are not already pending before a Customs Service office by reason of arrival, entry, or otherwise.") (citing *Am. Air Parcel Forwarding Co. v. United States*, 5 CIT 8, 557 F. Supp. 605 (1983), *aff'd*, 718 F.2d 1546 (Fed. Cir. 1983); *Dennison Mfg. Co. v. United States*, 12 CIT 1, 3, 678 F. Supp. 894, 897 (1988); 19 C.F.R. § 177.1(a) (defining "prospective transactions")). The imports covered by the protest at issue in this case are not prospective entries, (*see* Am. Compl. ¶¶ 1–2, 4, 11, 16), and, therefore, are not subject to review under subsection (h). *Cummins Inc. v. United States*, 29 CIT 525, 530 n.10, 377 F. Supp. 2d 1365, 1370 n.10 (2005) (holding that action under § 1581(h) seeking pre-importation review of Customs ruling was moot where plaintiff instituted action under § 1581(a) seeking review of denied protest related to test shipment of products at issue) ("Because Plaintiff actually imported the test shipment of the finished crankshafts, the Court finds [Plaintiff's] § 1581(h) action fails to present a live controversy and is therefore moot. Accordingly, that portion of the consolidated case is dismissed."). In providing jurisdiction pursuant to § 1581(h), Congress did not intend for subsection (h) to replace subject matter jurisdiction under subsection (a). *Heartland By-Prods.*, 26 CIT at 274, 223 F. Supp. 2d at 1325.

to consider Otter's claims pursuant to §§ 1581(h) and (i). Consequently, Defendant's partial motion to dismiss is moot.

SPECK'S MOTION TO APPEAR AS AMICUS CURIAE

On December 16, 2014, Speck, owner of the '561 Patent underlying the ITC's GEO in this case, filed a motion, pursuant to USCIT Rules 7 and 76, to appear as amicus curiae. (ECF No. 26.) Based upon the court's reading of Speck's motion, it is clear to the court that Speck desires a role greater than that of an amicus curiae. To that end, Speck effectively seeks to become a defendant-intervenor in the case and advocate for its own benefit. (ECF No. 26 at 2–3.) The court is statutorily prohibited from permitting parties to intervene in § 1581(a) cases. 28 U.S.C. § 2631(j)(1)(A); *accord Jazz Photo Corp. v. United States*, 439 F.3d 1344, 1357 (Fed. Cir. 2006); *Corning Gilbert*, No. 11–511 (CIT June 14, 2012) (order denying motion for leave to appear as amicus curiae). The court therefore denies the motion.

CONCLUSION

For the reasons provided above, the court

DENIES Plaintiff's motion for a preliminary injunction;

ORDERS the TRO of December 12, 2014, dissolved;

DISMISSES in part the Amended Complaint to the extent that it invokes subject matter jurisdiction pursuant to 28 U.S.C. § 1581(h) and (i);

DENIES Defendant's motion to partially dismiss the Amended Complaint as moot; and

DENIES Speculative Product Design, LLC's motion to appear as amicus curiae.

Parties are hereby advised that, in early January 2015, the court will set a time for a telephonic conference with the parties, during which it will establish an expedited briefing schedule on the merits.

Dated: December 23, 2014

New York, New York

/s/ Mark A. Barnett

MARK A. BARNETT, JUDGE

Slip Op. 14–155

INFANTINO, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Richard W. Goldberg, Senior Judge
Court No. 11–00497

[Plaintiff's motion for summary judgment is granted; defendant's cross-motion for summary judgment is denied.]

Dated: December 24, 2014

Mandy A. Edwards and *S. Richard Shostak*, Stein Shostak Shostak Pollack & O'Hara, LLP, of Los Angeles, CA, for plaintiff.

Beverly A. Farrell, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, and *Amy M. Rubin*, Acting Assistant Director, International Trade Field Office. Of counsel on the brief was *Sheryl A. French*, Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, NY.

OPINION

Goldberg, Senior Judge:

At issue is the proper classification of merchandise sold under the name Shop & Play® Funny Farmer (“Funny Farmer” or “merchandise”)¹ and imported by Plaintiff Infantino, LLC (“Infantino”). Infantino and the United States (the “Government”) have cross-moved for summary judgment. The Government argues that U.S. Customs and Border Protection (“Customs” or “CBP”) correctly classified the merchandise under U.S. Harmonized Tariff Schedule (“HTSUS”) subheading 9404.90.20. Infantino claims that the merchandise is properly classifiable under HTSUS subheading 9503.00.00. Merchandise under HTSUS subheading 9503.00.00 enters duty free, while merchandise under HTSUS 9404.90.20 carries a six percent *ad valorem* duty. The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2012). As set forth below, the court grants Infantino’s motion for summary judgment and denies the Government’s cross-motion for summary judgment.

BACKGROUND

The Funny Farmer is sold under the Shop & Play® brand as a “2-in-1 play mat” specially designed for use both as a normal play mat and inside of a shopping cart. *See* Pl.’s Mot. for Summ. J. (“Pl.’s Br.”) at Ex. 1, ECF No. 39; Def.’s Opp’n to Pl.’s Mot. for Summ. J. & Cross-Mot. for Summ. J. (“Def.’s Br.”) at Ex. E at 2, ECF No. 45. It measures approximately nineteen to twenty inches wide and forty-five inches long and is stuffed with a uniform, light polyester-fiber batting. *See* Pl.’s Br. at Decl. of Wendy McLean ¶ 4 & Ex. 1. One side of the Funny Farmer is a solid blue color, while the activity side depicts a farm theme and contains brightly colored graphics, five

¹ The parties refer to the merchandise as the “Funny Farmer,” though Infantino’s catalogue refers to it as the “Funny Farm.” *See* Def.’s Opp’n to Pl.’s Mot. for Summ. J. & Cross-Mot. for Summ. J. at Ex. B at 35, ECF No. 45. The court assumes that the parties have correctly identified the name of the product at issue and refers to the product as “Funny Farmer” throughout this opinion.

removable activity toys, and one sewn-in activity toy. *Id.* Some of the merchandise's features enable its shopping-cart use, such as a detachable waist belt, leg flaps, a crescent-shaped detachable bolster pillow decorated like a pea pod, small pockets designed as a "convenience add-on" for parents to store items, and Velcro that secures the mat to the shopping-cart seat. Def.'s Br. at Ex. C ("Cosky Dep.") at 49:8; *see* Pl.'s Br. at Decl. of Wendy McLean ¶¶ 4–6 & Ex. 1. The packaging for the Funny Farmer advertises the Funny Farmer's dual use as both the "perfect mat for tummy time play" and an in-cart mat that "turns any shopping cart into a clean, comfy activity center." Pl.'s Br. at Ex. 1.

Infantino imported the Funny Farmer merchandise in question on February 3, 2008 at the Long Beach Seaport. Summons 1, ECF No. 1. The merchandise was assigned Entry Number 231–5466017–1 and entered under HTSUS subheading 9404.90.20. *Id.* at 2. That heading covers

[m]attress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered.

CBP liquidated the entry without change on December 19, 2008. Def.'s Br. 2; Pl.'s Notice of Errata 1, ECF No. 50. Infantino subsequently filed Protest Number 2704–09–101681, claiming that the Funny Farmer is properly classified under HTSUS subheading 9503.00.0080, which pertains to

[t]ricycles, scooters, pedal cards and similar wheeled toys; dolls' carriages; dolls, other toys; reduced-scale ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof.

See Compl. ¶¶ 3, 6, ECF No. 5; Pl.'s Br. 3. Customs denied that protest, apparently without extensive analysis, on August 5, 2011. *See* Compl. ¶ 3. The propriety of Customs' protest denial is the subject of the instant action. Infantino claims that the denial is in error, reasserting that the Funny Farmer must be classified under subheading 9503.00.00. The Government claims that the protest was properly denied, because the original 9404.90.20 subheading was correct.

Although the protest denial in this case was executed summarily, Customs earlier issued a more detailed ruling that classified identical

or nearly identical merchandise imported by Infantino. See Def.'s Br. at Ex. F ("HQ H031397"). The issue in HQ H031397 was the same: whether the merchandise had been properly classified under HTSUS heading 9404 or should have been classified, per Infantino's protest, under 9503. *Id.* at 2. In order to decide whether 9503 was the proper heading, Customs analyzed whether the primary purpose of the merchandise was "to amuse or to provide a utilitarian/functional quality." *Id.* at 3. To that end, Customs considered several of the analytical factors set forth in *United States v. Carborundum Co.*, 63 CCPA 98, 102, 536 F.2d 373, 377 (1976). Specifically, Customs considered "(1) the general physical characteristics of the merchandise; (2) the expectation of the ultimate purchasers; (3) the channels, class or kind of trade in which the merchandise moves; (4) the environment of the sale . . . ; [and] (5) usage, if any, in the same manner as merchandise" principally designed for amusement. HQ H031397 at 3. Customs ultimately determined that, though the Funny Farmer "has some amusing features incorporated into the design, this is outweighed by the utilitarian design and purpose of the article which is intended to provide for the safety and comfort of infants while in a shopping cart." *Id.* at 4. Thus, Customs denied Infantino's protest and upheld the Funny Farmer's classification under heading 9404. *Id.* at 5.

STANDARD OF REVIEW

In the context of a protest denial, the court reviews CBP's findings of fact and conclusions of law *de novo*. See 28 U.S.C. §§ 2639(a)(1), 2640(a); *Tyco Fire Prods. L.P. v. United States*, 37 CIT __, __, 918 F. Supp. 2d 1334, 1339 (2013). The court arrives at the proper classification by first determining the meaning of the relevant tariff provisions (a question of law) and then deciding under which of the properly construed tariff provisions the merchandise at issue falls (a question of fact). See *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365–66 (Fed. Cir. 1998). Though the court accords "respect" to CBP's classification rulings "proportional to [their] 'power to persuade,'" *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), the court has "an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms," *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005).

Summary judgment is appropriate if, viewing the evidence in a light most favorable to the nonmoving party, "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In a clas-

sification case, this means that summary judgment is appropriate when “there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is.” *Bausch & Lomb*, 148 F.3d at 1365.

DISCUSSION

The court now considers Infantino’s and the Government’s claims and holds that the Funny Farmer is properly classified as a toy under subheading 9503.00.00. The rationale for this holding must be prefaced with a brief explanation of the import-classification process.

Import classifications are governed by the General Rules of Interpretation (“GRIs”) of the HTSUS and any applicable Additional United States Rules of Interpretation. *See Dependable Packaging Solutions, Inc. v. United States*, 757 F.3d 1374, 1377 (Fed. Cir. 2014). The GRIs are applied in numerical order. *Id.* Accordingly, the court’s analysis begins with GRI 1, which provides that “classification shall be determined according to the terms of the [HTSUS chapter] headings and any relative section or chapter notes.” *Id.* at 1377–78.² In evaluating whether subject merchandise fits within a particular heading, the court generally construes HTSUS terms “according to their common and commercial meanings, which are presumed to be the same.” *Id.* at 1378 (quoting *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999)). In its analysis, the court may also consult the World Customs Organization’s “Explanatory Notes,” which, though not legally binding, are “generally indicative of the proper interpretation of the various HTSUS provisions.” *Kahrs Int’l, Inc. v. United States*, 713 F.3d 640, 644–45 (Fed. Cir. 2013). If, consulting these sources, “the proper heading can be determined under GRI 1, the court is not to look to the subsequent GRIs.” *Dependable Packaging*, 757 F.3d at 1378.

If, however, the proper heading cannot be determined under GRI 1 because the merchandise is *prima facie* classifiable under two or more headings, the court moves to GRI 3. GRI 3(a) provides that, in such a case, “[t]he heading which provides the most specific description shall be preferred to headings providing a more general description.” In cases when GRI 3(a) is unavailing, GRI 3(b) offers guidance for

² The HTSUS is composed of a total of ninety-nine chapters, which are distributed among twenty-two sections. Each chapter contains headings that are further divided into subheadings. “The headings contain ‘general categories of merchandise,’ whereas ‘the subheadings provide a more particularized segregation of the goods within each category.’” *Deckers Outdoor Corp. v. United States*, 714 F.3d 1363, 1366 (Fed. Cir. 2013) (quoting *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998)). In applying GRI 1, the subheadings are not to be consulted until it is determined that the merchandise in question is classifiable under a particular heading. *Dependable Packaging*, 757 F.3d at 1377–78.

composite goods. Under GRI 3(b), composite goods “shall be classified as if they consisted of the material or component which gives them their essential character.” See, e.g., *Alcan Food Packaging (Shelbyville) v. United States*, 771 F.3d 1364 (2014).

Infantino and the Government each claim that the Funny Farmer is *prima facie* classifiable only under their respective proposed headings, and not under the other’s heading, such that this case is properly resolved under GRI 1. Infantino alternatively claims that the Funny Farmer is *prima facie* classifiable under both heading 9404 and 9503, and that heading 9503 is the more specific of the two, rendering it victorious under GRI 3(a). As to Infantino’s alternative claim, the Government rebuts that heading 9404 is appropriate because it is the only heading to “wholly” describe the Funny Farmer.

In its *de novo* review, the court agrees with Infantino’s alternative claim—but only in part. Although some parts of the Funny Farmer fall within heading 9404 and others within 9503—such that the good falls *prima facie* within both headings—neither heading wholly describes all parts of the Funny Farmer. That is, each heading describes “part only” of the Funny Farmer. GRI 3(a). In such a situation, the proper GRI to apply is GRI 3(b) for composite goods. Under GRI 3(b), the court holds that the Funny Farmer’s essential character is imparted by its toy components, which are classifiable under HTSUS heading 9503. Accordingly, the entire good is classifiable as such.

I. The Merchandise Is *Prima Facie* Classifiable Under HTSUS Heading 9404

The court first holds that the merchandise is *prima facie* classifiable under HTSUS heading 9404. As previously noted, heading 9404 covers “articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material.” The Explanatory Notes define “any material” to include “cotton, wool, horsehair, down, synthetic fibres, etc.” Explanatory Note (“EN”) 94.04. The body and pillow of the Funny Farmer is stuffed with 100% polyester-fiber filling and is a quilt, cushion, or similar item. HTSUS 9404. Thus, the court agrees with the Government that the Funny Farmer is *prima facie* classifiable under HTSUS heading 9404.

Infantino disagrees with this classification, but does not directly address the plain language of HTSUS heading 9404. Pl.’s Reply to Gov’t’s Opp. to Pl.’s Mot. for Summ. J. (“Pl.’s Reply Br.”) 12–13, ECF No. 49. Instead, Infantino merely attempts to distinguish a case—*Bauerhin Technologies Ltd. Partnership v. United States*, 110 F.3d 774 (Fed. Cir. 1997)—that the Government cited as an analogue

favoring its preferred classification. In *Bauerhin*, the Federal Circuit found that certain cushioned inserts “imported in the shape and form of” the baby car seats into which they were to be inserted were “cushions” within the meaning of HTSUS 9404. *Id.* at 775, 779–80. In so holding, the court rejected the plaintiff’s argument that HTSUS heading 9404 was limited to items whose primary purpose is to facilitate sleeping or napping. *Id.* at 776–778.

Infantino points out a number of physical differences between the Funny Farmer and the cushioned seat inserts at issue in *Bauerhin*, for example that Funny Farmer does not form-fit its receptacle shopping cart. But these differences are not the issue: The important point from *Bauerhin* is that heading 9404 can cover non-sleep-purposed cushioning, like the Funny Farmer in both its play-mat and shopping-cart configurations. *Id.* The Funny Farmer certainly qualifies as cushioning, insofar as it is stuffed with a polyester-fiber filling and is designed to cushion a child in either of its configurations. It is thus *prima facie* covered under HTSUS heading 9404, and Infantino’s effort to distinguish *Bauerhin* is inapposite.

II. The Merchandise Is *Prima Facie* Classifiable Under HTSUS Heading 9503

The court’s inquiry does not end upon concluding that the Funny Farmer is *prima facie* classifiable under HTSUS heading 9404. The court must next consider whether the Funny Farmer is also classifiable under HTSUS heading 9503, which, *inter alia*, covers “other toys.”³ There being no HTSUS definition of the term “toys,” this court has determined a toy to be “an object primarily designed and used for

³ The Government argues that the court should decline to undertake its own HTSUS heading 9503 inquiry because CBP already decided the matter in HQ H031397, and that ruling deserves *Skidmore* deference. Def.’s Br. 14–15. The court disagrees. In *Mead*, the Supreme Court held that courts may accord *Skidmore* deference to a particular CBP ruling based on its “thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight.” 533 U.S. at 235; *see also Rubie’s Costume Co. v. United States*, 337 F.3d 1350, 1354 (Fed. Cir. 2003). In HQ H031397, CBP did not arrive at its ruling following a “deliberative notice-and-comment . . . process,” which is “an important factor [in] attributing *Skidmore* deference to a particular classification ruling.” *Structural Ind., Inc. v. United States*, 356 F.3d 1366, 1370 (Fed. Cir. 2004) (quoting *Rubie’s*, 337 F.3d at 1356). Moreover, CBP’s ruling is not reflective of a consistent pattern in classifying similar imports. *See id.* at 1370–71 (declining to afford *Skidmore* deference, in part, because no consistent pattern of rulings existed). As the Federal Circuit has noted, “[a] single ruling standing alone has very limited value.” *Id.* at 1371. Finally, CBP’s analysis in HQ H031397 is not particularly persuasive because it focuses heavily on the utilitarian features of the Funny Farmer while only summarily considering the product’s countervailing amusing features.

pleasurable diversion,” as opposed to practicality or utility. *Springs Creative Prods. Grp. v. United States*, Slip Op. 13–107, 2013 WL 4307857, at *8 & n.4 (CIT Aug. 16, 2013).⁴ The court holds that the Funny Farmer is *prima facie* classifiable under HTSUS heading 9503, because it was designed for and is used for pleasurable diversion.

Three aspects of the Funny Farmer render it *prima facie* classifiable as a toy: (1) the way that Infantino trademarked and tested the Funny Farmer, (2) its product positioning,⁵ and (3) its physical characteristics. First, Infantino trademarked and tested the Funny Farmer as a toy. The trademark for the entire Shop & Play® line is associated with International Class 28, Pl.’s Br. at Ex. 11, which is in turn defined to include “[g]ames and playthings” *see* 37 C.F.R. § 6.1 (2014). And Infantino also designed and tested the Funny Farmer so that it would comply with U.S. and British toy standards. Specifically, at Infantino’s behest, SGS Hong Kong Ltd. and Bureau Veritas Consumer Products Services UK Ltd. tested the Funny Farmer for compliance with an internationally recognized toy standard published by ASTM International and a mandatory European toy standard published by the British Standards Institution. *See* Pl.’s Br. at Decl. of Wicky Lee ¶¶ 3–4 & Exs. 14–16.

Infantino’s positioning of the Funny Farmer also indicates that the Funny Farmer is *prima facie* classifiable as a toy. In positioning the Funny Farmer—and all other themed two-in-one play mats sold under the Shop & Play® line—Infantino underscored the product’s “uniqueness” as an “activity center that moms could use for their babies at home and then take with them into an actual shopping environment” so that children could be “surrounded by their toys and be entertained.” Cosky Dep. 27:10–24.

This positioning is evident from the Funny Farmer’s catalogue placement and also its packaging. Infantino included the Funny Farmer in its “2007 Toys & Activity Play” catalogue. Def.’s Br. at Ex. B. In that catalogue, Infantino separated at least a portion of its products into various tabs labeled “Pegged Toys,” “Boxed Toys,” “Gyms & Playmats,” “Puzzles,” and “Shopping Cart Covers.” *Id.* The Shop & Play® line in the Funny Farmer theme appeared under the

⁴ The *Springs Creative* court observed its duty to accord undefined terms their common and commercial meanings by consulting dictionaries to reach the common meaning of “toy” quoted in the text. The court also found that this definition was consistent with judicial interpretation and the HTSUS Explanatory Note 95.03(D) defining other toys, in part, as “toys intended essentially for the amusement of persons (children or adults).” 2013 WL 4307857, at *7–8.

⁵ “Product positioning” refers to a company’s intended purpose for a product, as consistently communicated across a variety of media platforms. *See* Cosky Dep. 25:22–26:14.

“Shopping Cart Covers” tabs alongside other activity-themed shopping-cart inserts sold under different product line names (Shop & Dine®, CartSafari™, CartTunes™). Though the catalogue’s description of the Shop & Play® line emphasizes its utilitarian features (including that the product is easy to clean, is protected by a material that inhibits the growth of bacteria, contains storage pockets, and offers a back rest and soft padding), the description and accompanying photograph also prominently portray the accompanying “plush pals.” *Id.* Furthermore, though Infantino does not refer to its Shop & Play® line as “toys” like other items in the catalogue, the catalogue itself is called a “Toys and Activity Play” catalogue and does not feature Infantino’s purely utilitarian travel products. *See id.*⁶ Thus, Infantino’s placement of the Funny Farmer in the Toys and Activity Play catalogue suggests that the product is a toy.

So does the packaging of the Funny Farmer itself. The packaging displays the Shop & Play® brand name on all sides of the box. The front, back, and side of the packaging describes the Funny Farmer as a “2-in-1 play mat [that] turns any shopping cart into a clean, comfy activity center.” Pl.’s Br. at Ex. 1. The front of the package also contains three different-sized photographs. The largest photograph depicts a smiling baby seated in a shopping cart covered by the Funny Farmer, with the Funny Farmer’s toys dangling outside the cart. *See id.* Infantino purposely positioned the toys outside the cart “to highlight them,” even though the toys usually dangle inside the cart in front of the child. *See id.* at Decl. of Wendy McLean ¶ 13. A second picture depicts a different angle of a child playing inside a shopping cart fitted with the Funny Farmer while the storage pockets are visible. Lastly, the smallest of the photographs depicts the Funny Farmer laid flat along with the description, “The perfect mat for tummy time play!”

The back cover of the packaging contains a more thorough description of the Shop & Play® product line that emphasizes the product’s toy-like aspects in both its mat and cart-insert configurations. Specifically, the packaging provides,

⁶ A screenshot of Infantino’s website from July 16, 2008 shows that Infantino separated products on its website into “Toys,” “Carriers,” “Soft Travel,” “Shopping Cart Covers,” and “Puzzles.” Def.’s Br. at Ex. D. The Funny Farmer was featured under the “Shopping Cart Covers” tab and not the “Toys” tab. Similarly, when Infantino marketed its products at trade shows, Infantino separately featured the Shop & Play® line instead of visually grouping the Shop & Play® products with its “Toys.” Pl.’s Br. at Exs. 7–8. But that the product was not advertised as a pure “toy” does not preclude classification under HTSUS 9503. *See Springs Creative*, 2013 WL 4307857, at *9. Indeed, Infantino does not contend that the Funny Farmer is a toy in its entirety.

Gone shopping? **Shop & Play™** can make your errands more rewarding for baby and more relaxing for you. **At home** Shop & Play™ spreads out to surround baby with a world of fun things to discover. **At the store**, its padded, wraparound design **transforms any shopping cart** into a **clean, secure and comfortable activity center** for baby to keep on playing and learning.

Pl.'s Br. at Ex. 1 (emphasis in original, in the form of words offset in different font colors). The back cover also contains a picture of the Funny Farmer laid flat with arrows pointing to and describing, *inter alia*, “[r]oomy storage pockets,” protective leg flaps, a “cozy headrest for baby,” and “[f]ive removable toys that rattle, crinkle and squeak!” *Id.*

Collectively, the packaging supports classification as a toy. The court acknowledges that the packaging extols the utilitarian features of the Funny Farmer when used in a shopping cart. But Infantino’s emphasis on the Funny Farmer’s shopping cart use was not intended to downplay the product’s additional use as a traditional play mat. Rather, Infantino chose to highlight Funny Farmer’s more novel use instead of its familiar use. *See* Pl.’s Br. at Decl. of Wendy McLean ¶ 12. Furthermore, and most importantly, the *uniform* theme throughout the packaging is not the product’s ability to keep a child comfortable, clean, or secure in a cart; it is that the product is uniquely situated to keep children entertained both at home and on-the-go. While only a portion of the good’s packaging emphasizes the Funny Farmer’s shopping-cart use, the entirety of the packaging highlights the Funny Farmer’s amusing activity elements (which do not vary based on use in a cart or on the floor).

Finally, the Funny Farmer’s physical characteristics support *prima facie* classification as a toy. An examination of the Funny Farmer confirms that it is a “configured shopping cart seat cover or insert” that is visually similar to a traditional play mat and that has been “specifically adapted to be reconfigured into a play mat for an infant or toddler.” *Compare* Pl.’s Br. at Ex. 1, *with* Def.’s Br. at Ex. E at 2. But regardless of whether the Funny Farmer is used in a shopping cart or on the floor, the item contains many features that are obviously

amusing to small children. *See* Pl.’s Br. at Ex. 1.⁷ The activity side of the Funny Farmer displays multiple bright colors and is farm-themed, consisting of graphics of food items (such as watermelon slices, eggs, cheese, peas, carrots, and strawberries), barnyard animals (such as rabbits, cows, chickens, and pigs), and farmers (both male and female, wearing overalls and straw hats). *See id.* There are also several removable cloth toys attached to the Funny Farmer. *See id.*; Def.’s Br. 4 (referring to the items as toys). These toys dangle in front of the child when seated in a shopping cart and lie flat on the ground when used as a play mat.

Three of the toys make crinkling sounds when squeezed—(1) a stuffed red tomato; (2) a fabric square that contains a drawing of a cow along with the word “moo!” on one side and a cheese wedge on the other side; and (3) a fabric square that contains a drawing of a chicken along with the words “cluck cluck!” on one side and a cooked egg on the other side. Another toy, a stuffed cloth milk “carton,” rattles when shaken. Lastly, there is a “book” that opens to a graphic of a smiling baby along with the phrase “I see you” on one side and a mirror on the other. The front cover of the “book” contains graphics of a female and male farmer along with the words “funny farmers!” and the back cover contains a graphic of a smiling baby waving along with the words “bye-bye!” The Funny Farmer also features one sewn-in toy, a cloth basket, that sits upright on the shopping-cart handle when the Funny Farmer is used in a cart. The basket is intended to allow children to mimic the actions of their parent in a shopping cart by moving the detachable toys (the tomato, the milk carton, etc.) in and out of the basket. *See* Pl.’s Br. at Decl. of Wendy McLean ¶ 5 & Ex. 1.

Though the Funny Farmer offers much amusement value, the product also serves a utilitarian purpose as a shopping-cart insert and contains features exclusively geared towards that use. For instance, the Funny Farmer contains leg flaps that may be secured by Velcro when used solely as a play mat. *See id.* at Decl. of Wendy McLean ¶ 10 & Ex. 1; Def.’s Br. at 3–4. The Funny Farmer also has a removable waist belt that secures a child inside a shopping cart and pockets

⁷ The court need not address the parties’ arguments related to the admissibility of a publication by the U.S. Consumer Products Safety Commission (“CPSC”) (appended to Infantino’s moving brief as Exhibit 13) identifying various toy characteristics that are amusing to young children. The Government does not seriously dispute that portions of the Funny Farmer are stimulating and amusing to young children and indeed refers to the items attached to the mat as “toys” in its briefing. *See* Def.’s Br. 4. The amusement/play value of the Funny Farmer is apparent from a simple physical examination of the merchandise, and reliance on the CPSC document is unnecessary.

intended to store items for parents while shopping. *See* Def.'s Br. at 3–4. Lastly, the Funny Farmer contains a removable, decorative bolster pillow that supports a child's back when used in a shopping cart (and that serves to prop up a child engaged in tummy-time play). *Id.*

Even so, many goods that have been classified as toys had *some* utilitarian value: for instance, traditional play mats, inflatable floats, and play tents. *See Ero Indus. v. United States*, 24 CIT 1175, 1180–84, 118 F. Supp. 2d 1356, 1360–63 (2000) (classifying play tent with licensed graphics of children's characters as a toy even though it provided some utility as a tented play structure); *Ideal Toy Corp. v. United States*, 78 Cust. Ct. 28, 34, C.D. 4688 (1977) (upholding classification of a brightly-colored, themed inflatable float as a toy); Pl.'s Br. at Ex. 12 (compiling CBP rulings classifying play mats and play gyms as toys); *see also Springs Creative*, 2013 WL 4307857, at *9 (classifying a craft blanket kit as a toy notwithstanding its utilitarian value as a blanket). While the court acknowledges that the Funny Farmer has more utilitarian value than a pure play mat, it also lacks certain features detracting from its overall utility as a shopping-cart insert. For instance, the Funny Farmer does not contain additional padding where the child sits or near areas of the cart with which the child would come into contact, thus detracting from the product's use for comfort. *See* Pl.'s Br. 7–8 & Ex. 1. The Funny Farmer also does not cover the sides of the cart, thus reducing the overall utility of the product in keeping the child clean and germ-free. *Id.* Furthermore, the Funny Farmer is not a particularly useful means of safely securing a child in a shopping cart, as the waist belt “is not intended to prevent children from standing up in or climbing/falling out of a shopping cart.” Pl.'s Br. at Ex. 1; *see also Ideal Toy*, 78 Cust. Ct. at 34 (finding that, given the play float's possibility of overturning, the prime motivation of a parent purchasing a play float is to amuse the child and not to offer safe support in water). Lastly, the Funny Farmer cannot even be used in a shopping cart until a child can sit upright and has value only as a play mat for the first months of a child's life. *See* Pl.'s Br. at Decl. of Wendy McLean ¶ 16. As such, the Funny Farmer's utilitarian value cannot be said to outweigh its amusement value, and the product is *prima facie* classifiable as a toy.

III. Those Portions of the Funny Farmer that Impart the Product's “Essential Character” Are Classifiable under HTSUS Heading 9503

Having concluded that the Funny Farmer is *prima facie* classifiable under two headings (HTSUS headings 9404 and 9503), the court must next apply GRI 3. Although GRI 3(a) would normally provide for the Funny Farmer to be classified under the heading that “provides

the most specific description,” that provision does not apply “when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods.” In such a circumstance, GRI 3(b) applies instead, and provides that the goods at issue “shall be classified as if they consisted of the material or component which gives them their essential character.” See, e.g., *Alcan Food Packaging*, 771 F.3d at 1364.

The court holds that neither HTSUS heading 9404 nor heading 9503 describe the Funny Farmer in full, and that the portions of the Funny Farmer that impart it with its “essential character” are properly classified under HTSUS heading 9503. First, heading 9404 cannot fully describe the Funny Farmer. That heading covers articles of bedding and the like; it clearly would not cover, for example, the plush toys that can be detached from the Funny Farmer.⁸ As for heading 9503, no party disputes that it describes the Funny Farmer only in part. See Pl.’s Reply Br. 13–14. Its detachable seatbelt and backside storage pockets, which serve no amusement purpose at all but are strictly utilitarian, make this clear. Def.’s Br. 18–19. Therefore, both heading 9404 and heading 9503 describe only part of the Funny Farmer.

This being the case, the court’s mandate under GRI 3(b) is to decide which of the two headings covers those parts of the Funny Farmer that impart it with its “essential character.” This decision is informed by the Explanatory Note to GRI 3(b):

The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the good.

This note suggests that a close examination of the Funny Farmer itself is most helpful in determining which of its constituent parts

⁸ Because the court holds that HTSUS heading 9404 does not “wholly” cover the Funny Farmer, it need not address those of the Government’s arguments premised on the notion that heading 9404 is the *only* heading to wholly cover the product. See Def.’s Br. 18–19. The Government does not directly explain why it believes heading 9404 wholly covers the Funny Farmer: Rather, the Government simply claims that the Funny Farmer is *prima facie* classifiable under 9404 despite its attached toys and the like, and then asserts that the product is wholly covered by 9404. See *id.* at 17–19. But, in order for GRIs 1 and 3 to make any sense, *prima facie* and whole coverage must be discrete concepts. Otherwise, any product *prima facie* classifiable under at least one tariff heading pursuant to GRI 1 would be immune from composite classification under GRI 3(b). That would render GRI 3(b) incapable of fulfilling its purpose: to act as a tiebreaker when a good is *prima facie* classifiable under more than one tariff heading.

imparts its essential character. *See also Simod Am. Corp. v. United States*, 872 F.2d 1572, 1578 (“[T]he merchandise itself is often a potent witness in classification cases.”)

Upon such an examination, the court holds that the Funny Farmer’s essential character is imparted by its toy components. First, per the Explanatory Note, the “bulk” of the Funny Farmer’s components are classifiable under 9503: The detachable toys are toys by their own terms, and the play mat would be classifiable as a toy were it not convertible into a cart insert. *See* Pl.’s Br. at Ex. 12 (compiling CBP rulings classifying play mats and play gyms as toys); *see also Springs Creative*, 2013 WL 4307857, at *9 (classifying a craft blanket kit as a toy notwithstanding its utilitarian value as a blanket). The fact that most of the items that make up the Funny Farmer are toys suggests that the entire good is a toy.

Second, the Funny Farmer’s packaging and pricing suggest that it is a toy. The packaging, as already noted, uniformly touts the Funny Farmer’s benefits as a toy. Pl.’s Br. at Decl. of Wendy McLean ¶ 13 & Ex. 1. By so doing, the packaging suggests that the Funny Farmer is essentially a toy, and that its cart-insert function is an auxiliary use. Similarly, the Funny Farmer is priced the same as Infantino’s other play mats (which, as discussed, would be classified as toys). *See id.* at Decl. of Wendy McLean ¶ 20 & Ex. 2. This too indicates that the Funny Farmer is a toy with cart-insert features. Thus, because the Funny Farmer’s packaging and pricing suggest that it is a toy, and also because the bulk of the product’s components would be so classifiable, the court holds that entire good is classifiable under heading 9503.

CONCLUSION

Because the Funny Farmer is classifiable as a toy under HTSUS 9503.00.00, Customs incorrectly liquidated the entries associated with Protest No. 2704–09–101681 at a six percent *ad valorem* duty rate under HTSUS 9404.90.20. Accordingly, for reasons discussed above, Infantino’s motion for summary judgment is granted and the Government’s cross-motion for summary judgment is denied. Judgment will enter accordingly.

Dated: December 24, 2014
New York, New York

/s/ Richard W. Goldberg

RICHARD W. GOLDBERG

Slip Op. 14–156

JTEKT CORPORATION AND KOYO CORPORATION OF U.S.A., Plaintiffs, v.
UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-
Intervenor.

Before: Timothy C. Stanceu, Chief Judge
Consol. Court No. 07–00377

[Affirming a remand redetermination issued by the International Trade Administration, U.S. Department of Commerce, in litigation arising from administrative reviews of antidumping duty orders on ball bearings and parts thereof]

Dated: December 24, 2014

Neil R. Ellis and *Dave M. Wharwood*, Sidley Austin, LLP, of Washington, D.C., for plaintiffs JTEKT Corp and Koyo Corp of U.S.A.

Diane A. MacDonald, Baker & McKenzie, LLP, of Chicago, IL, for plaintiffs NTN Bower Corporation, NTN Corp., NTN Bearing Corp. of America, NTN-BCA Corp., NTN Driveshaft, Inc., and American NTN Bearing Manufacturing Corp. With her on the brief were *Kevin M. O'Brien* and *Christine M. Streatfeild*.

David A. Riggle, W.L. Gore & Associates, of Newark, DE, for plaintiff Asahi Seiko Co., Ltd.

Kevin M. O'Brien, Baker & McKenzie, LLP, of Washington, D.C., for plaintiffs Nippon Pillow Block Co. Ltd. and FYH Bearing Units USA, Inc.

Alexander H. Schaefer, Crowell & Moring, LLP, of Washington, D.C., for plaintiffs NSK Ltd., NSK Corp., and NSK Precision America.

Alexander H. Schaefer and *Daniel Cannistra*, Crowell & Moring, LLP, of Washington, D.C., for plaintiffs Aisin Seiki Co., Ltd. and Aisin Holdings of America, Inc.

Greyson L. Bryan, O'Melveny & Myers, LLP, of Washington, D.C., for plaintiffs Nachi America, Inc., Nachi Fujikoshi Corp., and Nachi Technology, Inc.

Claudia Burke, Assistant Director, *L. Misha Preheim*, Senior Trial Counsel, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, of Washington, D.C., for defendant United States. With them on the brief were *Jeanne E. Davidson*, Director, *Stuart F. Delery*, Assistant Attorney General. Of counsel on the brief were *Shana Hofstetter*, Attorney, and *Daniel J. Calhoun*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce.

Geert De Prest, *Lane S. Hurewitz*, and *Terence P. Stewart*, Stewart and Stewart, of Washington, D.C., for plaintiff and defendant-intervenor the Timken Company.

OPINION

Stanceu, Chief Judge:

In this consolidated action,¹ several plaintiffs contested various aspects of a determination (“Final Results”) issued by the Interna-

¹ Seven actions are consolidated under Consolidated Court Number 07–00377: NSK Ltd. v. United States (Ct. No. 07–00387); Aisin Seiki Co., Ltd. v. United States (Ct. No. 07–00392); NTN Bearing Corp. of America v. United States (Ct. No. 07–00395); Nippon Pillow Block Co. Ltd. v. United States (Ct. No. 07–00398); Asahi Seiko Co., Ltd. v. United States (Ct. No. 07–00409); Nachi Fujikoshi Corp. v. United States (Ct. No. 07–00412). Order (July 29, 2008), ECF No. 26 (consolidating cases).

tional Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”) to conclude the seventeenth administrative reviews of antidumping duty orders on ball bearings and parts thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom (“subject merchandise”). See *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Admin. Reviews and Rescission of Review in Part*, 72 Fed. Reg. 58,053 (Int’l Trade Admin. Oct. 12, 2007) (“*Final Results*”).

Before the court is the second redetermination upon remand (“Second Remand Redetermination”) that Commerce submitted in response to the court’s opinion and order in *JTEKT Corp. v. United States*, 35 CIT __, 768 F. Supp. 2d 1333 (2011) (“*JTEKT I*”). *Final Second Remand Determination* (Sept. 19, 2011), ECF No. 147 (“*Second Remand Redetermination*”). For the reasons presented herein, the court affirms the Second Remand Redetermination.

I. BACKGROUND

When described together with their affiliates, there are seven plaintiffs in this consolidated action, all of which contested various aspects of the Final Results involving the antidumping duty order on ball bearings and parts from Japan (the “Order”). The seven plaintiffs are: (1) Asahi Seiko Co., Ltd. (“Asahi”); (2) Aisin Seiki Co., Ltd. and Aisin Holdings of America, Inc. (collectively, “Aisin”); (3) JTEKT Corp. and Koyo Corp. of U.S.A. (collectively, “JTEKT”); (4) Nachi Technology, Inc., Nachi-Fujikoshi Corp., and Nachi America, Inc. (collectively, “Nachi”); (5) FYH Bearing Units USA, Inc. and Nippon Pillow Block Co. Ltd. (collectively, “NPB”); (6) American NTN Bearing Manufacturing Corp., NTN Bearing Corp. of America, NTN Bower Corp., NTN Corp., NTN Driveshaft, Inc., and NTN-BCA Corp. (collectively, “NTN”); and (7) NSK Corp., NSK Ltd., and NSK Precision America, Inc. (collectively, “NSK”). *JTEKT I*, 35 CIT __, 768 F. Supp. 2d at 1338–39. The seventeenth administrative review of the Order covers entries of subject merchandise made during the period of May 1, 2005 through April 30, 2006 (“POR” or “period of review”). *Final Results*, 72 Fed. Reg. at 58,053.

The detailed background of plaintiffs’ various challenges in this case is provided in the court’s prior opinions and is supplemented herein. See Order 1–3 (Sept. 3, 2009), ECF No. 100 (first remand order); *JTEKT I*, 35 CIT __, 768 F. Supp. 2d at 1339–41 (second remand order); *JTEKT Corp. v. United States*, 35 CIT __, Slip Op. 11–86 (July 20, 2011) (denying reconsideration) (“*JTEKT II*”); *JTEKT Corp. v. United States*, 36 CIT __, Slip Op. 12–73 (June 4, 2012) (stay

order) (“*JTEKT III*”).

On October 12, 2007, Commerce issued the Final Results and an accompanying decision memorandum (“Decision Memorandum”). *Final Results*, 72 Fed. Reg. at 58,054–55; *Issues & Decision Mem. for the Antidumping Duty Admin. Reviews of Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, Singapore, & the United Kingdom for the Period of Review May 1, 2005, through April 30, 2006* (Oct. 12, 2007), available at <http://enforcement.trade.gov/frn/summary/MULTIPLE/E7–20151–1.pdf> (“*Decision Mem.*”) (last visited Dec. 18, 2014). The Final Results assigned the following anti-dumping duty margins to plaintiffs: Aisin, 6.15%; Asahi, 1.28%; JTEKT, 15.01%; Nachi, 11.46%; NPB, 26.89%; NSK, 3.66%; and NTN, 7.76%. *Final Results*, 72 Fed. Reg. at 58,054.

A. *The First Redetermination in Response to a Remand Order on a Claim by Aisin*

On September 3, 2009, upon defendant’s consent motion for a voluntary remand to address a claim by Aisin, the court issued a narrow first remand order requiring Commerce to reconsider the methodology it used in the Final Results to calculate constructed export price (“CEP”) for sales of Aisin’s merchandise. Order 1–3, ECF No. 100 (“first remand order”). Commerce filed the results of this remand order (“First Remand Redetermination”) on December 16, 2009, in which it changed its methodology for determining CEP and revised Aisin’s margin from 6.15% to 1.13%. *Redetermination Pursuant to Remand 1*, ECF No. 105. In *JTEKT I*, issued on May 5, 2011, the court affirmed the Department’s resolution of Aisin’s claim concerning CEP, to which no party had objected. *JTEKT I*, 35 CIT at ___, 768 F. Supp. 2d at 1363–64.

B. *The Court’s Second Remand Order*

The court’s opinion and order in *JTEKT I* also addressed various challenges not adjudicated in the limited first remand order, as discussed below.

1. *The Order to Reconsider the Use of the “Zeroing” Methodology*

The court’s opinion and order in *JTEKT I* included, *inter alia*, a second remand order on the Department’s decision in the Final Results to apply the “zeroing” methodology, under which Commerce assigned to U.S. sales made above normal value a dumping margin of zero, instead of a negative margin, when calculating weighted-

average dumping margins. *Id.* at ___, 768 F. Supp. 2d at 1364. The court considered a remand on the zeroing question necessary because of an intervening decision of the Court of Appeals for the Federal Circuit (“Court of Appeals”), *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011). *Id.* at ___, 768 F. Supp. 2d at 1342–43. The court ordered Commerce to modify its decision to apply the zeroing methodology or, alternatively, to provide an explanation of the Department’s inconsistent interpretation of 19 U.S.C. § 1677(35) with respect to antidumping duty investigations and administrative reviews.² *Id.* at ___, 768 F. Supp. 2d at 1343. The court subsequently denied a motion by defendant for reconsideration of the court’s directive in *JTEKT I* concerning zeroing. *JTEKT II*, 35 CIT at ___, Slip Op. 11–86 at 4.

2. *Rejection of Claims Challenging the Use of a Revised Model-Match Methodology*

Commerce uses a “model-match” methodology to identify identical and similar merchandise for the purpose of conducting comparisons between the U.S. price of subject merchandise and the price of comparable merchandise in the comparison market. *See JTEKT I*, 35 CIT at ___, 768 F. Supp. 2d at 1343–44 (citing 19 U.S.C. §§ 1677b, 1677(16)(A)-(C)). In *JTEKT I*, the court considered claims by JTEKT, Nachi, NBP, NSK, and NTN that challenged the Department’s use of a ball bearing model-match methodology in the seventeenth administrative reviews that differed from the methodology Commerce used in the first fourteen administrative reviews of the ball bearing antidumping duty orders. *Id.* at ___, 768 F. Supp. 2d at 1345. The court rejected these claims, finding lawful the Department’s decision to adopt the particular model-match methodology used in the seventeenth administrative reviews.³ *Id.* at ___, 768 F. Supp. 2d at 1345–50.

² Unless otherwise indicated, all statutory citations herein are to the 2006 edition of the U.S. Code and all regulatory citations herein are to the 2007 edition of the Code of Federal Regulations.

³ The court reasoned that the Court of Appeals for the Federal Circuit (“Court of Appeals”) had previously rejected arguments similar to those that plaintiffs advanced in this case, noting that 19 U.S.C. § 1677(16) “is silent with respect to the methodology that Commerce must use to match a U.S. product with a suitable home-market product.” *JTEKT Corp. v. United States*, 35 CIT ___, ___, 768 F. Supp. 2d 1333, 1346 (2011) (“*JTEKT I*”) (citing *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1379 (Fed. Cir. 2008) (quoting *Koyo Seiko Co. v. United States*, 66 F.3d 1204, 1209 (Fed. Cir. 1995)). After the court issued *JTEKT I*, the Court of Appeals sustained the Department’s application of the revised model-match methodology in the eighteenth administrative reviews of the antidumping duty orders on ball bearings, stating that “Commerce has provided ample justification for the use of this method and it is therefore reasonable.” *JTEKT Corp. v. United States*, 642 F.3d 1378, 1381 (Fed. Cir. 2011).

3. *The Court's Consideration of Claims Challenging Individual Model Matches*

The court in *JTEKT I* also considered claims of JTEKT, NPB, NSK, and Asahi that the Department's model-match methodology produced certain individual matches that did not satisfy the statutory criteria for similar merchandise as set forth in 19 U.S.C. § 1677(16). *Id.* at ___, 768 F. Supp. 2d at 1350. The court rejected these claims other than one claim made by JTEKT, as discussed below.

a. *The Order Concerning an Individual Match Challenged by JTEKT*

JTEKT identified fourteen ball bearing matches it claimed to be impermissible under the statute. *Id.* In *JTEKT I*, the court denied relief on all but one of the fourteen claims. *Id.* at ___, 768 F. Supp. 2d at 1351–53. The court issued a remand with respect to one match (JTEKT's "third match"), noting that Commerce had rejected as untimely certain information that raised a factual issue as to whether that match resulted from a misapplication of the model-match methodology and ordering Commerce to reconsider that information. *Id.* at ___, 768 F. Supp. 2d at 1352–53, 1364.

b. *Rejection of Claims by NPB, NSK, and Asahi that Individual Matches Were Unlawful*

NPB claimed that Commerce impermissibly matched housed bearings to unhoused bearings and bearings with collars to bearings without collars. *JTEKT I*, 35 CIT at ___, 768 F. Supp. 2d at 1353–55. The court dismissed these claims in *JTEKT I* for failure to exhaust administrative remedies, noting that NPB had not raised the issue of these matches in the case brief it filed during the review. *Id.*

In *JTEKT I*, the court also rejected a claim by NSK that the Department's application of the model-match methodology impermissibly produced egregiously dissimilar matches. *Id.* at ___, 768 F. Supp. 2d at 1355–56. The court concluded that NSK had not substantiated its claim with specific record evidence that such objectionable matches of its merchandise actually occurred. *Id.* The court reasoned that "NSK's argument reduces to a contention that the new model-match methodology theoretically could result in matching models under the new methodology that would have been rejected under the old methodology," *id.* at ___, 768 F. Supp. 2d at 1356, a contention the court found insufficient as a basis for overturning the Department's decisions, *id.*

Asahi claimed that the Department's matching of its "standard bearings" sold in the United States with its "high temperature bear-

ings” sold in Japan was inconsistent with 19 U.S.C. § 1677(16)(B). *Id.* The court denied relief on this claim on the basis that the Department’s model-match methodology has a mechanism for adjusting for differences in the variable cost of manufacturing and for rejecting matches in which that adjustment would be too large. *Id.* at ___, 768 F. Supp. 2d at 1356–57. Noting that Asahi had proposed in its case brief to Commerce that the model-match methodology should be modified to address specifically the differences between standard and high-temperature bearings, the court decided that Commerce did not exceed its discretion in rejecting Asahi’s proposal because the proposal was made at a late stage of the review proceeding. *Id.* at ___, 768 F. Supp. 2d at 1357.

4. *The Order for Consideration of NPB’s Proposed Changes to the Model-Match Methodology*

During the review, NPB proposed substantive changes to the model-match methodology suggesting that Commerce incorporate the existence of various physical characteristics of ball bearings that the methodology did not address specifically. *Id.* Commerce rejected this proposal for the same reason it rejected the proposal by Asahi: it considered the proposal to have been made in the case brief and, therefore, too late in the review to merit consideration. *Id.* at ___, 768 F. Supp. 2d at 1357–58. In *JTEKT I*, the court determined that the record contradicted the Department’s finding that NBP had first made the proposal in a case brief. *Id.* at ___, 768 F. Supp. 2d at 1358. The court noted record evidence showing that NPB made the proposal in a response to a supplemental questionnaire, six months prior to publication of the preliminary results of the review. *Id.* The court also observed that “Commerce never made a specific finding that it could not consider the merits of NPB’s proposal for additional physical characteristics . . . due to the date on which the supplemental questionnaire response was filed.” *Id.* The court, therefore, ordered Commerce to reconsider the decision to reject NPB’s proposal. *Id.* at ___, 768 F. Supp. 2d at 1358, 1364.

5. *The Order on Bearings Claimed by NTN to Fall Within More than One Design Type*

As discussed later in this Opinion, the model-match methodology matches bearings according to various characteristics, including specified “design types” of ball bearings. In considering various claims by NTN that the model-match methodology should consider incorporating additional design types, the court concluded that Commerce had not addressed one of the issues raised by NTN, specifically,

how the model-match methodology resolved the problem of bearings that could be classified within more than one of the specified design types. *Id.* at ___, 768 F. Supp. 2d at 1360. The court directed Commerce to resolve this issue upon remand. *Id.* at ___, 768 F. Supp. 2d at 1360, 1364.

6. *Rejection of NSK's Claim Pertaining to Certain Employee Benefit Expenses*

NSK claimed that Commerce, when calculating the constructed export price of its merchandise, improperly deducted certain employee benefit expenses that NSK incurred in the United States on behalf of employees who are Japanese nationals. *Id.* at ___, 768 F. Supp. 2d at 1360–62. Denying relief on this claim, the court affirmed the Department's findings that the employees received the benefits and were supporting the U.S. sales to unaffiliated purchasers; it also affirmed the Department's conclusion that the expenses qualified for deduction as “expenses associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser” within the meaning of the Department's regulation. *Id.* at ___, 768 F. Supp. 2d at 1361 (citing 19 C.F.R. § 351.402(b)).

C. *The Department's Second Remand Redetermination*

Commerce filed the Second Remand Redetermination on September 19, 2011, *Second Remand Redetermination 1*, and NPB, JTEKT, and NTN each filed comments thereon on October 19, 2011, Pls.' Nippon Pillow Block Co. Ltd. & FYH Bearing Units USA, Inc. Comments on Second Remand Determination, ECF No. 153 (“NPB's Comments”); Comments of Pls. JTEKT Corp. & Koyo Corp. of U.S.A. on Second Remand Determination, ECF No. 154 (“JTEKT's Comments”); Pls.' Comments on the Dep't of Commerce's Second Remand Determination, ECF No. 155 (“NTN's Comments”). Timken filed rebuttal comments on December 14, 2011, Timken's Rebuttal Comments in Support of Commerce's Remand Determination, ECF No. 160 (“Timken's Comments”), and defendant filed a reply on December 22, 2011, Def.'s Reply to Pls.' Comments upon the Second Remand Redetermination, ECF No. 165 (“Def.'s Reply”). In the Second Remand Redetermination, Commerce did not recalculate the margins for any respondent. *Second Remand Redetermination 2*.

D. *The Court's Order Staying these Proceedings*

Before reviewing the Second Remand Redetermination, the court, upon a motion by several plaintiffs, stayed this case until thirty days

after the final resolution of all appellate review proceedings in *Union Steel v. United States*, CAFC Court No. 2012–1248, which addressed the question of whether it was permissible for Commerce to use its zeroing methodology in administrative reviews of antidumping duty orders. See *JTEKT III*, 36 CIT at __, Slip Op. 12–73 at 7. The Court of Appeals issued an opinion in *Union Steel v. United States*, 713 F.3d 1101 (Fed. Cir. 2013) (“*Union Steel*”), on April 16, 2013 and a mandate on June 10, 2013.

On August 15, 2013, several plaintiffs asked the court to stay further proceedings in this case until the resolution of all appellate proceedings in *NSK Corp. v. U.S. Int’l Trade Comm’n*, 716 F.3d 1352 (Fed. Cir. 2013), a request the court later denied as moot. Order (June 5, 2014), ECF No. 182.

II. DISCUSSION

The court exercises subject matter jurisdiction over this action pursuant to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c). The court must “hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” See Tariff Act of 1930 (“Tariff Act”) § 516A, 19 U.S.C. § 1516a(b)(1).

A. *The Court Affirms the Department’s Application of the Zeroing Methodology*

In an administrative review of an antidumping duty order, Commerce determines both the normal value and the export price (“EP”), or, if the EP cannot be determined, constructed export price (“CEP”), for the subject merchandise under review. Tariff Act § 751, 19 U.S.C. § 1675(a)(2)(A)(i). Commerce then determines an antidumping duty margin by calculating the amount by which the normal value exceeds the EP or CEP. *Id.* §§ 1675(a)(2)(A)(ii), 1677(35)(A). When Commerce determines an antidumping duty margin according to the zeroing methodology, as it did in the seventeenth administrative reviews, it assigns a value of zero, rather than a negative margin, where the normal value is less than the EP or CEP. *Union Steel*, 713 F.3d at 1104. Commerce then aggregates these margins to calculate a weighted-average dumping margin. 19 U.S.C. § 1677(35)(B).

JTEKT, NPB, NTN, Aisin, and Nachi challenged the Department’s use of zeroing in the seventeenth administrative reviews. *JTEKT I*, 35 CIT at __, 768 F. Supp. 2d at 1341–43. As discussed previously, *JTEKT I* instructed Commerce to either reconsider the use of zeroing in calculating the weighted-average dumping margins or “provide an

explanation for its express or implied construing of 19 U.S.C. § 1677(35) inconsistently with respect to antidumping duty investigations and administrative reviews.” *Id.* at ___, 768 F. Supp. 2d at 1364. On remand, Commerce did not modify its decision to apply zeroing and did not recalculate the antidumping margins for those plaintiffs challenging zeroing. *Second Remand Redetermination 2*. Commerce provided an explanation for its continued application of zeroing in administrative reviews while ceasing to apply zeroing in antidumping investigations. *Id.* at 4–14. In comments on the Second Remand Redetermination, various parties found fault with the Department’s explanation for the continued application of zeroing in administrative reviews. *See* JTEKT Comments 9–11; NTN Comments 3–7; NPB’s Comments 5–6.

After the parties to this action submitted comments on the Second Remand Redetermination, the Court of Appeals issued its decision in *Union Steel*. In *Union Steel*, the Court of Appeals affirmed the Department’s use of zeroing in circumstances that the court considers analogous to those presented by this case. *See Union Steel*, 713 F.3d at 1103. Upon considering the Department’s explanation for its use of zeroing and the opinion of the Court of Appeals in *Union Steel*, the court concludes that *Union Steel* is dispositive of the zeroing claims at issue in this action and sustains the Department’s use of zeroing in the Second Remand Redetermination.

B. Remaining Claims Involving Application of the Model-Match Methodology

To determine an antidumping margin, Commerce compares the U.S. price of the subject merchandise with the price of comparable merchandise (the “foreign like product”) in the “home” market (i.e., the actual home market or another comparison market). 19 U.S.C. § 1677b. In identifying a foreign like product, Commerce attempts to match U.S. sales of the subject merchandise with home market sales of identical merchandise. 19 U.S.C. § 1677(16)(A). Where Commerce is unable to identify home market sales of identical merchandise, Commerce attempts to match a U.S. sale of subject merchandise with a home market sale of similar merchandise. *See id.* § 1677(16)(B)-(C).

Commerce first applied its revised model-match methodology in the fifteenth administrative reviews of the ball bearing antidumping duty orders.⁴ *JTEKT I*, 35 CIT at ___, 768 F. Supp. 2d at 1344. Under

⁴ In the first fourteen administrative reviews of the antidumping duty orders, the U.S. Department of Commerce (“Commerce” or the “Department”) identified similar merchandise using what was termed the “family” model-match methodology, according to which Commerce grouped ball bearings based on exact matches of eight specific characteristics. *JTEKT I*, 35 CIT at ___, 768 F. Supp. 2d at 1344.

the revised methodology, Commerce matches a ball bearing model sold in the United States, i.e., a “subject” ball bearing, with one sold in the home market only if the two bearings are identical with respect to the following four physical characteristics: (1) load direction, (2) number of rows of rolling elements, (3) precision rating, and (4) ball bearing “design type.” *Id.* As applied in the seventeenth reviews, the model-match methodology recognized the following ball bearing design types: angular contact, self-aligning, deep groove, integral shaft, thrust ball, housed, and insert. *Id.* For pairs of bearings that are identical with respect to all four physical characteristics, Commerce examines four quantitative characteristics: (1) load rating, (2) outer diameter, (3) inner diameter, and (4) width. *Id.* Commerce makes the match only if the sum of the individual deviations for these four quantitative characteristics does not exceed forty percent. *Id.* Commerce also applies a “difference-in-merchandise adjustment” (“DIFMER” adjustment), under which Commerce makes a price adjustment to account for any difference in the variable cost of manufacturing, up to twenty percent. *Id.* Commerce does not make the match if the DIFMER adjustment would exceed twenty percent. *Id.*

1. *The Court Affirms the Department’s Rejection of NPB’s Proposal to Incorporate Additional Physical Characteristics Into the Model-Match Methodology*

As discussed previously, NBP proposed a modification to the model-match methodology that Commerce rejected, erroneously, on the ground that NPB first made the proposal in a case brief. *JTEKT I*, 35 CIT at __, 768 F. Supp. 2d at 1357. NPB’s proposal was that “at a minimum” Commerce should incorporate into the methodology certain additional physical characteristics, namely, types of seals (e.g., standard or heat-proof), types of grease (e.g., standard or heat-proof), ceramic versus non-ceramic, and diameters of a second inner dimension, second outer dimension, second width dimension, and third width dimension. *Id.* Before the court, NPB argued that the Department’s decision not to incorporate the additional physical characteristics resulted in the mismatch of standard bearings that NPB sold in the United States to high temperature bearings and other specialized bearings that NPB sold in the home market of Japan. *Id.*

On remand, Commerce acknowledged that it made a factual error as to the timing of NPB’s proposal but nevertheless maintained that it acted appropriately in declining to consider that proposal during the review. *Second Remand Redetermination* 30. Commerce explained that “the timing of NPB’s proposal,” *id.*, which was five

months into the review, “still presents difficulty,” *id.*, and that “we did not have the time to give reasonable consideration to NPB’s proposal when it made the proposal in its response to our supplemental questionnaire,” *id.* at 35. Commerce noted that in the final results of the prior administrative review it had instructed parties that proposals for modifications to the model-match methodology, including proposals to incorporate additional physical characteristics, must be made at the beginning of the administrative review period. *Id.* at 30 (citing *Issues & Decision Mem. for the Antidumping Duty Admin. Reviews of Ball Bearings & Parts Thereof from France, Germany, Italy, Japan, & the United Kingdom for the Period of Review May 1, 2004, through April 30, 2005*, at 23–24 (July 14, 2006), available at <http://enforcement.trade.gov/frn/summary/MULTIPLE/E6-111231.pdf> (“*Decision Mem. AR 16*”) (last visited Dec. 18, 2014). Commerce recounted in the Second Remand Redetermination that NPB submitted its proposal in December 2006, more than five months after Commerce initiated the administrative review in July 2006 and after Commerce first issued questionnaires on July 10, 2006. *Id.* Commerce maintained that adopting NPB’s proposal would have affected the methodology applied to other respondents, requiring Commerce to collect data concerning the additional characteristics from all respondents “by incorporating them into our questionnaire.” *Id.* at 31. Because these data were never collected, Commerce concluded that the record lacked the data from the other respondents that would be needed for implementation of NPB’s proposed physical characteristics. *Id.* at 32.

On the reasoning Commerce has put forth, the court affirms the Department’s decision not to adopt NPB’s proposal to incorporate additional physical characteristics into the model-match methodology. The court is guided by two considerations. First, regarding procedure, while the notice of a deadline provided in a prior review cannot suffice for purposes of the current review, the court does not view the failure of Commerce to provide notice of the deadline at the initiation of the seventeenth review as a sufficient reason to overturn the Department’s decision to reject NPB’s proposal. When viewed solely in the context of the seventeenth review, that decision did not violate any procedural requirement in the statute or the Department’s regulations.⁵ Second, Commerce acted reasonably in light of

⁵ The Department’s regulations, at 19 C.F.R. § 351.301(b)(2), require the submission of new factual information for the final results of an administrative review by “140 days after the last day of the anniversary month, except that factual information requested by the verifying officials from a person normally will be due no later than seven days after the date on which the verification of that person is completed” Nevertheless, a proposal to modify the existing model-match methodology requires more than a submission of new

the time constraints under which it must conduct a review⁶ and the obligations to ensure both consistency and procedural fairness with respect to all parties to the review. Here, the need for consistency supported the Department's reasoning that it could not adopt changes to the physical characteristics used in the methodology unless it were practicable to apply those changes to the ball bearings of all respondents in the review. The record lacked the data with which Commerce could have accomplished this task because NPB made its proposal at a time that did not allow Commerce to distribute to the various respondents initial questionnaires that would solicit the necessary information to adopt NPB's proposal. Additionally, the Department's obligation to ensure procedural fairness required that all interested parties have the opportunity to consider and comment on a proposal for a fundamental change to the methodology.

The court is not persuaded by the objections to the Department's decision that NPB offers in comments on the Second Remand Redetermination. NPB argues that Commerce failed to explain why it did not have sufficient time to consider the proposal, especially in light of the various supplemental questionnaires that Commerce issued after NPB had already submitted the proposal for additional physical characteristics. NPB's Comments 4–5. The court disagrees. Commerce explained why changing the model-match methodology to expand the list of physical characteristics was not practicable unless it could act on a proposal to do so when formulating the initial questionnaires. *Second Remand Redetermination* 30–32. Specifically, Commerce stated that a “necessary part” of any decision to adopt NPB's proposed physical characteristics “would be to ask for comments from all parties to ensure that each of these additional characteristics are appropriate for examination and that the appropriate values be reported for a particular characteristic” *Id.* at 31. Commerce claimed that it “would need the time, beginning from close to the initiation of the review, to solicit and analyze comments from interested parties and to formulate changes to the model-match methodology, if appropriate.”

factual information: a party must request a methodological change as well as submit any new factual information on which that party relies in support of its proposal.

⁶ Section 751(a)(3)(A) of the Tariff Act of 1930, 19 U.S.C. § 1675(a)(3)(A), provides that Commerce shall make a preliminary determination in an administrative review:

[W]ithin 245 days after the last day of the month in which occurs the anniversary of the date of publication of the order . . . , and a final determination . . . within 120 days after the date on which the preliminary determination is published. If it is not practicable to complete the review within the foregoing time, the administering authority may extend that 245-day period to 365 days and may extend that 120-day period to 180 days. The administering authority may extend the time for making a final determination without extending the time for making a preliminary determination, if such final determination is made not later than 300 days after the date on which the preliminary determination is published.

Id. ; see also 19 C.F.R. § 351.213(h).

Id. Moreover, Commerce stated that it would want to consider comments from other interested parties on how to integrate the proposed physical characteristics into the model-match methodology. *Id.* at 37–38. It explained that although it distributed supplemental questionnaires, these later questionnaires “sought clarification and information to correct deficiencies with respect to parties’ responses to questions we had asked previously,” *id.* at 35, and not “information relating to entirely new physical characteristics which we had never required respondents to report previously,” *id.* According to Commerce, requesting information on the additional physical characteristics five months into the administrative proceeding, which likely would require Commerce to issue later supplemental questionnaires to collect any deficient information, would have delayed the administrative review contrary to the deadlines imposed in section 751(a)(3)(A) of the Tariff Act, 19 U.S.C. § 1675(a)(3)(A). *Id.* at 35–36. Commerce noted that it found the need to exercise its authority to extend the deadline for the preliminary results even though it did not request supplementary information from respondents on the additional physical characteristics that are the subject of NPB’s proposal. *Id.* at 35.

NPB makes the related argument that Commerce did not actually need to request supplemental information from the other respondents, asserting that Commerce could have extracted the additional physical characteristics (e.g., greases, added dimensions, etc.) from the abbreviated product codes already provided by the respondents in response to questionnaires. *Second Remand Redetermination* 36. The court rejects this argument based on an explanation Commerce offered in the Second Remand Redetermination, which the court finds reasonable. Commerce explained that it requests that respondents assign a control number to each unique product so that Commerce can match *identical* merchandise based on the assigned control numbers. *Id.* at 37. Commerce acknowledged that “the control numbers should reflect differences in physical characteristics such as seals and shields,” *id.*, but also noted that “we have never asked respondents to report such characteristics as separate variables,” *id.* Commerce explained that using the product codes to identify *similar* merchandise would require Commerce to cross-reference information from the product codes to respondents’ product catalogues in a process that would be “time-consuming and potentially fraught with error.” *Id.*; see also Timken’s Comments 29. Based on these considerations, Commerce concluded that in order for it to consider the additional physi-

cal characteristics in identifying *similar* merchandise, respondents would have to report information concerning these characteristics instead of the Department's deriving these characteristics from control numbers. *Second Remand Redetermination* 37. In view of the detailed explanation in the Second Remand Redetermination, which the court considers reasonable, the court has no grounds to dismiss the Department's concerns.

NPB argues, further, that "there was no need" for it to submit its proposal at the beginning of the seventeenth administrative reviews because, according to NPB, Commerce already had agreed to pursue NPB's proposal in the final results of the sixteenth administrative reviews. NPB's Comments 3. NPB argues that because Commerce issued the final results in the sixteenth reviews after Commerce already had initiated the seventeenth reviews, NPB would have expected that Commerce first sought information on the additional physical design types in supplemental questionnaires. *Id.* According to NPB, "it became apparent that Commerce had retracted from its agreement to consider NPB's proposal," *id.*, only after Commerce issued supplemental questionnaires in the seventeenth reviews, *id.*

Although NPB provides no specific citation of an "agreement" that emerged from the final results of the sixteenth administrative reviews, the court can infer that NPB is describing a passage from the issues and decision memorandum for those reviews (of which the court takes judicial notice). In that passage, Commerce rejected NPB's proposal for additional physical characteristics and explained that NPB's request, made in a case brief after Commerce had issued the preliminary results of that review, had come too late and lacked details as to proposed implementation of the proposal. *See Decision Mem. AR 16* at 23–24. Commerce explained that "[w]e intend to pursue this matter further in subsequent reviews," *Id.* at 24, but the court does not discern in this statement an actual "agreement" to consider NPB's proposal in the next review absent some action by NPB to submit a proposal at the beginning of the review. As defendant points out, the discussion by Commerce in the sixteenth reviews "did not absolve NPB of its responsibility to raise the issue in a timely manner in the subsequent reviews." Def.'s Reply 30. In the seventeenth reviews, Commerce could not have known whether NPB would submit such a proposal until NPB actually did so, in December 2006.

Finally, the court rejects NPB's argument that the Department's decision not to incorporate the additional physical characteristics resulted in the mismatch of standard bearings that NPB sold in the United States to high temperature bearings and other specialized bearings that NPB sold in the home market of Japan. The Depart-

ment's statutory obligation is to ensure that any methodology it applies is consistent with 19 U.S.C. § 1677(16). As the Court of Appeals recognized, "Congress has granted Commerce considerable discretion to fashion the methodology used to determine what constitutes 'foreign like product' under the statute." *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1379 (Fed. Cir. 2008) (citation omitted). In this case, NPB fails to substantiate its claim that the Department's decision not to incorporate the additional characteristics impermissibly mismatched standard bearings that NPB sold in the United States with high temperature bearings and other specialized bearings that NPB sold in Japan. NPB has not demonstrated that the methodology Commerce applied, and specifically the DIFMER adjustment and a DIFMER-based limitation on matches, were inadequate to address the differences between standard and specialized bearings so as to render the matches impermissible under the statutory standard.

2. *The Court Affirms the Department's Decision to Reject NTN's Proposal to Add Design Types to the Model-Match Methodology*

In contesting the Final Results, NTN claimed that the seven bearing design types Commerce used in its methodology (angular contact, self-aligning, deep groove, integral shaft, thrust ball, housed, and insert) were insufficient to allow for variations in NTN's bearings. *JTEKT I*, 35 CIT at __, 768 F. Supp. 2d at 1359. NTN proposed that Commerce add a number of ball bearing design types "that [NTN] used in the normal course of its business" and reported to Commerce during the reviews. *Id.* (citation omitted). Commerce denied this request, explaining that some of the requested design types are "distinguishable due to a single element of difference or an element of difference that is not pertinent," *id.* (citation omitted), and that some of the separate design designations concern product characteristics, such as load direction and rating, "for which Commerce already accounts in the new model-matching methodology," *id.*

Reviewing the Department's decision not to incorporate the additional design types proposed by NTN, the court concluded in *JTEKT I* that in the Final Results Commerce "did not explain how it categorized bearings that could be classified according to more than one design type." *Id.* at __, 768 F. Supp. 2d at 1360 (stating that because "Commerce has failed to address NTN's argument by explaining its treatment of bearings that can fit within two design types, the court will direct Commerce to resolve this issue upon remand.") *Id.* The Court required Commerce, on remand, to "reconsider NTN's proposal

to incorporate into the model-match methodology additional design-type categories and explain its rejection of that proposal with respect to individual bearings described in more than one design type.” *Id.* at ___, 768 F. Supp. 2d at 1364.

On remand, Commerce answered the court’s question regarding bearings classified within more than one design type by concluding that NTN was correct in identifying two design types applied by the model-match methodology—“thrust” ball and “angular contact” ball bearings—for which there was “overlap.” *Second Remand Redetermination* 42. The Department’s response indicates to the court, first, that an overlap between two design types is possible under the methodology and, second, that Commerce did not have in place during the review a procedure for resolving the question of how a respondent is to report bearings falling within more than one design type. The Second Remand Redetermination also concludes that the two design types NTN identified as overlapping did not result in mismatches during the review. *Id.* Commerce explained that a match of two ball bearings would occur only if the bearings share the same four physical characteristics, including design type and load direction, and that the record data of the review showed that differences in load direction prevented any mismatches stemming from the two design types that NTN identified. *Id.*

In its comments on the Second Remand Redetermination, NTN does not dispute the Department’s finding that no actual mismatches resulted during the review due to the differences in load direction that Commerce described. NTN argues, nevertheless, the design types selected by Commerce are unsustainable because Commerce failed to instruct respondents on what to do when reporting a ball bearing that falls under more than one design type. NTN’s Comments 8. According to NTN, the “single example of thrust and angular contact bearings demonstrates the importance of the Court’s directive to examine all of NTN’s reported design types” *Id.* at 8.

The court disagrees with NTN’s argument that the design types Commerce used in the model-match methodology during the review are unsustainable. The overlap between two design types identifies a flaw in the model-match methodology, as design types are intended to describe different classes of ball bearings. Unless these design types are intended to be, and are, mutually exclusive, some difficulties in reporting by respondents and difficulties in administration of the model-match methodology would appear to be inevitable. Nonetheless, on the record of this review, the court must conclude that the flaw NTN has identified is of a conceptual nature. As previously noted, NTN’s comments do not object to the Department’s finding

that the overlap did not result in mismatches during the seventeenth review. Overlaps between design types might pose problems in future reviews, but the court's concern necessarily is limited to the administrative review under consideration, and NTN has not shown during the second remand proceeding that the conceptual flaw rendered the design types unreasonable as applied during the review or adversely affected NTN's margin calculation. *See JTEKT Corp. v. United States*, 642 F.3d 1378, 1382 (Fed. Cir. 2011) ("in order to overturn Commerce's determination of design types, the appellant must show that 'Commerce's choice of design types . . . was unreasonable.'") (citation omitted). In light of the standard of review the court is to apply in adjudicating NTN's claim centering on design types, the court must conclude that NTN has not met the burden of showing that Commerce made an error of fact or law that justifies another remand. Because no actual mismatches resulted from the flaw, the court can identify no purpose to be served by issuing another remand in response to NTN's claim.

3. *The Court Sustains the Department's Third Match Challenged by JTEKT and Grants JTEKT's Motion to Terminate the Preliminary Injunction Affecting JTEKT's Entries*

In *JTEKT I*, the court considered claims by JTEKT alleging that the revised model-match methodology resulted in fourteen specific, impermissible matches. *JTEKT I*, 35 CIT at ___, 768 F. Supp. 2d at 1350–51. The court dismissed JTEKT's claims concerning thirteen of these fourteen matches but required Commerce to reconsider the remaining claim (which involved what was identified as the "third match") after examining factual information that JTEKT had included in a case brief during the administrative proceeding but that Commerce had chosen not to consider after rejecting the information as untimely. *Id.* at ___, 768 F. Supp. 2d at 1351–53, 1364. The court directed a remand after concluding that Commerce had failed to justify the decision not to consider the information contained in JTEKT's administrative case brief that called the third match into question. *Id.*

In the Second Remand Redetermination, Commerce complied with the court's order to reconsider the third match but continued to find that impermissible mismatches did not occur.⁷ *Second Remand*

⁷ Commerce continued to maintain that it was justified in refusing to consider the factual information contained in JTEKT's case brief on the grounds that this information was untimely. *Second Remand Redetermination* 28. Nevertheless, in response to the court's order, Commerce examined the previously-rejected information that JTEKT had submitted in its case brief and concluded based on that information and information already on the

Redetermination 28–29. Following the Second Remand Redetermination, JTEKT moved for termination of the injunction on liquidation of JTEKT's entries at issue in this case, explaining that "JTEKT no longer seeks to address the dumping margins that were calculated by the U.S. Department of Commerce in the administrative review that is the subject of this litigation." Mot. to Terminate Prelim. Inj. 1 (Oct. 23, 2014), ECF No. 183 ("JTEKT's Mot. to Terminate Prelim. Inj."). Moreover, JTEKT has not objected to or otherwise commented on the Department's resolution of the issue posed by the third match. See JTEKT Comments 3 & n.6. The court, therefore, affirms the Department's resolution of that issue.

The court grants JTEKT's motion for termination of the injunction on the liquidation of JTEKT's entries. See Order of Inj. (Oct. 16, 2007), ECF No. 7 (enjoining liquidation of JTEKT's entries). According to JTEKT, defendant, through counsel, consents to this motion. JTEKT's Mot. to Terminate Prelim. Inj. 2. Timken filed a reply consenting to JTEKT's motion. The Timken Co.'s Notice of Consent to JTEKT's Oct. 23, 2014 Mot. to Terminate the Prelim. Inj. 1 (Nov. 5, 2014), ECF No. 187. The court will terminate the injunction that is the subject of JTEKT's motion. All other orders of injunction entered in this case remain in effect according to the terms of those orders.⁸

C. The Court Denies as Moot NPB's Challenge Concerning Revocation of the Antidumping Orders for a Portion of the Administrative Review

In its comments on the Second Remand Redetermination, NPB argued that the margins challenged in this case were unlawful because of the Department's action to revoke the antidumping duty order on subject merchandise from Japan for a portion of the POR of the seventeenth administrative review. NPB's Comments 2, 6. NPB's argument relates to litigation concerning the five-year ("sunset") reviews, conducted pursuant to 19 U.S.C. § 1675(c), of the antidumping record of the review, including certain proprietary information, that the model sold in the United States and the model sold in the home market were appropriately matched because they actually were of the same design type. *Id.* at 29 ("Because both the U.S. model and home-market model for the match in question have the same design type, the model-match methodology worked correctly and we have not made an adjustment to our calculation of JTEKT's margin.").

⁸ The court entered orders of injunction in each of the cases consolidated under Court No. 07–00377. See Order (Nov. 7, 2007), ECF No. 8 (Ct. No. 07–00387) (NSK's entries); Order (Nov. 1, 2007), ECF No. 9 (Ct. No. 07–00392) (Aisin's entries); Order (Nov. 7, 2007), ECF No. 10 (Ct. No. 07–00395) (NTN's entries); Order (Nov. 7, 2007), ECF No. 9 (Ct. No. 07–00398) (NPB's entries); Order (Nov. 21, 2007), ECF No. 14 (Ct. No. 07–00409) (Asahi's entries); Order (Nov. 21, 2007), ECF No. 12 (Ct. No. 07–00412) (Nachi's entries).

duty orders on ball bearings from Japan and the United Kingdom.⁹ The court rejects NPB's argument.

In June 2005, the International Trade Commission ("ITC" or the "Commission"), pursuant to section 751(c) of the Tariff Act, 19 U.S.C. § 1675(c), began the second sunset reviews of the ball bearing anti-dumping duty orders. The ITC determined that revocation of these orders would be likely to lead to the continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. *See Certain Bearings From China, France, Germany, Italy, Japan, Singapore, and the United Kingdom*, 71 Fed. Reg. 51,850 (Int'l Trade Comm'n Aug. 31, 2006).

In this Court, NSK and JTEKT challenged the Commission's sunset review affirmative injury determinations for ball bearings, NSK with respect to ball bearings from Japan and the United Kingdom and JTEKT with respect to ball bearings from Japan. *NSK Corp. v. U.S. Int'l Trade Comm'n*, 716 F.3d 1352, 1356 (Fed. Cir. 2013) ("*NSK*"), *cert. denied*, 134 S. Ct. 2719 (2014). After a series of remand orders, this Court affirmed negative injury determinations issued under protest by the Commission. *See NSK Corp. v. U.S. Int'l Trade Comm'n*, 34 CIT ___, 744 F. Supp. 2d 1359 (2010) (concerning the United Kingdom); *NSK Corp. v. U.S. Int'l Trade Comm'n*, 35 CIT ___, 774 F. Supp. 2d 1296 (2011) (concerning Japan). Responding to these judicial decisions, Commerce, on July 15, 2011, revoked the antidumping duty orders on ball bearings and parts thereof from Japan and the United Kingdom. *Ball Bearings and Parts Thereof From Japan and the United Kingdom: Revocation of Antidumping Duty Orders*, 76 Fed. Reg. 41,761 (Int'l Trade Admin. July 15, 2011). In its comments on the Second Remand Redetermination, NPB argued that sales made after July 10, 2005 are no longer subject to the seventeenth administrative reviews because Commerce revoked the orders involving Japan as of that date. NPB's Comments 6. NPB maintained that because of the revocation, the weighted-average dumping margins were unlawfully calculated according to sales outside of the scope of the administrative review. *Id.*

After NPB filed comments on the Second Remand Redetermination, the Court of Appeals reversed the decisions of this Court and vacated the judgment affirming the Commission's negative determinations regarding the orders on merchandise from the United Kingdom and

⁹ Pursuant to 19 U.S.C. § 1675(c), every five years after the issuance of an antidumping duty order, the International Trade Commission conducts a review to determine "whether revocation of an order, or termination of a suspended investigation, would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time." *Id.* § 1675a(a)(1).

Japan. *NSK*, 716 F.3d at 1369. As ordered by the Court of Appeals, *id.*, this Court issued a final judgment reinstating the ITC's affirmative injury determinations on November 18, 2013. *NSK Corp. v. U.S. Int'l Trade Comm'n*, 37 CIT __, __, Slip Op. 13–143 at 1 (Nov. 18, 2013). Subsequently, Commerce reinstated the orders and resumed the administrative reviews of those orders, including the seventeenth administrative reviews. *See Ball Bearings and Parts Thereof From Japan and the United Kingdom: Notice of Reinstatement of Anti-dumping Duty Orders, Resumption of Admin. Reviews, and Advance Notification of Sunset Reviews*, 78 Fed. Reg. 76,104 (Int'l Trade Admin. Dec. 16, 2013). In light of the reinstatement of the relevant antidumping duty orders, NPB's argument cannot be sustained.

III. CONCLUSION

For the reasons discussed in the foregoing, the court concludes that the Second Remand Redetermination conforms to the court's remand order in *JTEKT I* and is in accordance with law. In accordance with this Opinion, the court will enter a judgment affirming the Second Remand Redetermination. In accordance with the court's opinion and order in *JTEKT I*, 35 CIT at __, 768 F. Supp. 2d at 1363–64, the court's judgment will also affirm the Department's reconsideration of Aisin's constructed export price and recalculation of Aisin's anti-dumping duty margin in the First Remand Redetermination.

Dated: December 24, 2014

New York, NY

/s/ Timothy C. Stanceu

TIMOTHY C. STANCEU

CHIEF JUDGE

Slip Op. 14–157

SAMSUNG ELECTRONICS CO., LTD., Plaintiff, v. UNITED STATES,
Defendant. WHIRLPOOL CORPORATION, Defendant-Intervenor.

Before: Nicholas Tsoucalas,

Senior Judge

Court No. 13–00099

PUBLIC VERSION

[The Department of Commerce's remand determination is sustained.]

Dated: December 24, 2014

Warren E. Connelly, J. David Park, and Nazak Nikakhtar, Akin Gump Strauss Hauer & Feld LLP, of Washington, DC, for Plaintiff. Phyllis L. Derrick, Akin Gump Strauss Hauer & Feld LLP, of Washington, DC, consultant for Plaintiff.

Douglas G. Edelschick, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Joyce R. Branda*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Whitney Rolig*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Jack A. Levy, *John D. Greenwald*, *Myles S. Getlan*, *Thomas M. Beline*, and *Jonathan M. Zielinski*, Cassidy Levy Kent (USA) LLP, of Washington, DC, for Defendant-Intervenor.

OPINION

Tsoucalas, Senior Judge:

This action involves a challenge contesting subsidy calculations that were made by defendant Department of Commerce (“Commerce”) in the final results of a countervailing duty (“CVD”) investigation covering large residential washers (“LRWs”) from the Republic of Korea. See *Large Residential Washers From the Republic of Korea: Final Affirmation Countervailing Duty Determination*, 77 Fed Reg. 75,975 (Dec. 26, 2012) (“*Final Determination*”); See also *Issues and Decision Memorandum for the Final Determination in the CVD Investigation of LRWs from the Republic of Korea* (Dec. 18, 2012) (“*IDM*”). Before the court are the *Final Results of Redetermination Pursuant to Court Order*, ECF No. 50 (Apr. 11, 2014) (“*Remand Results*”), filed by Commerce pursuant to *Samsung Electronics Co., Ltd. v. United States*, 38 CIT ___, 973 F.Supp.2d 1321 (2014) (“*Samsung I*”). The relevant facts and procedural history are set forth in *Samsung I*. Familiarity with the court’s decision in *Samsung I* is presumed.

Plaintiff Samsung Electronics Co., Ltd. (“Samsung” or “Plaintiff”) contests the *Remand Results*. Defendant-intervenor Whirlpool Corporation supports Commerce’s findings in its *Remand Results*. For the reasons discussed below, the court sustains the *Remand Results*.

JURISDICTION and STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006) and section 516A(a)(2)(B)(I) of the Tariff Act of 1930 (the “Act”),¹ as amended, 19 U.S.C. § 1516a(a)(2)(B)(I) (2006). The court will uphold Commerce’s remand redetermination in a CVD investigation unless it is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(I).

Additionally, “an agency’s interpretation of its own regulations is

¹ Further citations to the Tariff Act of 1930 are to the relevant portions of Title 19 of the U.S. Code, 2006 edition, and all applicable amendments thereto.

entitled to broad deference from the courts.” *Cathedral Candle Co. v. U.S. Int’l Trade Comm’n*, 400 F.3d 1352, 1363 (Fed. Cir. 2005).

Discussion

In the original proceeding, Commerce determined that the Government of Korea (“GOK”) provided countervailable subsidies to Samsung, warranting the application of a 1.85% ad valorem CVD rate. *See Final Determination*, 77 Fed. Reg. at 75,977. Of particular relevance to this instant action, Commerce found that Samsung’s tax credits under the Republic of Korea Restriction of Special Taxation Act (RSTA) Article 10(1)(3) were de facto specific because Samsung received a disproportionately large share of the total benefit the GOK conferred under this program. *See IDM* at 11–13. The GOK provides RSTA Art. 10(1)(3) tax credits to companies making eligible investments in research and human resources development (“R&D”). *See Remand Results* at 3–4. Specifically, Commerce determined that Samsung received [[]]% of the total benefit the GOK conferred under RSTA Art. 10(1)(3), while the average beneficiary received [[]]%. *See Calculations for Samsung* (Dec. 18, 2012), Confidential Rec. 196, Att. 7 at 1.

Under the Act, “a countervailable subsidy is a subsidy... which is specific as described in [19 U.S.C. § 1677(5A)].” 19 U.S.C. § 1677(5)(A). Where the subsidy in question is a domestic subsidy, as is the case here, Commerce may find that the subsidy is specific as a matter of law or as a matter of fact. 19 U.S.C. § 1677(5A)(D).

A domestic subsidy is specific in fact if “[a]n enterprise or industry receives a disproportionately large amount of the subsidy.” 19 U.S.C. § 1677(5A)(D)(iii)(III). The Court of Appeals for the Federal Circuit held that “determinations of disproportionality . . . are not subject to rigid rules, but rather must be determined on a case-by-case basis taking into account all the facts and circumstances of a particular case.” *AK Steel Corp. v. United States*, 192 F.3d 1367, 1385 (Fed. Cir. 1999). Accordingly, the court seeks to determine whether Commerce’s disproportionality finding in its *Remand Results* was reasonable given the facts of the instant case. *Samsung I*, 973 F.Supp.2d at 1328.

In *Samsung I*, the Court remanded the *Final Determination* with instructions to revisit its determination regarding the disproportionality of Samsung’s Art. 10(1)(3) tax credits. *Samsung I*, 973 F.Supp.2d at 1328. The Court held that “Commerce’s determination was unreasonable because it did not adequately address how Samsung’s Art. 10(1)(3) tax credit was disproportionately large based on the facts in the case.” *Id.* The Court stated that “[o]n remand, Commerce is not barred from comparing Samsung’s share of the total benefit to the

share an average beneficiary received, but it must explain, with specific reference to the facts of this case, why such a comparison is indicative of disproportionality.” *Id.*

In its *Remand Results*, Commerce continued to find that Samsung received a disproportionately large amount of the benefits under the RSTA Art. 10(1)(3). *See Remand Results* at 4–5. On remand, Commerce: (1) clarified its findings with respect to whether RSTA Art. 10(1)(3) conferred benefits pursuant to a “standard pricing mechanism”; (2) analyzed Samsung’s share of benefits under Art. 10(1)(3) relative to the amount received by the other 99 largest recipients of benefits under the program; and (3) analyzed Samsung’s tax savings under RSTA Art. 10(1)(3) relative to the tax savings that the other 99 largest recipients received in relation to their total tax liability.

I. Commerce Reasonably Concluded that RSTA Art. 10(1)(3) Does Not Confer Benefits According to a Standard Pricing Mechanism

Plaintiff argues that Commerce “continues to erroneously rely on the very same method for determining disproportionality that this Court initially found to be unreasonable ‘because it did not adequately address how Samsung’s Art. 10(1)(3) tax credit was disproportionately large based on the facts in the case.’” Pl.’s Br. at 1 (citing *Samsung I*, 973 F.Supp.2d. at 1328). Plaintiff insists that Commerce incorrectly distinguishes the tax credit in the instant case from the “standard pricing mechanism” which conferred a benefit based on “usage levels” found in the electricity benefit programs considered in *Bethlehem Steel v. United States*. *Id.* at 4 (citing *Bethlehem Steel v. United States*, 25 CIT 307, 322, 140 F. Supp. 2d 1354, 1369 (2001), *amended by*, 25 CIT 627, 155 F.Supp.2d 7071 (2001)). Plaintiff also argues that the fact that the amount a beneficiary may claim on their tax returns differs from the amount of tax credits that beneficiary has earned “does not destroy the proportionality” of the subsidy. *Id.* at 6.

Plaintiff’s arguments are unconvincing. In *Samsung I*, the court noted that Commerce has previously applied the concept of a “standard pricing mechanism” with regards to analyzing whether a company received a disproportionate amount of benefits under to a subsidy. *See Final Affirmative CVD Determinations: Pure Magnesium and Alloy Magnesium From Canada*, 57 Fed. Reg. 30,946 (Jul. 13, 1992); *See also Samsung I*, 973 F.Supp.2d at 1326–27. The court also noted that in *Bethlehem Steel v. United States*, the Court found that it was reasonable for Commerce to consider an enterprise or industry’s use of a subsidy program in determining whether the benefit was

proportionate. See *Bethlehem Steel*, 25 CIT at 322, 140 F. Supp. 2d at 1369. In that case, the Korean steel industry received 51% of the discounts the GOK awarded under an electricity rate reduction subsidy. *Id.* Nevertheless, Commerce found that the benefit was proportionate because high electricity usage was an inherent characteristic of the steel industry, all recipients received an identical rate reduction based on a standard mechanism, and the subsidy was not designed to benefit any one industry over another. See *id.* at 321–23, 140 F. Supp. 2d at 1368–70.

Subsequently, on remand Commerce effectively distinguished Art. 10(1)(3) from the standard pricing mechanism in *Bethlehem Steel*. See *id.* at 322, 140 F. Supp. 2d at 1369. In *Samsung I*, the Court was concerned with the notion that “[i]n virtually every program that confers benefits based on usage levels one or more groups will receive a greater share of the benefits[.]” *Samsung I*, 973 F.Supp.2d at 1326 (citing *Bethlehem Steel*, 25 CIT at 322, 140 F. Supp. 2d at 1369). This concern stemmed in part from the fact that in the original proceeding, Commerce’s analysis of the structure of Art. 10(1)(3) was limited to the following: the GOK calculates a company’s Art. 10(1)(3) tax credit in one of two ways, either 40% of the difference between eligible expenditures in the tax year and the average of eligible expenditures in the prior four years, or a maximum of 6% of eligible expenditures in the current tax year. See *LRWs From the Republic of Korea: Preliminary Affirmative CVD Determination and Alignment of Final Determination With Final Antidumping Determination*, 77 Fed.Reg. 33,181, 33,187 (Jun. 5, 2012). Commerce addressed the Court’s concern in its *Remand Results* by providing evidence supporting its finding that RSTA Art. 10(1)(3) tax credits are not based strictly on the basis of a company’s qualifying investments in a given year. *Remand Results* at 6–7. Specifically, Commerce found that companies were permitted to claim RSTA Art. 10(1)(3) tax credits by “using one of two formulas: as a percentage of the difference between qualifying research and development expenses in the current tax year and the average of qualifying expenditures from the previous four years, or using a maximum percentage of total qualifying research and development expenses for the current tax year.” *Id.* at 6. Commerce also found the tax credits a company was eligible to receive varied due to the fact that “RSTA Article 10(1)(3) establishes different rates for small-and medium-sized enterprises [(“SMEs”)] versus larger companies.” *Id.* at 7. Additionally, Commerce determined that, “under the first formula, SMEs may claim up to 50 percent, while larger corporations may claim only 40 percent; under the second formula, SMEs may claim up to 25 percent, while larger corporations are limited to

a maximum of six percent.” *Id.* at 7–8. Based on these variations, Commerce reasonably distinguished the subsidy program in the instant case from the program present in *Bethlehem Steel*, which conferred benefits based solely on a company’s qualifying expenditures. Because under RSTA Art. 10(1)(3) companies with identical amounts of eligible investments could receive different amounts of the tax credits, Commerce reasonably concluded based on the facts in the instant case that RSTA Art. 10(1)(3) tax credits are unlike the benefits conferred in *Bethlehem Steel*. See *Bethlehem Steel*, 25 CIT at 321–23, 140 F. Supp. 2d at 1368–70; See also *Remand Results* at 8.

Commerce also provided further data demonstrating that it is inappropriate to classify RSTA Art. 10(1)(3) as a standard pricing mechanism through its analysis of the GOK’s “Minimum Tax Scheme.” *Remand Results* at 8. Commerce found that the GOK’s Minimum Tax Scheme limits the amount of tax credits a beneficiary may claim under the RSTA, effectively creating a “tax ceiling.” *Id.* ; See also Def.’s App. Accompanying Resp. to Pl.’s Comments Concerning *Remand Results*, GOK’s May 30, 2014 Resp. at 2–4. Specifically, Commerce determined that Samsung only claimed [[]]% of its RSTA Art. 10(1)(3) tax credits earned in 2010, while deferring the remainder. *Remand Results* at 8. As discussed above, because a company’s RSTA Art. 10(1)(3) tax credits are based on a number of variables, such as the formula used, prior years eligible investments, and the application of Korea’s Minimum Tax Scheme, Commerce reasonably concluded that RSTA Art 10(1)(3) did not qualify as a “standard pricing mechanism” which is directly proportionate to a company’s qualifying expenditures. See *Bethlehem Steel*, 25 CIT at 321–23, 140 F. Supp. 2d at 1368–70; See also *Remand Results* at 7–9.

II. Commerce Reasonably Determined that Samsung Received a Disproportionate Amount of the RSTA Art. 10(1)(3) Benefits

Plaintiff argues that Commerce relied on exactly the same methodology in its *Remand Results*, except here Commerce chose to alter the following: (1) “instead of using the total tax credits awarded to all 11,764 companies, [Commerce] used the tax credit awarded to just 100 companies;” (2) “instead of dividing the total credit by the total number of recipients to derive the average percentage of the total benefit received by each company, [Commerce] divided the tax credits received by 99 to get the average percentage credit received by each of the 99 companies.” Pl.’s Br. at 12–13. Since the methodology used by Commerce was “identical in concept” to the original methodology, Plaintiff therefore insists that Commerce’s findings are insufficient

“as a matter of fact or law to demonstrate disproportionality for the reasons that this court has previously found.” *Id.* at 14.

Moreover, Plaintiff argues that Commerce improperly used taxable income as an appropriate variable of comparison between Samsung and the 99 companies because “the investments that are eligible for RSTA Art. 10(1)(3) tax credit are not a function of taxable income.” *See id.* at 14–15. Plaintiff notes that “the ratio of each company’s R&D expenses that were eligible for tax credit to its total expenses,” is a better variable of comparison because such ratio would “identify those companies that were comparable in terms of their investment strategies.” *Id.* at 15. Additionally, Plaintiff contends that Commerce improperly equated taxable income with size of company. *Id.* at 14–15. Plaintiff argues that Commerce should have compared companies similar to Samsung on the basis of “gross sales revenue or, alternatively, by asset value or number of employees,” as opposed to using “taxable corporate income [which] is a direct function of gross revenue, permissible adjustments to revenue, and deductible expenses.” *Id.* at 16. Finally, Plaintiff insists that taxable income as a variable is “unrelated” to disproportionately. *Id.* at 17.

The court is not persuaded by Plaintiff’s arguments. As discussed above, in *Samsung I*, the court held that Commerce failed to “adequately address how Samsung’s Art. 10(1)(3) tax credit was disproportionately large based on the facts in the case.” *Samsung I*, 973 F.Supp.2d at 1328. The Court noted that “[o]n remand, Commerce is not barred from comparing Samsung’s share of the total benefit to the share an average beneficiary received, but it must explain, with specific reference to the facts of this case, why such a comparison is indicative of disproportionality.” *Id.*

In its *Remand Results*, Commerce continued to find that Samsung received [[]]% of the total benefit the GOK conferred under RSTA Art. 10(1)(3), while the average beneficiary received [[]]%. *Remand Results* at 2. Additionally, Commerce first obtained data from the GOK allowing it to compare Samsung’s total benefit under the subsidy with the 100 largest companies who received the benefit by taxable income. *Id.* at 9–11. In doing so, Commerce determined that “Samsung accounted for approximately [[]]% of RSTA Art. 10 tax credits granted to the top 100 recipients, and by its credit was equal to [[]]% of the credits received by the other 99 largest recipients.” *Id.* at 10–11.

Secondly, Commerce conducted an analysis of the data it received from the GOK in order to allow it to account for company size and total tax liability. This analysis allowed Commerce to compare Samsung’s reduction in taxable income with the remaining 99 companies. Commerce found that the amount of RSTA Art. 10(1)(3) tax credits

Samsung received reduced its tax liability by [[]]%. *Id.* at 14. Conversely, the tax credits reduced the other 99 companies' tax liability by [[]]%. *Id.* at 14. Ultimately, Commerce found that Samsung received over [[]] times greater amount of tax benefits than the other companies analyzed. *Id.* at 14.

The court finds that Commerce's *Remand Results* reasonably addressed its concerns in *Samsung I*. At best, the Plaintiff's arguments amount to another reasonable interpretation of the data before the court. *See Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."). Accordingly, based on the facts of the instant case, Commerce reasonably concluded that Samsung received a disproportionately large benefit of the RSTA Art. 10(1)(3) tax benefit.

Conclusion

For the foregoing reasons, Commerce's remand redetermination is sustained in its entirety. Judgment will be entered accordingly.

Dated: December 24, 2014

New York, New York

/s/ Nicholas Tsoucalas

NICHOLAS TSOUCALAS
SENIOR JUDGE

Slip Op. 14–158

MERIDIAN PRODUCTS, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 13–00018

[Sustaining second results of remand on scope of antidumping and countervailing duty orders on aluminum extrusions from the People's Republic of China as to "trim kits".]

Dated: December 29, 2014

Daniel Cannistra and *Richard P. Massony*, Crowell & Moring LLP, of Washington DC, for the plaintiff.

Tara K. Hogan, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, for the defendant. On the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Jessica M. Forton*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington DC.

OPINION

Musgrave, Senior Judge:

This opinion addresses the *Final Results of Redetermination Pursuant to Court Remand, Meridian Products, LLC v. United States*, Court No. 13–0018, PDoc 29 (June 17, 2014) (“Second Remand”) of the International Trade Administration of the U.S. Department of Commerce (“Commerce”) pursuant to *Meridian Products, LLC v. United States*, 38 CIT ___, Slip Op. 14–32 (Mar. 26, 2014) (“*Meridian II*”). The plaintiff, Meridian Products LLC, a U.S. importer of refrigerator/freezer trim kits, moves for a third remand of this action challenging various aspects of the Second Remand. Meridian’s Motion for Remand and accompanying Cmts in Resp. to Second Redetermination Upon Remand, PDoc 35 (July 15, 2014) (“Pl’s Mot.”). The defendant asks that the court sustain the Second Remand results, claiming that it complied with the court’s order and that its determination is both supported by substantial evidence and is in accordance with law. Def’s Resp. to Cmts Regarding the Second Remand Redetermination, PDoc 38 (Aug. 8, 2014) (“Def’s Resp.”).

Upon review of the Second Remand results, the court finds that the redetermination complies with the judicial orders in *Meridian II* and sustains the results.

I. Background

Familiarity with the facts of this case as provided in the court’s prior opinions is presumed, but background is supplemented herein for ease of understanding. See *Meridian II*; see also *Meridian Products, LLC v. United States*, 37 CIT ___, Slip Op. 13–75 (June 17, 2013) (“*Meridian I*”). In *Meridian I*, the court remanded to Commerce, directing it to reconsider if the plaintiff’s trim kits fell within finished goods scope exclusion of the antidumping and countervailing duty orders on aluminum extrusions from the People’s Republic of China¹ as applied in the *Side Mount Valve Controls Scope Ruling*, the *Drapery Rail Kits Remand*, and the *Auto Parts Remand*.² In *Meridian II*,

¹ See *Aluminum Extrusions from the People’s Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30650 (May 26, 2011) (“AD Order”) & *Aluminum Extrusions from the People’s Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30653 (May 26, 2011) (“CVD Order”) (collectively, “Orders”).

² See *Meridian I* at 4; see also Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, “Initiation and Preliminary Scope Ruling on Side Mount Valve Controls” (Sept. 24, 2012), *aff’d*, Final Scope Ruling on Side Mount Valve Controls (Oct. 26, 2012) (“*Side Mount Valve Controls Scope Ruling*”); *Final Results of Redetermination Pursuant to Court Remand, Rowley Co. v. United States*,

the court remanded to Commerce a second time, directing it to “proceed from a clean slate on the question of whether the [t]rim [k]its fall within the scope of the *Orders*, fully taking into account the prior relevant scope rulings”, including evaluating the trim kits under the finished goods exclusion methodology in the *Drapery Rail Kits Remand* and *Solar Panel Mounting Ruling*.³

The relevant scope language, which Commerce must first examine in any scope determination to determine whether merchandise falls within the scope of an antidumping duty order,⁴ is as follows:

The scope also excludes [1] *finished merchandise* containing aluminum extrusions as parts that are *fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels*. The scope also excludes [2] *finished goods containing aluminum extrusions that are entered unassembled in a “finished goods kit.”* A finished goods kit is understood to mean a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled “as is” into a finished product. *An imported product will not be considered a “finished goods kit” and therefore excluded from the scope of the [Orders] merely by including fasteners such as screws, bolts, etc. in the packaging with an aluminum extrusion product.*

Orders, 76 Fed. Reg. at 30651 and 30654 (italics and bracketing added).

In the Second Remand, Commerce again determined that the plaintiff’s trim kits fell within the scope of the *Orders* as subject aluminum extrusions identified by reference to their end use: as “frames” for

Ct. No. 12–00055 (Feb. 28, 2013) (“*Drapery Rail Kits Remand*”); *Final Results of Redetermination Pursuant to Court Remand Aluminum Extrusions from the People’s Republic of China, Valeo, Inc., Valeo Engine Cooling Inc., and Valeo Control Corp. v. United States*, Ct. No. 12–00381 (Feb. 13, 2013) (“*Auto Parts Remand*”).

³ See *Meridian II* at 20; see also *id.* at 3, referencing Memorandum to Christian Marsh, “Final Scope Ruling on Clenergy (Xiamen) Technology’s Solar Panel Mounting Systems” (Oct. 31, 2012) (“*Solar Panel Mounting Ruling*”) and *Drapery Rail Kits Remand*.

⁴ See *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1302 (Fed. Cir. 2013) (internal citations omitted); see also *Walgreen Co. of Deerfield, IL v. United States*, 620 F.3d 1350, 1357 (Fed. Cir. 2010) (“it is the language of Commerce’s final order that defines the scope of the order albeit ‘with the aid of the antidumping petition, the factual findings and legal conclusions adduced from the administrative investigations, and the preliminary order’”) (quoting *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002)).

major appliances.⁵ Commerce first determined that the trim kits did not qualify for the “finished merchandise” exclusion. It found that the kits consisted entirely of aluminum extrusions, fasteners, and extraneous materials. Based on the plaintiff’s own description of its trim kits as consisting of a package of finished parts which, when assembled, will make up a customized frame around a single freezer unit or single refrigerator unit, Commerce found that the kits were included with the scope language of the *Orders* and did not meet the “finished merchandise” exclusion because they entered the U.S. unassembled. See Second Remand at 5–6, referencing “Aluminum Extrusions from the People’s Republic of China: Request for Scope Ruling for Refrigerator/Freezer Trim Kits” (Nov. 13, 2012) (“Trim Kits Scope Ruling Request”) at 1–2; see also *id.* at 12–14, 22–24.

Commerce next determined that the plaintiff’s trim kits did not qualify as an excluded “finished goods kit” on the ground that, again, they consisted entirely of aluminum extrusions, fasteners, and extraneous materials and fell within the express limitation to the exclusion. *Id.* at 1214, 23–25. Commerce distinguished the trim kits from the goods in the *Drapery Rail Kits Remand* and in the *Solar Panel Mounting Ruling* by first determining that unlike the trim kits, the goods in the *Drapery Rail Kits Remand* and *Solar Panel Mounting Ruling* were eligible for the “finished goods kit” exclusion because those goods “do not consist entirely of aluminum extrusions” and did not fall within the “limitation” to the exclusion.⁶ Pursuant to the court’s instruction, Commerce then analyzed the trim kits ability to “display” or “work with” an appliance. See Second Remand at 15, referencing *Meridian II* at 14; see also *id.* at 25–27, referencing *Meridian II* at 16. Commerce determined that the trim kits “merely frame the space into which the refrigerator is placed” and were therefore unlike the goods in those rulings, because in those rulings the subject goods were designed to “display” or “work with” a missing non-essential interchangeable component by the functional means of holding the component. Second Remand at 15–20, 25–26.

⁵ See Second Remand at 2, referencing Draft Results of Redetermination Pursuant to Court Remand, *Meridian Products, LLC v. United States*, Court No. 13–0018, Slip Op. 14–32, PDoc 40–1 (May 14, 2014) (“Second Remand Draft”) at 11–19; see also *id.* at 6, referencing Memorandum to Christian Marsh, “Final Scope Ruling on Refrigerator/Freezer Trim Kits” (Dec. 17, 2012) (“*Trim Kits Scope Ruling*”) at 10, quoting the scope of the *Orders*.

⁶ See Second Remand at 15, referencing Second Remand Draft at 14, citing *Solar Panel Mounting Ruling* at 6–7 (summarizing in the Second Remand that “the products at issue were comprised of non-subject aluminum and steel products”) and *Drapery Rail Kits Remand* at 4 (summarizing in the Second Remand that “the products at issue included decorative finials and brackets that were made of steel”); see also *id.* at 24–25.

The plaintiff filed with the court its comments in response to Commerce's Second Remand objecting to the findings of the Second Remand. In its filing, the plaintiff claims in the Second Remand Commerce did not comply with the court's order because it did not sufficiently explain why the trim kits do not meet the criteria for the finished goods exclusion and did not distinguish between goods that "incorporate" and goods that "display". Pl's Mot. at 1.

The defendant responds that it complied with the court's remand order, maintaining that its finding that the trim kits consist solely of subject aluminum extrusions, fasteners, and extraneous materials and do not satisfy the two finished goods exclusions is supported by the scope language and prior scope rulings. Def's Resp. at 1, 10–19, 22. The defendant further argues it provided a reasonable explanation of why the *Drapery Rail Kits Remand* and *Solar Panel Mounting Ruling* did not apply to the plaintiff's trim kits that is supported by substantial evidence. *Id.* at 19–22.

II. Discussion

1. Exhaustion of Administrative Remedies

At the outset, the defendant claims that the plaintiff raised certain arguments in its comments before the court with respect to both the "finished goods kit" and "finished merchandise" exclusions⁷ that the plaintiff did not raise in its draft comments on the Second Remand, and that the plaintiff has accordingly failed to exhaust its administrative remedies concerning those issues. *See* Def's Resp. at 13–15, referencing Pl's Mot. at 4; *see also id.* at 17, referencing Pl's Mot. at 5; *id.* at 17–18, referencing Pl's Mot. at 6–10. Specifically, the defendant contends the following are precluded by failure to exhaust: the argument opposing the determination that the trim kits were not eligible for the "finished goods kit" exclusion because Commerce found that they consist solely of aluminum extrusions, fasteners, and extraneous materials;⁸ the argument that Commerce erroneously applied an

⁷ The defendant correctly points out that the "[O]rders identify the finished goods kit exclusion and the finished merchandise exclusion as two separate exclusions". Def's Resp. at 12 fn.7.

⁸ *See Id.* at 13–15, referencing Second Remand at 24 (which noted that "Meridian does not address this first criterion that [Commerce] considers in its determination as to whether a product satisfies the exclusion for a finished goods kit, and does not appear to contest [Commerce]'s interpretation, as discussed in the *Geodesic Domes Scope Ruling* and elsewhere, that, in order to qualify for the finished goods kit exclusion, the kit must consist of merchandise other than aluminum extrusions, fasteners and extraneous materials") and Cmts on the Draft Results of Redetermination Pursuant to the Remand Order of the U.S. Court of International Trade in *Meridian Products, LLC v. United States*, Court No. 13–00018, Slip Op. 14–32, PDoc 40–2 (May 19, 2014) ("Pl's Cmts on Second Remand Draft"); *see also* Pl's Mot. at 3–4.

“aluminum content limitation” with the effect of disqualifying goods consisting entirely of aluminum extrusions from ever satisfying either the “finished merchandise” or “finished goods kit” exclusions;⁹ and the argument that Commerce is inconsistent in the test(s) it applies in order to determine if the non-aluminum components of a good qualify it for the exclusions. Def’s Resp. at 17, referencing Pl’s Mot. at 5, citing Memorandum to Christian Marsh, “Final Scope Ruling on Titan’s Scaffolding Planks” (July 8, 2014) (“*Scaffolding Planks Scope Ruling*”).

The court tends to take a strict approach to the doctrine of administrative exhaustion in accordance with its statutory mandate. See *SeAH Steel Corp. v. United States*, 35 CIT ___, 764 F. Supp. 2d 1322, 1325 (2011), referencing *Jiaxing Brother Fastener Co., Ltd. v. United States*, 34 CIT ___, 751 F. Supp. 2d 1345, 1355–57 (2010); see also 28 U.S.C. §2637(d) (stating that in trade cases the court “shall, where appropriate, require the exhaustion of administrative remedies”). Exhaustion is generally appropriate in antidumping proceedings as it protects the administrative agency’s authority and promotes judicial efficiency by permitting the agency to apply its expertise, correct its own administrative mistakes, and create an adequate record for judicial review. See *Woodford v. Ngo*, 548 U.S. 81, 88–89 (2006) (discussing the “two main purposes” of exhaustion of administrative remedies); see also *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599–600 (Fed. Cir. 1998) (internal citations omitted); *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 28 CIT 627, 644, 342 F. Supp. 2d 1191, 1206 (2004) (internal citations omitted).

In the Second Remand Draft, Commerce defined both the “finished merchandise” and “finished goods kit” exclusions to the *Orders*. Citing previous scope rulings, Commerce discussed its finding that a good that consists entirely of subject aluminum extrusions, fasteners, and extraneous materials will not qualify for either exclusion¹⁰ and then, critically, Commerce found that the trim kits consist entirely of

⁹ See Def’s Resp. at 17–19; see also Pl’s Mot. at 4–10 (arguing its trim kits consist of more than merely “aluminum extrusions” and claiming that Commerce has erroneously created a “aluminum content” limitation in its Second Remand not supported by the scope language, previous rulings, or prior published guidance, by concluding that goods which consist entirely of aluminum extrusions may not be excluded from the scope of the *Orders* as “finished merchandise” or a “finished goods kit”).

¹⁰ Second Remand Draft at 11–14 (stating that, consistent with the scope of the *Orders*, the *Geodesic Domes Scope Ruling* and the *Cutting and Marking Edges Scope Ruling* determined that, “a product may not consist entirely of aluminum extrusions and be excluded as a finished goods kit or finished merchandise”), referencing Memorandum to Christian Marsh, “Final Scope Ruling on J.A. Hancock Co., Inc.’s Geodesic Structures” (July 17, 2012) (“*Geodesic Domes Scope Ruling*”) and Memorandum to Christopher Marsh, “Aluminum Extrusions from the People’s Republic of China: Final Scope Ruling on Cutting and

aluminum extrusions “of various shapes and forms” within the scope definition as well as fasteners and extraneous materials and that they did not qualify for either of the two exclusions. Second Remand Draft at 13–14, referencing Trim Kits Scope Ruling Request at 5–6.

Although the plaintiff had the opportunity in its comments before Commerce to challenge these factual bases for Commerce’s determinations and develop the administrative record, it did not do so with sufficient specificity at that level to enable proper judicial review of the arguments it now here considers relevant.¹¹ See *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010) (“Commerce regulations require the presentation of all issues and arguments in a party’s administrative case brief”), citing 19 C.F.R. §351.309(c)(2)) (“The case brief must present all arguments that continue in the submitter’s view to be relevant to the Secretary’s final determination.”); see also *Aluminum Extrusions Fair Trade Comm. v. United States*, 37 CIT ___, ___, 938 F. Supp. 2d 1337, 1342 (2013) (time to object to “new discretionary policy regarding an interpretation of a scope exclusion” is at preliminary determination). The plaintiff did not continue to press in its comments on the Second Remand Draft those arguments it had raised during the First Remand relating to its claim that its trim kits consisted of more than aluminum extrusions, fasteners, and extraneous materials,¹² nor, apparently, did it incorporate arguments by reference. For the court to address these issues *Marking Edges*” (Nov. 13, 2012) (“*Cutting and Marking Edges Scope Ruling*”) and *Orders*, 76 Fed. Reg. at 30651.

¹¹ The plaintiff made three arguments in its comments on the Second Remand Draft before Commerce: First, it contended that the scope definition in the *Petition* is clear, and that the subject merchandise intended to be included in the scope of the *Orders* is *parts* of door frames as opposed to excluded *finished* door frames, and that the trim kits are akin to final finished door frames. Pl’s Cmts on Second Remand Draft at 1–2, referencing *Petitions for the Imposition of Antidumping and Countervailing duties: Aluminum Extrusions from the People’s Republic of China* (Mar. 31, 2010) (“*Petition*”) at 4. Second, it averred that Commerce did not sufficiently explain why the trim kits are not intended to “display” an appliance simply because they do not physically hold an appliance in place. Third, it argued that Commerce could not have arrived at its conclusion that the trim kits do not “display” a customizable appliance based on the application of the scope language and the descriptions of the merchandise alone without undertaking an analysis pursuant to the criteria listed in 19 U.S.C. §351.225(k)(2) to support that finding, which Commerce expressly stated it did not do. *Id.* at 2–4.

¹² These arguments included: that Commerce mistakenly characterized the non-aluminum components of its trim kits as an “exception to the finished goods exclusion” but that the addition of fasteners is not an exception but rather “a sensible clarification that the addition of fasteners will not automatically qualify an aluminum extrusion product as a finished good”; that many of its non-aluminum extrusion components serve the same purpose as the non-aluminum extrusion components at issue in the *Drapery Rail Kits Remand*; that Commerce did not address aluminum content in the *Drapery Rail Kits Remand* but still found that the products were finished goods kits because the products were intended to be

properly the plaintiff needed to raise them in its arguments first before Commerce, in order to assist Commerce in compiling an administrative record that is adequate for judicial review. *See McCarthy v. Madigan*, 503 U.S. 140, 145 (1992) (“exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical [or] factual context”).

The plaintiff has not done so, and none of the apparent exceptions to exhaustion apply. *See SeAH Steel Corp.*, *supra*, 35 CIT at ___, 764 F. Supp. 2d at 1325–26 (listing the exceptions as, “where exhaustion would be ‘a useless formality;’ intervening legal authority ‘might have materially affected the agency’s actions;’ the issue involves ‘a pure question of law not requiring further factual development;’ where ‘clearly applicable precedent’ should have bound the agency, or where the party ‘had no opportunity’ to raise the issue before the agency”), referencing *Jiaxing*, *supra*, 34 CIT at ___, 751 F. Supp. 2d at 1355–56 (internal citations omitted). Accordingly, the court will not consider those arguments of the plaintiff’s summarized above.¹³

2. “Finished Goods Kit” Exclusion

The plaintiff’s lack of exhaustion impacts the remaining arguments it raised concerning Commerce’s determination that the trim kits did not qualify for the “finished goods kit” exclusion. The Second Remand’s analysis clarifies that Commerce essentially interprets the methodology applied in the *Solar Panel Mounting Ruling* and the customizable; that the trim kits are “comprised of *more* non-aluminum componentry than drapery kits”; that the content of aluminum extrusions should be irrelevant to the issue of whether the products are finished goods; that products which could consist predominantly, or entirely, of aluminum extrusions and fasteners which are listed in the *Petition* were excluded from the *Orders* as finished goods kits; that the excluded goods in the *Auto Parts Remand* consist entirely of aluminum extrusions; that Commerce expanded its “aluminum-only” exception to encompass products comprised of both aluminum extrusions and non-aluminum extrusion components; that the exception to the finished goods exclusion for “fasteners” and products that “otherwise do not ‘complete the kit’” are not based on the scope language, that Commerce should apply the dictionary definition of “fasteners”; and that the plastic hinge covers and steel brackets in the trim kits are not fasteners even if the exceptions to the finished goods exclusion were valid. *Final Results of Redetermination Pursuant to Court Remand, Meridian Products, LLC v. United States*, Court No. 13–0018, Slip Op. 13–75, PDoc 17 (Aug. 15, 2013) (“First Remand”) at 16–18, referencing “Aluminum Extrusions from the People’s Republic of China: Comment Following Remand Regarding Refrigerator/Freezer Trim Kits” (July 1, 2013) at 6–10.

¹³ *See Ta Chen Stainless Steel Pipe*, *supra*, 28 CIT at 644, 342 F. Supp. 2d at 1206, quoting *JCM, Ltd. v. United States*, 210 F.3d 1357, 1359 (Fed. Cir. 2000) (citing *Sandvik Steel Co.*, *supra*, 164 F.3d at 599–600) (In antidumping cases “Congress has prescribed a clear, step-by-step process for a claimant to follow, . . . the failure to do so precludes [the claimant] from obtaining review of that issue in the Court of International Trade.”).

Draperly Rail Kits Remand as the latter part of a multi-step analysis it uses in examining whether the “finished goods kit” exclusion is applicable to a given product. The first step in Commerce’s analysis is determining whether the unassembled good under consideration overcomes the “limitation” to the “finished goods kit” exclusion. If the good does not overcome the limitation, it is within scope; if it does, the question is then whether the good contains all the necessary parts to fully assemble a final finished good.¹⁴ If it does contain all the necessary parts to fully assemble a final finished good and otherwise meets the definition of a “finished goods kit”, the good is outside the scope; if it does not, the next question the rulings address is whether the “missing” “customizable/interchangeable” component is “nonessential” to the final finished good by determining if the good is intended to “display” or “work with” the component.¹⁵ If it is, and otherwise meets the definition of a “finished goods kit”, the product is outside scope.

Addressing that analysis in part, the plaintiff faults Commerce’s definition of “display” as applied to the trim kits, the definition of which was applied from the *Solar Panel Mounting Ruling* and the *Draperly Rail Kits Remand*.¹⁶ Commerce’s interpretation thereof is

¹⁴ Second Remand at 15, referencing Second Remand Draft at 14 (explaining that when evaluating a good under the exclusion, Commerce ends its analysis if it determines a kit is comprised entirely of aluminum extrusions, fasteners, and extraneous materials and does not therefore pass the initial exclusionary step, but that it provided an application of the further analysis from the rulings in the Second Remand to comply with the court’s order in *Meridian II*).

¹⁵ Commerce concluded that the products expressly excluded from the scope of the *Orders* and excluded in prior scope rulings (e.g., the picture frames, draperly rail kits, banner stands, and solar panel mounting systems) “serve the functional purpose of holding a customizable/ interchangeable product in each instance” and that this functional purpose goes “beyond the aesthetic purpose of displaying interchangeable material by virtue of proximity.” See Second Remand at 25, referencing Second Remand Draft at 17 and *Solar Panel Mounting Ruling* at 9 (determining that, “like picture frames, banner stands, and backwall kits, the mounting systems are designed to work with removable/replaceable components”); see also Second Remand at 15–16, citing *Draperly Rail Kits Remand* at 8 (stating in the Second Remand that, “in the *Draperly Rail Kits Remand*, the missing component was the drape which is held by the draperly rail . . . [Commerce] found that, like those products, ‘the draperly rail kits contain all of the parts necessary to assemble a draperly rail system, save for the decorative drapers or curtains that may be affixed at a later date, and are designed to meet the specifications of the end customer’”).

¹⁶ The plaintiff argues that in the Second Remand Commerce has failed to comply with the court’s remand order by not distinguishing between those goods that “incorporate” and those goods that “display” customizable materials, that Commerce’s reasoning for defining these terms is not coherent, that Commerce does not apply the plain meaning of the word “display” as required where “a term with an ‘accumulated, settled meaning’ has no special meaning in antidumping law”. Pl’s Mot. at 13–16, referencing *NSK Ltd. v. United States*, 115 F.3d 965, 974 (Fed. Cir. 1997) (“[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of

normally entitled to “significant deference”, *Global Commodity Grp. LLC v. United States*, 709 F.3d 1134, 1138 (Fed. Cir. 2013) (internal citations omitted) (granting Commerce “significant deference” to interpret the scope of an antidumping order), however the court cannot reach the merits of the contention in any event because the plaintiff’s arguments over “display” only arise in the context of the last step of Commerce’s analysis. Further consideration here of that aspect is precluded due to the plaintiff’s failure to press the contention with greater specificity at the administrative level, *i.e.*, exhaustion.

In clarifying its methodology, Commerce distinguished the trim kits from the products in the aforementioned rulings by finding that the products in the rulings met the initial requirement for the “finished goods kit” exclusion and that the trim kits did not. Second Remand at 24–25. In order to analyze whether the trim kits are intended to “display” (or for that matter “work with”) a “non-essential” “customizable/interchangeable” component, Commerce concluded in this instance that it only needed to rely on the plaintiff’s own description of its trim kits in its scope ruling request rather than engage in a full “(k)(2)” factors analysis.¹⁷ Commenting on the Second Remand Draft, the plaintiff only disagreed with Commerce’s finding that its “[t]rim [k]its are not intended to ‘display’ an appliance simply because they do not physically hold the appliance in place” and only argued that “Commerce cannot know if [t]rim [k]its are intended to display a customizable appliance purely based on the application and descriptions of the merchandise” without applying the “(k)(2)” criteria, which Commerce explicitly stated it had not done. Pl’s Cmts on the Second Remand Draft at 3.

these terms”) (citing *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322 (1981)). The plaintiff also argues that Commerce does not support with substantial evidence its conclusion that a good’s ability to incorporate, display, or work with customizable materials affects its ability to qualify as a “finished goods kit”. Pl’s Mot. at 16. Furthermore, the plaintiff claims that Commerce based its finding that the plaintiff’s trim kits are not intended to display an appliance on incorrect facts, as the trim kits “attach to the appliance and the surrounding cabinetry”. Pl’s Mot. at 15. It avers that Commerce could not have concluded that the trim kits are not intended to “display or work with a customizable appliance” and that they “do not hold the appliance like a mounting system holds a solar panel, or a drapery rail holds a drape” without evaluating the physical characteristics of the product, expectations of the purchaser, and ultimate use of the product under the “(k)(2)” factors. Pl’s Mot. at 10–11, 14. See 19 C.F.R. §351.225(k)(2); see also *supra*, footnote 11.

¹⁷ As explained by the defendant, “[f]rom Meridian’s description of the product, it is clear that the trim kits at issue do not hold the refrigerator[]; rather, they merely frame the space into which the refrigerator is placed.” Second Remand at 26, referencing Trim Kits Scope Ruling Request at 1–2; see also *id.* at 5 and Second Remand Draft at 4–5 (noting that “[a]s described in the Scope Request filed by Meridian, the trim kits at issue consist of three different styles of complete aluminum trim kit packages which are utilized as an aesthetic frame around the perimeter of (though not attached to) a major home kitchen appliance, such as a refrigerator”).

Thus, proceeding from a “clean slate” during the Second Remand, Meridian did not revive its earlier arguments, raised during the First Remand, with sufficient particularity to contest Commerce’s factual distinction or distinguishment of the trim kits from the *Solar Panel Mounting Ruling* and the *Drapery Rail Kits Remand* on the basis of the first step of the analysis, as argued by the defendant.¹⁸ The court is left unable to further address the plaintiff’s critique of “display”, because “display” is only applicable in the final step of Commerce’s analysis and the plaintiff did not exhaust its administrative remedies on the finding of whether the trim kits consisted of “more than” aluminum extrusions, fasteners, and extraneous materials. Commerce having ended its consideration of the issue at step one, with the kits falling within the limitation to the “finished goods kit” exclusion, and the plaintiff having failed to exhaust its remedies on the factual predicate underpinning that consideration, the court’s review is thus constrained.

In distinguishing the trim kits based on this reasoning, upon which it did not rely in the First Remand, Commerce has facially complied with the court’s orders in *Meridian II*. See *Meridian II* at 2–3, referencing *Solar Panel Mounting Ruling* and *Drapery Rail Kits Remand*; see also *id.* at 15, 17–20. There appearing to be no further challenges to Commerce’s determination that the trim kits do not qualify as a “finished goods kit”, the Second Remand will be sustained as to the defendant’s “finished goods kit” exclusion findings.

3. “Finished Merchandise” Exclusion

The plaintiff also advances several arguments to support its claim that its trim kits qualify as “finished merchandise”. Here, however, the plaintiff is now pursuing the wrong path. The plaintiff first proposes its own interpretation of the *Orders* and exclusion, stating that the *Orders* are only intended to cover aluminum extrusions that could be “further processed into something else after importation” and that “once an extrusion is bent, shaped, molded, assembled, *etc.* it is no longer an extrusion; it has become something else”. Pl’s Mot. at 4. It claims that its trim kits should accordingly be excluded as they are “akin to a fully finished door frame that has been so completely and irrevocably processed that it can never become anything

¹⁸ Commerce found that the products at issue in the *Solar Panel Mounting Ruling* were comprised of “non-subject aluminum and steel products” and that the products at issue in the *Drapery Rail Kits Remand* “included decorative finials and brackets that were made of steel.” Second Remand at 15, referencing Second Remand Draft at 14, citing *Solar Panel Mounting Ruling* at 6–7 and *Drapery Rail Kits Remand* at 4. The court need not consider whether the trim kits consist of more than aluminum extrusions, “fasteners”, and “extraneous materials” as the plaintiff has not pressed the argument to this extent.

other than a finished frame.”¹⁹ *Id.* at 6. The plaintiff points to the *Petition* to further advance its claim that its trim kits qualify as “finished merchandise” that are analogous to finished door frames, and it maintains that the petitioners made a clear distinction between parts of door frames that were to be included in the scope of the *Orders*, as opposed to excluded final finished door frames, and that like final finished door frames its kits are “completely and permanently processed to the extent that they are suitable only for their ultimate purpose at the time of importation[,] . . . are fully fabricated[,] and do not require further cutting, punching, or other processing prior to installation”.²⁰

While the plaintiff’s argument might be reasonable, it is Commerce, not the plaintiff, that is tasked with interpreting the scope of the *Orders*, and Commerce’s interpretation is to be sustained so long as the interpretation reasonably clarifies the scope. *See, e.g., Sandvik Steel Co., supra*, 164 F.3d at 600 (“the order’s meaning and scope are issues particularly within the expertise of [Commerce]”). The plaintiff’s argument does not, *per se*, render Commerce’s interpretation unreasonable. Further, the argument is directed towards requirements of the “finished goods kit” exclusion and ignores the explicit language in the “finished merchandise” exclusion of the *Orders* that requires full and permanent assembly of the parts for final finished products “at the time of importation”, as well as the language of the *Petition* that requires a good be “imported in finished form, *i.e.*, fully and permanently assembled” in order for a good to qualify for that exclusion. *See Orders*, 76 Fed. Reg. at 30651; *see also Petition* at 5; Second Remand at 22–23.

¹⁹ The court notes that in its filings the plaintiff used the broader term “finished goods” to make this particular argument but the plaintiff appears to be referring to the “finished merchandise” exclusion. *See id.* at 3–4 (“[E]ach trim kit is akin to a fully finished door frame that has been so completely and irrevocably processed that it can never become anything other than a finished frame. As such, [the trim kits] qualify as finished goods and should be excluded from the scope of the [O]rders. . . . Alternatively, if trim kits do not qualify as finished goods, they still meet the exclusion criteria for finished goods kits and should therefore be excluded from the scope of the [O]rders.”) (italics and bracketing added).

²⁰ *See* PI’s Mot. at 3–4; *see also id.* at 12–13, citing *Petition* at 4–5 (stating the requested scope definition for the subject merchandise includes “*parts of products* that are assembled or otherwise further processed after importation, including, but not limited to, window frames, door frames, solar panels, curtain walls, or furniture” and excludes “*final finished goods* containing aluminum extrusions that are imported in finished form, *i.e.*, fully and permanently assembled, such as finished window frames, *door frames*, picture frames, and solar panels. The scope also excludes unassembled final finished goods containing aluminum extrusions, *e.g.*, ‘kits,’ that, at the time of importation, contain all of the necessary parts to assemble the finished good”) (plaintiff’s italics).

In the Second Remand Commerce determined that the trim kits do not qualify as “finished merchandise” first because they exist entirely of “aluminum extrusions, fasteners and extraneous materials”, and second because they enter the U.S. unassembled. *See* Second Remand at 13–14, 22–24. As discussed *supra*, the plaintiff has failed to exhaust its administrative remedies concerning Commerce’s factual determination that its trim kits consist entirely of aluminum extrusions, fasteners, and extraneous materials and do not meet one of the two proposed requirements of the “finished merchandise” exclusion.²¹ Concerning the second requirement of this exclusion, the plaintiff does not claim that its trim kits enter the U.S. assembled; rather, it argues that defining the trim kits as an “unfinished good simply because the product is unassembled upon entry is absolutely nonsensical” because Commerce recognizes that a “kit” is considered a finished good if it contains all the parts required to assemble the finished good. Pl’s Mot. at 12–13. The argument is unpersuasive, because in advancing it the plaintiff ignores that there are two *separate* exclusions for finished goods and that the exclusions each have separate requirements that a good must meet in order to qualify. The scope language expressly supports the defendant’s second requirement for the “finished merchandise” exclusion that a good must be “fully and permanently assembled and completed at the time of entry”. *Orders*, 76 Fed. Reg. at 30651. The *Petition* also supports this requirement stating the scope excludes “*final finished goods* containing aluminum extrusions that are imported in finished form, *i.e.*, *fully and permanently assembled*, such as finished window frames, *door frames*, picture frames, and solar panes.”²²

²¹ In explaining this requirement, Commerce noted that the list of products that meet this criteria in the scope language were “finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels” and it determined that a window frame without the glass, a door frame without the glass or vinyl door, or a picture frame without the glass pane or backing, would not meet the exclusion criteria. It also cited Memorandum to Christian Marsh, “Final Scope Ruling on Window Kits” (Dec. 6, 2011) (“*Window Kits Scope Ruling*”), and stated that in the ruling “[c]onsistent with [the scope language], [Commerce] determined that certain window kits were outside the scope of the *Orders* provided that ‘they contain at the time of importation all of the parts, including the glass panels, necessary to assemble a finished window or windows’”. Second Remand at 23, also referencing scope of the *Orders* and Trim Kits Scope Ruling Request at 5–6.

²² *See Petition* at 5 (italics added) (the *Petition* states that the scope also excludes “unassembled final finished goods containing aluminum extrusions, *e.g.*, ‘kits,’ that, at the time of importation, contain all of the necessary parts to assemble the finished goods.”); *see also Ad Hoc Shrimp Trade Action Comm. v. United States*, 33 CIT 915, 924, 637 F. Supp. 2d.1166, 1174–75 (2009) (“[u]nder the statutory scheme, Commerce owes deference to the intent of the proposed scope of an antidumping investigation as expressed in the antidumping petition”), referencing 19 U.S.C. §§ 1673, 1673a(b) (additional internal citations omitted).

Gregory S. Menegaz, J. Kevin Horgan, and John J. Kenkel, DeKieffer & Horgan of Washington, DC for Plaintiff-Intervenor Foshan Shunde.

Michael D. Snyder, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice for Defendant United States. With him on the brief were Stuart F. Delery, Assistant Attorney General, Jeanne E. Davidson, Director, and Patricia M. McCarthy, Assistant Director. Of counsel on the brief were Nathaniel J. Halvorson and Aman Kakar, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce of Washington, DC.

Frederick L. Ikenson, Larry Hampel, and Kierstan L. Carlson, Blank Rome LLP of Washington, DC for Defendant-Intervenor Home Products International, Inc.

OPINION AND ORDER

Gordon, Judge:

This consolidated action involves the U.S. Department of Commerce's ("Commerce") fifth administrative review of the antidumping duty order covering Floor-Standing, Metal-Top Ironing Tables from China. *See Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China*, 76 Fed. Reg. 15,297 (Dep't of Commerce Mar. 21, 2011) (final results admin. review), *as amended* by 76 Fed. Reg. 23,543 (Dep't of Commerce Apr. 27, 2011) (amended final results admin. review); *see also* Issues and Decision Memorandum for Ironing Tables from China, A-570-888 (Mar. 22, 2011), available at <http://ia.ita.doc.gov/frn/summary/PRC/2011-6558-1.pdf> (last visited this date) ("*Decision Memorandum*"). Before the court are the Final Results of Redetermination (July 8, 2014), ECF No. 162 ("*Third Remand Results*") filed by Commerce pursuant to *Since Hardware (Guangzhou) Co. v. United States*, 38 CIT ___, 977 F. Supp. 2d 1347 (2014) ("*Since Hardware III*"); *see also* Final Results of Redetermination (Aug. 14, 2013), ECF No. 113 ("*Second Remand Results*"); *Since Hardware (Guangzhou) Co. v. United States*, 37 CIT ___, 911 F. Supp. 2d 1362 (2013) ("*Since Hardware II*"); Final Results of Redetermination (Dec. 17, 2012), ECF No. 85 ("*First Remand Results*"); *Since Hardware (Guangzhou) Co. v. United States*, Consol. Court No. 11-106, ECF No. 81 (CIT Aug. 14, 2012) ("*Since Hardware I*") (order remanding to Commerce). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),¹ and 28 U.S.C. § 1581(c) (2012). Familiarity with the prior judicial and administrative decisions in this action is presumed.

Before the court are Foshan Shunde, and Since Hardware, and Home Products' comments on the *Third Remand Results*. Pl. Foshan Shunde's Comments on the U.S. Dep't of Commerce's Third Remand

¹ Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

Redetermination (July 24, 2014), ECF No. 168 (“Foshan Comments”); Since Hardware (Guangzhou) Co. Objection to the Dep’t of Commerce’s Third Remand Results (July 24, 2014), ECF No. 170; Comments of Home Prods. Int’l, Inc. on the Final Results of Redetermination by the U.S. Dep’t of Commerce (July 24, 2014), ECF No. 169 (“Home Products Comments”); *see also* Def.’s Resp. to Comments to the Remand Redetermination (Aug. 21, 2014), ECF No. 179.

Home Products has also moved for reconsideration of *Since Hardware III*. Mot. of Home Prods. Int’l, Inc. for Reh’g of Slip Op. 14–44, Insofar as it Relates to the Issue of Brokerage and Handling (May 15, 2014), ECF No. 153 (“Home Products Mot. for Reh’g”); *see also* Pls. Foshan Shunde and Since Hardware Joint Opp’n to Def. Intervenor Home Prods. Int’l’s Mot. for Recons. (June 23, 2014), ECF No. 158 (“Joint Reh’g Resp.”); Def.’s Resp. to Def.-Intervenor’s Mot. for Recons. (June 23, 2014), ECF No. 159; Reply of Home Prods. Int’l, Inc. to the Resps. to its Mot. for Reh’g (July 14, 2014), ECF No. 166.

For the reasons that follow, the court denies Home Products’ motion to reconsider, and sustains the *Third Remand Results*.

I. Standard of Review

For administrative reviews of antidumping duty orders, the court sustains Commerce’s “determinations, findings, or conclusions” unless they are “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as “something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966). Fundamentally, though, “substantial evidence” is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2014). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency

action “was reasonable given the circumstances presented by the whole record.” Edward D. Re, Bernard J. Babb, and Susan M. Koplin, 8 *West’s Fed. Forms, National Courts* § 13342 (2d ed. 2014).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce’s interpretation of the anti-dumping statute. See *United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (Commerce’s “interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.”).

II. Discussion

In its comments on the *Third Remand Results*, Foshan Shunde challenges Commerce’s failure to adjust its brokerage and handling (“B&H”) valuation for document preparation and customs clearance costs as unreasonable and Commerce’s zeroing methodology in the non-market economy context as inconsistent with law. Foshan Comments at 7–19. In its comments on the *Third Remand Results*, Since Hardware also challenges Commerce’s surrogate valuation for B&H as unreasonable, though the court in its first decision in this action deemed the issue waived due to the incompleteness of Since Hardware’s opening brief. *Since Hardware I* at 7. One portion of Commerce’s remand results has been submitted under protest: Commerce’s use of the \$473.94 baseline for B&H that the court directed Commerce to use as the best available information. See *Since Hardware III*, 38 CIT at ___, 977 F. Supp. 2d at 135859, 1364. Commerce avers that its original choice of \$645 remains reasonable on the administrative record. *Third Remand Results* at 6–9. Home Products agrees and argues that the court should remand to Commerce to calculate Foshan Shunde’s surrogate B&H value using the \$645 data point. Home Products Comments at 2. For the reasons that follow, the court sustains the *Third Remand Results* with the \$473.94 baseline calculation as the “best available information.” The court also sustains Commerce’s other B&H determinations, vacates that portion of *Since Hardware II* addressing the container size conversion factor, and sustains Commerce’s justification for zeroing.

A. B&H Baseline Cost

In *Since Hardware III* the court reviewed Foshan Shunde’s challenge to Commerce’s calculation of its B&H costs. Commerce originally chose \$645 as the best available information to value respondents’ B&H costs, a number derived from the World Bank’s *Doing Business in India: 2010* publication. Commerce and the parties ap-

pear to have believed that number was an average derived from costs in 17 cities across India, which for Commerce represented a “broad market average.” *First Remand Results* at 18; see *Decision Memorandum* at 19 (describing the World Bank data point as, *inter alia*, a “broad market average” that is “a more credible and representative source than the data provided by Foshan Shunde that are limited to select Indian companies and ports”). Commerce and the parties, however, were incorrect about the \$645 data point. That number was not a “broad market average” of multiple port city data points, but instead, a Mumbai-only data point. This was a somewhat surprising fundamental error with the administrative record because Commerce and the parties had been litigating the B&H issue since at least 2010 over the course of three administrative and three judicial proceedings. The complexity of surrogate valuations and margin calculations normally means that Commerce and the interested parties have a better command of the administrative record than the court.

Here, however, to help with closure on the B&H issue, the court in *Since Hardware III* provided a thorough explanation of the various B&H data as the record grew during successive remand proceedings. *Since Hardware III*, 38 CIT at ___, 977 F. Supp. 2d at 1354–55. As the court explained, only during the second remand proceedings when individual data points for all 17 Indian cities were on the record did Commerce and the parties appear to understand that the World Bank’s \$645 figure was in fact a Mumbai-only data point as opposed to a 17-city average. *Id.* The court also observed that the \$645 Mumbai-only data point, the second highest value for any individual city on the record, was significantly higher than the \$473.94 average for all 17 cities on the record. See *id.* at ___, 977 F. Supp. 2d at 1354–59.

Recall that when Commerce selected the \$645 data point, it did so in the belief that the \$645 data point was “publicly available, specific to the costs in question, represents a broad market average, and [was] contemporaneous to the POR.” *Decision Memorandum* at 19; see *First Remand Results* at 17–18; see 19 U.S.C. § 1677b(c)(1). Applying those very same selection criteria to the properly interpreted surrogate B&H data, the court in *Since Hardware III* concluded that a reasonable mind would only choose the \$473.94 17-city average as the “best available” baseline B&H surrogate value. The court reasoned that the only difference between the Mumbai-only data point and the 17-city average under Commerce’s own selection criteria was that the 17-city average represented a broader “market average” for B&H, and directed Commerce to use that figure. *Since Hardware III*, 38 CIT at ___, 977 F. Supp. 2d at 1358–59, 1364.

On remand, Commerce used that data point, but has done so under protest. Commerce now explains that it has concerns about the reliability of the data from the other Indian cities and that the Mumbai-only data point is the best available information. Commerce's reasons include the frequency at which the Mumbai-only data point is updated in comparison to the 16 other data points, the high level of population and container traffic in Mumbai as compared to the remaining 16 cities, and Foshan Shunde's location in a large urban area in China that is more comparable to Mumbai than the 16 other Indian cities. *Third Remand Results* at 6–7.

Standing alone, without any consideration of the prior substantive and procedural posture of this action, Commerce's explanation and choice of the \$645 baseline might pass as reasonable. The *Third Remand Results*, however, do not stand alone, but represent the *fourth* opportunity for Commerce to reasonably explain Foshan Shunde's surrogate B&H calculation. The \$645 data point has always been a surrogate value selection in search of a reasoned basis. The prior administrative and judicial proceedings necessarily inform Commerce's decision-making, and in the *Third Remand Results* Commerce has arbitrarily altered the application of its surrogate value selection criteria. Had Commerce been concerned about the reliability of the World Bank's data for the 16 smaller cities or the importance of selecting B&H data from an individually comparable city, it could have articulated those concerns in *any* of the three prior administrative determinations.² Instead, what Commerce continually emphasized was the importance of selecting "surrogate values which are . . . representative of a broad market average." *First Remand Results* at 17–18 (citing *Certain Polyester Staple Fiber from the People's Republic of China*, 75 Fed. Reg. 1336 (Dep't of Commerce Jan. 11, 2010) (final results admin. review)). In those prior administrative proceedings, Commerce did not distinguish the Mumbai-only data point from the 16 other ports, and "reliability" was not mentioned or analyzed as a significant concern. *Compare Third Remand Results* at 6–9, 21–22 (explaining preference for the Mumbai-only data point due to concerns over the reliability of the subnational data for the 16 other Indian cities and the level of port traffic in Mumbai as compared to Foshan Shunde's home city with reference to new evidence added to the record), *with Decision Memorandum* at 18–19 (no similar discussion), *First Remand Results* at 15–22, 38–41 (no similar discussion),

² Foshan Shunde first placed the subnational reports for four seaport cities on the record on October 18, 2010, well before Commerce issued its *Final Determination*. *Third Remand Results* at 7 n.29. Commerce and Foshan Shunde placed the remaining subnational report data on the record during the second remand proceedings.

and *Second Remand Results* at 12–14, 31–35 (explaining preference for the Mumbai-only data point but omitting any reference to the relative reliability of the data points or the importance of selecting data from a particular city that is more comparable to Foshan Shunde’s home city).

In the *Third Remand Results*, therefore, Commerce altered its selection criteria by suddenly shifting its emphasis away from identifying a “broad market average” to a focus on reliability and single-city comparability. Commerce apparently derived this new thinking from Home Products’ motion to reconsider, which was filed with the court one month before Commerce circulated its draft remand results. Turning briefly to the merits of Home Products’ motion, disposition of a Rule 59 motion is “within the sound discretion of the court.” *USEC, Inc. v. United States*, 25 CIT 229, 230, 138 F. Supp. 2d 1335, 1336 (2001). Such motions do not permit an unsuccessful party to re-litigate a case, but are supposed “to address a fundamental or significant flaw in the original proceeding.” *Id.* To that end, “a court’s previous decision will not be disturbed unless it is ‘manifestly erroneous.’” *Id.* at 230, 138 F. Supp. 2d at 1337. Home Products’ motion does not identify manifest error in *Since Hardware III*, but instead, as Foshan Shunde points out, raises arguments that Home Products could have made earlier in the litigation either before the court or Commerce. See *Joint Reh’g Resp.* at 3–16. The court does not entertain afterthought arguments in a motion for reconsideration. See *Donguan Sunrise v. United States*, 38 CIT ___, ___, Slip. Op. 14–117 at 4 (2014) (“Because AFMC had ample opportunity to raise its concerns about the general context of Commerce’s choice previously but failed to do so, the court will not entertain them now.”); see also *United States v. Matthews*, 32 CIT 1087, 1089, 580 F. Supp. 2d 1347, 1349 (2008) (arguments raised for first time on rehearing not properly before the court when prior opportunity existed for moving party to make its position known).

Apart from creating a tactical annoyance for Foshan Shunde (which had to simultaneously answer the motion and file comments on the remand), the real motivation behind the motion may have been, as Foshan Shunde alleges, *Joint Reh’g Resp.* at 2–3, to communicate to Commerce a dispositional path for the *Third Remand Results*. In addition to the timing between Home Products’ motion and Commerce’s draft remand results described above (with the motion filed one month before issuance of the draft remand results), Foshan Shunde identifies a substantive similarity between the two. *Id.* ; *Foshan Comments* at 4–5. *Compare, e.g.*, Home Products Mot. for Reh’g at 8–9 (discussing the frequency of publication of the subna-

tional reports, citing to the World Bank's website), *and id.* at 12–14 (discussing Mumbai's population and port volume as compared to other Indian cities and citing to Wikipedia entries), *with Third Remand Results* at 7–8 & n.30 (discussing the frequency of publication of the subnational reports, citing to printouts of pages from the World Bank's website that no party had submitted as evidence or cited to at any earlier proceeding), *and id.* at 8–9 (discussing Mumbai's population and port volume as compared to other Indian cities and citing to printouts of pages from Indian internet sources that no party had submitted as evidence or cited to at any earlier proceeding).

There is nothing inherently wrong or improper with Commerce adopting the arguments of a party in its findings, conclusions, and determinations. The problem here, as noted above, is that Commerce's choice of the \$645 B&H baseline measure has, from the outset of the litigation, been in search of a reasoned basis. By co-opting Home Products' belated justification for the \$645 measure, Commerce arbitrarily shifts the application of its selection criteria away from a desire to obtain a "broad market average" toward a sudden emphasis on "reliability" and single-city comparability. Had Commerce consistently applied that focus earlier in the proceeding, it may have provided a reasonable justification for the \$645 measure. Coming as it does, however, so late in the game, Commerce's change in emphasis reads like an arbitrary effort to reach a desired outcome rather than a reasonable attempt to identify the best available information to value Foshan Shunde's B&H costs. The court will therefore sustain the *Third Remand Results* in which Commerce used the court-directed \$473.94 baseline measure for Foshan Shunde's B&H costs.

B. Document Preparation and Customs Clearance Cost Component

Foshan Shunde has consistently argued that Commerce should alter its B&H calculation to reflect evidence suggesting that Foshan Shunde may have incurred document preparation and customs clearance fees only once every 6.2 containers it shipped. In the *Second Remand Results*, Commerce declined to address this argument, indicating that it was "not part of the Foshan Shunde surrogate value information identified by the court in *Since Hardware II* . . . at issue in this redetermination." *Second Remand Results* at 31–32. The court in *Since Hardware III* disagreed, and remanded to Commerce with instructions to "address Foshan Shunde's arguments regarding document preparation and customs clearance costs," and "in particular record evidence appearing to demonstrate that Foshan Shunde actually incurred such costs only once per 6.2 containers it shipped." *Since Hardware III*, 38 CIT at ___, 977 F. Supp. 2d at 1361. Commerce in

the *Third Remand Results* considered and rejected Foshan Shunde's argument, explaining that the World Bank data is not specific enough to adjust bill of lading costs in the way Foshan Shunde requests, and that Foshan Shunde's bill of lading evidence is drawn from too small and unreliable a data set to conclude that Foshan Shunde actually incurred bill of lading costs once per 6.2 containers.

Foshan Shunde now argues that “[t]he World Bank materials on the record of this case preclude any consideration of reported costs accounting for multiple shipments or multiple containers with one shipment” due to the “rigidity with which the World Bank has set its parameters.” Foshan Comments at 7–8. Foshan Shunde explains that the World Bank surveyed producers seeking “one quote for a one-time shipment of one container.” *Id.* at 8 (quoting Foshan Shunde Surrogate Values for the Final Results Ex. 8 at 91–92 (Dep’t of Commerce Oct. 18, 2010)). According to Foshan Shunde, this parameter “renders the World Bank study inappropriate for calculating Foshan Shunde’s [B&H] expenses without important adjustments, including accounting for the fact that Foshan Shunde shipped multiple containers included on one bill of lading with one set of export documentation considered together for a single customs clearance.” *Id.* at 8–9. In response to Commerce’s finding that the bill of lading evidence may not accurately reflect Foshan Shunde’s experience, Foshan Shunde maintains that Commerce’s selection is unreasonable because the record demonstrates at minimum that Foshan Shunde did ship multiple containers per bill of lading. *Id.* at 9–10.

The court understands Foshan Shunde’s logical assumption that a “one quote for a one-time shipment of one container” could imply that the World Bank’s survey accounts for the full cost of issuing exactly one bill of lading for exactly one container of goods. Commerce, however, reasonably concluded that the record here supports a different finding. As Commerce explains, the World Bank study “seeks to prescribe the total time and cost of exporting without specifying the specific number of bills of lading that are issued with each shipment,” and does not itemize bill of lading costs independently from the broader document preparation and customs clearance metric. *Third Remand Results* at 12–14. The record, in other words, does not foreclose the possibility that the World Bank’s document preparation and customs clearance figure may instead incorporate the *average* bill of lading cost for shipping one container, as opposed to the cost of exactly one bill of lading per container. Moreover, as Commerce explains, Foshan Shunde derived its “6.2” figure from an “examination of *nine* U.S. sales traces examined at verification, which themselves were culled from a U.S. database that is approximately *70 times larger*

than the sample base used by Foshan Shunde.” *Id.* at 14 (emphasis added). With such concerns over the accuracy of Foshan Shunde’s proposed figure and its relevance to the World Bank’s data, Commerce reasonably found that using the unadjusted World Bank document preparation and customs clearance cost component was the “best available” means of estimating that portion of Foshan Shunde’s overall B&H costs.

C. Zeroing

In accordance with a prior order lifting a stay on consideration of the zeroing issue, the court in *Since Hardware III* remanded for Commerce to address Foshan Shunde’s arguments about zeroing in the non-market economy context. *Since Hardware III*, 38 CIT at ___, 977 F. Supp. 2d at 1364. In the *Third Remand Results*, Commerce continued to apply zeroing and justified its approach largely by reference to *Union Steel v. United States*, 713 F.3d 1101 (Fed. Cir. 2013), a Court of Appeals for the Federal Circuit (“Federal Circuit”) decision affirming Commerce’s justification for zeroing in administrative reviews but not in investigations as a reasonable interpretation of an ambiguous statute under *Chevron* step two. *Third Remand Results* at 26–30 (citing *Union Steel* 713 F.3d at 1108).

Foshan Shunde argues that *Union Steel* does not apply to administrative reviews of non-market economies, and that Commerce’s justification for zeroing in such reviews is unreasonable. Foshan Shunde explains that the Federal Circuit in *Union Steel* upheld Commerce’s practice of zeroing in market economies as reasonable because of the “greater specificity” zeroing provided when conducting an average-to-transaction (“A-to-T”) comparison in administrative reviews than the average-to-average (“A-to-A”) comparison employed in investigations. Specifically, according to Foshan Shunde, *Union Steel* determined that Commerce’s practice of zeroing in administrative reviews but not investigations “was *only* justified by the greater accuracy resulting from the use of monthly normal values (calculated from actual invoiced sales prices).” Foshan Shunde Comments at 18 (emphasis added); see *Union Steel*, 713 F.3d at 1108 (citing *Union Steel v. United States*, 36 CIT ___, ___, 823 F. Supp. 2d 1346, 1359 (2012)). Because Commerce uses a yearly average normal value instead of monthly average normal values in non-market economy administrative reviews, Foshan Shunde argues that *Union Steel* does not apply. *Id.* Foshan Shunde requests the court to hold Commerce’s justification for zeroing here to be unreasonable because it, among other things, “tends to artificially drive some sales below fair value and others

above fair value” and “unfairly disadvantages NME [non-market economy] respondents.” *Id.* at 19.

The main focus of Foshan Shunde’s argument is on the normal value side of the antidumping duty margin equation. Foshan Shunde does not examine or consider the export or constructed export price side of the equation. Problematically for Foshan Shunde, *Union Steel* did not uphold zeroing as reasonable “only” because of the greater specificity Commerce attains by using monthly average *normal values* in market economy reviews. *See* Foshan Shunde Comments at 18. Instead, *Union Steel* consistently emphasized that zeroing in combination with the A-to-T methodology can increase accuracy and reveal masked dumping because Commerce compares normal value to *transaction-specific export prices* as opposed to *average export prices* under the A-to-A methodology used in investigations. As the Federal Circuit explained:

When using average-to-average comparisons, transactions are divided into “averaging groups.” *Remand Results* at 11. Transactions are divided into averaging groups on the basis of physical characteristics and level of trade for the purpose of price comparison. *Id.* When calculating the average export price or constructed export price, Commerce calculates a comparison result for each averaging group, and averages together high and low export prices within the group. Thus, those export prices above normal value offset those below normal value within the averaging group. Commerce then aggregates the results of the comparison for each averaging group to calculate a weighted average dumping margin. *Id.* at 11–12. Accordingly, this comparison methodology masks individual transaction prices below normal value with other above normal value prices within the same averaging group.

In contrast, when Commerce uses the average-to-transaction comparison method, as it did in this administrative review, Commerce compares the export price (or constructed export price) for a particular export transaction with an average normal value for the comparable sales of foreign like products within the averaging group. *Id.* at 12. For specific export transactions, Commerce calculates a comparison result which establishes the amount that transaction is priced at less than its normal value. *Id.* Using this methodology, Commerce does not average export transaction prices before comparing the export price (or constructed export price) to normal value. Instead, Commerce uses a single export transaction price and aggregates

the transaction-specific comparison result. The average-to-transaction comparison methodology thus reveals individual dumping.

Commerce's decision to use or not use the zeroing methodology reasonably reflects unique goals in differing comparison methodologies. In average-to-average comparisons, as used in investigations, Commerce examines average export prices; zeroing is not necessary because high prices offset low prices within each averaging group. When examining individual export transactions, using the average-to-transaction comparison methodology, prices are not averaged and zeroing reveals masked dumping. This ensures the amount of antidumping duties assessed better reflect the results of each average-to-transaction comparison. Commerce's differing interpretation is reasonable because the comparison methodologies compute dumping margins in different ways and are used for different reasons.

Id. at 1108–09. The Federal Circuit agreed that using “the export price (or constructed export price) for a particular export transaction” under the A-to-T methodology reasonably justified zeroing because it enabled Commerce to “reveal[] individual dumping.” *Id.* In its comments on the *Third Remand Results*, Foshan Shunde does not address the export price side of the equation, perhaps in recognition that Commerce's use of transaction-specific export prices in *both* non-market and market economy administrative reviews weakens Foshan Shunde's argument. *See* Foshan Shunde Comments at 12–19. For example, Foshan Shunde makes no effort to explain why using individual export transaction prices with zeroing does not “reveal individual dumping” in non-market economy reviews like it does in market economy reviews, or why it believes the accuracy of monthly average normal values is more important to revealing individual dumping than using individual export prices. *See id.* By leaving off one side of the ledger, Foshan Shunde has not provided the court with a sufficient basis to distinguish *Union Steel*.

Consistent with *Union Steel*, Commerce explained below that “the examination of *individual export transactions*, as opposed to averaging the export transactions, allows [Commerce] to further its recognized interest in greater specificity to determine pricing behavior for individual transactions and to identify masked dumping in administrative reviews,” even when comparing that export price to a single average normal value. *Third Remand Results* at 29 (emphasis added). As the Federal Circuit explained, “[n]o rule of law precludes Commerce from interpreting 19 U.S.C. § 1677(35) differently in different

circumstances as long as it provides an adequate explanation.” *Id.* at 1110. Here, Commerce’s explanation is consistent with that sustained as reasonable in *Union Steel* and other market and non-market economy cases. *See, e.g., id.* at 1108–11; *Dongguan Sunrise Furniture Co. v. United States*, 37 CIT ___, ___, 904 F.Supp.2d 1359, 1367 (2013); *Xiamen Int’l Trade & Indus. Co. v. United States*, 37 CIT ___, ___, 953 F. Supp. 2d 1307, 1310 n.1 (2013); *Grobest*, 36 CIT at ___, 853 F. Supp. 2d at 1356–62. That explanation rests on fundamental differences between A-to-A and A-to-T comparison methodologies and the purposes of conducting reviews as opposed to investigations that are applicable in non-market economy contexts as well as market economy contexts. *See* 19 U.S.C. §§ 1677(35), 1677f-1(d); 19 C.F.R. § 351.414. The court therefore must sustain Commerce’s use of zeroing in this administrative review.

D. Container Size Cost Conversion Factor

Foshan Shunde has now voluntarily abandoned its claim that the 20-foot to 40foot container cost conversion factor should be lower than a 50% increase. Joint Reh’g Resp. at 9. The court accordingly will vacate the portion of *Since Hardware III* that deals with this issue, and sustain Commerce’s selection of a 50% increase in the *Third Remand Results*. *See Since Hardware III*, 38 CIT at ___, 977 F. Supp. 2d at 1359–60.

E. Since Hardware’s B&H

In its first decision in this action the court deemed *Since Hardware’s* B&H issue waived because of incompleteness, *Since Hardware (Guangzhou) Co. v. United States*, No. 11–00106 (Aug. 14, 2012), ECF No. 81 (order), just as it did in the immediate prior action. *Home Prods. Int’l, Inc. v. United States*, No. 11–00104 (Jan. 3, 2012), ECF No. 62 (order deeming challenge to B & H calculation waived), as amended, ECF No. 63; *Home Prods. Int’l, Inc. v. United States*, 36 CIT ___, ___, 837 F. Supp. 2d 1294, 1300–02 (2012); *opinion after remand, Home Prods. Int’l, Inc. v. United States*, 36 CIT ___, 853 F. Supp. 2d 1257 (2012).

Missing from *Since Hardware’s* brief was any effort at identifying standards against which the court could evaluate the reasonableness of Commerce’s findings and conclusions for *Since Hardware’s* surrogate B&H calculation (e.g., how Commerce typically calculates B&H in the non-market economy context, etc.). *Since Hardware’s* R. 56.2 Mem. in Supp. of Mot. for J. upon Agency Rec. at 9–10, ECF No. 42. In marked contrast to *Since Hardware’s* approach is the well-

developed argumentation of Foshan Shunde. *See* Foshan Shunde’s R. 56.2 Mem. in Supp. of Mot. for J. upon Agency Rec. at 16–33, ECF No. 44.

It is just not possible to read the B&H section of Since Hardware’s opening brief and understand what is being argued, challenged or contested. Since Hardware cites no statutes, regulations, or administrative or judicial precedents. The court could not understand this section of Since Hardware’s brief. The court could not rightly review Since Hardware’s B&H issue without assuming the role of co-plaintiff and framing the issue against the operative standard of review. This is not the role of the court. *See United States v. Great Am. Ins. Co.*, 738 F.3d 1320, 1328 (Fed. Cir. 2013) (“It is well established that arguments that are not appropriately developed in a party’s briefing may be deemed waived.”); *MTZ Polyfilms, Ltd. v. United States*, 33 CIT 1575, 1578, 659 F. Supp. 2d 1303, 1308 (2009) (“[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel’s work, create the ossature for the argument, and put flesh on its bones.” (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990))).

Since Hardware suggests that it nevertheless is entitled to the same adjustments to B&H that Foshan Shunde received. Since Hardware though does not understand the posture of the litigation. When the court deemed the issue waived for Since Hardware, it sustained Commerce’s B&H determination for Since Hardware. There is, therefore, a real consequence for Since Hardware inadequately briefing the issue.

III. Conclusion

In accordance with the foregoing, it is hereby

ORDERED that the portion of the court’s decision in *Since Hardware III* dealing with the reasonableness of Commerce’s use of a 50% increase to convert prices for 20-foot containers into prices for 40-foot containers, *Since Hardware III*, 38 CIT at ___, 977 F. Supp. 2d at 1359–60, is vacated; it is further

ORDERED that the portion of the *Second Remand Results* pertaining to Commerce’s application of a 50% increase for converting 20-foot container costs to 40-foot container costs is sustained; it is further

ORDERED that HPI’s motion for reconsideration of *Since Hardware III* is denied; and it is further

ORDERED that Commerce’s *Third Remand Results* are sustained.

Judgment will issue separately.

Dated: December 30, 2014

New York, New York

/s/ Leo M. Gordon
JUDGE LEO M. GORDON

Slip Op. 14–160

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

Before: Timothy C. Stanceu, Chief Judge
Court No. 11–00147

[Affirming a remand redetermination by the U.S. Department of Commerce in response to a court order in litigation contesting the final results of an administrative review of an antidumping duty order on certain lightweight thermal paper from Germany]

Dated: December 31, 2014

F. Amanda DeBusk, Hughes Hubbard & Reed, LLP, of Washington, DC, for plaintiff Papierfabrik August Koehler SE. With her on the brief were *Matthew R. Nicely*, *Eric S. Parnes*, and *Robert L. LaFrankie*.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant United States. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Jessica M. Link*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

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

OPINION

Stanceu, Chief Judge:

In this case, plaintiff Papierfabrik August Koehler SE (“Koehler”) contested a final determination (“Final Results”) that the International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”) issued to conclude the first administrative review of an antidumping duty order on certain lightweight thermal paper from Germany (the “subject merchandise”).¹ See *Lightweight Thermal Paper From Germany: Notice of Final Results of the First Antidumping Duty Administrative Review*, 76 Fed. Reg. 22,078,

¹ During the course of the litigation, Papierfabrik August Koehler AG (“Koehler”) changed from an “AG” to an “SE” corporate form. First Am. Compl. 1 n.1 (May 20, 2013), ECF No. 83. Koehler America, Inc., previously a plaintiff in this action, was terminated as a party on May 20, 2013. See Order (May 20, 2013), ECF No. 82.

22,079 (Int'l Trade Admin. Apr. 20, 2011) (“*Final Results*”). The first administrative review period covers entries of subject merchandise made from November 20, 2008 through October 31, 2009 (the “period of review” or “POR”). *Id.*

Before the court is the redetermination pursuant to remand (“Remand Redetermination”) Commerce issued in response to the court’s order in *Papierfabrik August Koehler AG v. United States*, 38 CIT ___, 971 F. Supp. 2d 1246 (2014) (“*Papierfabrik I*”). *Final Results of Redetermination Pursuant to Court Remand* (June 23, 2014), ECF No. 104–1 (“*Remand Redetermination*”). The court will affirm the Remand Redetermination.

I. BACKGROUND

The court’s prior opinion provides background on this case, which is supplemented herein. *Papierfabrik I*, 38 CIT at ___, 971 F. Supp. 2d at 1247–49. Koehler is a German producer and exporter of lightweight thermal paper and Koehler America, Inc. is an affiliated U.S. distributor. Compl. ¶¶ 3–4 (June 3, 2011), ECF No. 6. Koehler was the only producer/exporter Commerce examined in the first review. *Final Results*, 76 Fed. Reg. at 22,079.

During the first administrative review, Koehler reported having made rebates to its customers, on monthly, quarterly, and annual bases, in selling the foreign like product in its home market of Germany. *Koehler’s First Supplemental Sections A–C Questionnaire Resp.* 15–16 (Apr. 15, 2010) (Pub. Admin.R.Doc. No. 44) (Conf. Admin.R.Doc. No. 10) (“*Koehler’s First Supplemental Questionnaire Resp.*”). For the preliminary results of the review (“Preliminary Results”), Commerce made downward adjustments to the home market sales prices for all of the reported rebates when determining the normal value of Koehler’s subject merchandise according to Koehler’s home market sales. *Lightweight Thermal Paper From Germany: Notice of Preliminary Results of Antidumping Duty Administrative Review*, 75 Fed. Reg. 77,831, 77,835–36 (Int’l Trade Admin. Dec. 14, 2010) (“*Prelim. Results*”). Commerce preliminarily assigned Koehler a *de minimis* antidumping duty margin. *Id.* at 77,837.

In the *Final Results*, published on April 20, 2011, Commerce continued to adjust the home market sales prices for Koehler’s reported quarterly and annual rebates but did not adjust the sales prices to account for any rebate that Koehler paid as a “monatsbonus,” i.e., monthly rebate. *Final Results*, 76 Fed. Reg. at 22,079; *Issues & Decision Mem. for the Final Results of the First Admin. Review of the Antidumping Duty Order on Lightweight Thermal Paper from Germany* 21, A-428–840, ARP 10–09(Apr. 13, 2011) (Pub.

Admin.R.Doc. No. 109), available at <http://enforcement.trade.gov/frn/summary/GERMANY/2011-9574-1.pdf> (last visited Dec. 23, 2014) (“*Decision Mem.*”). Commerce assigned a 3.77% weighted-average antidumping duty margin to Koehler. *Final Results*, 76 Fed. Reg. at 22,079.

In this action, plaintiff claimed that the Department’s decision not to make downward adjustments for the monthly rebates was unlawful. First Am. Compl. ¶¶ 24–25 (May 20, 2013), ECF No. 83 (“Am. Compl.”). Plaintiff also claimed that Commerce impermissibly denied Koehler an opportunity to respond to certain correspondence between U.S. Senators and Representatives and the Secretary of Commerce that Commerce placed on the record on the last day of the administrative review proceeding.² Am. Compl. ¶¶ 22–23.

In *Papierfabrik I*, the court held the Final Results unlawful, construing the governing regulations to preclude Commerce from disallowing adjustments to home market prices for the monthly rebates in the circumstances presented. *Papierfabrik I*, 38 CIT at __, 971 F. Supp. 2d at 1250–55. Because the court granted plaintiff’s requested relief based on that holding, the court did not reach the question of whether Commerce must reopen the record to allow Koehler to comment on the congressional correspondence. *Id.* at __, 971 F. Supp. 2d at 1258–59. The court ordered Commerce to reach a new determination upon remand that conformed to the court’s opinion and to redetermine Koehler’s margin as necessary. *Id.* at __, 971 F. Supp. 2d at 1259.

Commerce filed the Remand Redetermination with the court on June 23, 2014. *Remand Redetermination 1*. In the Remand Redetermination, Commerce recognized downward adjustments to Koehler’s home market sales prices to account for the monthly rebates. *Id.* at 4–5. Commerce recalculated Koehler’s dumping margin from the 3.77% of the Final Results to 0.03%, which qualifies as a *de minimis* margin. *Id.* at 5.

² The correspondence involved in this issue is a March 30, 2011 letter to then-Commerce Secretary Gary Locke co-signed by five members of the U.S. Congress and Secretary Locke’s individual responses to the letter. See *Mem. to the File re: Correspondence from U.S. Congressmen* (Pub. Admin.R.Doc. No. 107) (Apr. 13, 2011). On April 8, 2011, Secretary Locke sent each member a reply letter stating that the Department was considering whether to make adjustments for “certain reported rebates” in the Department’s final determination. *Letter to Rep. Michael Turner from Gary Locke* (Pub. Admin.R.Doc. No. 102); *Letter to Rep. Reid Ribble from Gary Locke* (Pub. Admin.R.Doc. No. 103); *Letter to Senator Rob Portman from Gary Locke* (Pub. Admin.R.Doc. No. 104); *Letter to Senator Sherrod Brown from Gary Locke* (Pub. Admin.R.Doc. No. 105); *Letter to Senator Herb Kohl from Gary Locke* (Pub. Admin.R.Doc. No. 106).

On July 23, 2014, plaintiff and defendant-intervenor Appvion, Inc. (“Appvion”) each filed comments on the Remand Redetermination.³ Pl.’s Comments on Final Results of Redetermination Pursuant to Ct. Remand, ECF No. 106 (“Koehler’s Comments”); Def.-intervenor’s Comments on the Remand Redetermination, ECF No. 108 (“Appvion’s Comments”). Defendant replied to these comments on August 14, 2014. Def.’s Resp. to Comments Regarding Remand Results, ECF No. 113 (“Def.’s Resp.”). Plaintiff fully supports the Remand Redetermination. Koehler’s Comments 1, 3. While noting that Commerce complied with the court’s decision under protest, defendant asks that the court affirm the Remand Redetermination. Def.’s Resp. 2 (“The Court should affirm the remand results because, as we demonstrate below, Commerce has complied with the Court’s opinion and order, and its determination is supported by substantial evidence and in accordance with law.”). Appvion disagrees with the court’s holding in *Papierfabrik I* that the Department’s disallowance of the monthly rebates was based on an impermissible interpretation of the governing regulation. Appvion’s Comments 1. Further, Appvion argues that the court must reject the Remand Redetermination on the ground that Commerce violated 19 C.F.R. § 351.401(g) by failing to consider whether Koehler’s allocation of the monthly rebates to a single product that Koehler sold in the home market resulted in inaccuracies or distortion. *Id.*

II. DISCUSSION

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930 (“Tariff Act”), 19 U.S.C. § 1516a, including an action contesting the final results of an administrative review that Commerce issues under section 751 of the Tariff Act, 19 U.S.C. § 1675(a).⁴ When reviewing the final results of an administrative review, the court “shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . .” 19 U.S.C. § 1516a(b)(1)(B)(i).

³ Defendant-intervenor changed its name from Appleton Papers Inc. to Appvion, Inc. (“Appvion”) during the course of this litigation. See *Letter to Clerk of the Court Re: Papierfabrik AG v. United States*, Ct. No. 11–00147 (June 21, 2013), ECF No. 84.

⁴ All statutory citations herein are to the 2006 edition of the United States Code and all citations to regulations are to the 2010 edition of the Code of Federal Regulations.

A. *The Remand Redetermination Reaches a Correct Result Under the Department's Regulations*

Papierfabrik I rejected the Department's conclusion in the *Final Results* that the monthly rebates should be disallowed because they were not "legitimate" rebates. That conclusion relied on reasoning the court considered erroneous and findings the court deemed irrelevant. See *Papierfabrik I*, 38 CIT at __, 971 F. Supp. 2d at 1250–54. The court ruled irrelevant the Department's findings that Koehler had failed to demonstrate that the monthly rebates were made according to a rebate "program" and that its customers had prior knowledge of the rebate or a rebate program. *Id.* at __, 971 F. Supp. 2d at 1252 (citing *Decision Mem.* 19). The court explained that the applicable regulations did not condition a downward adjustment on the existence of a "program" or whether a customer was aware of the terms of a rebate at the time of sale. *Id.* at 1256–57.

The court based its holding in *Papierfabrik I* on the plain language of 19 C.F.R. § 351.401(c), which provides in pertinent part that "[i]n calculating . . . normal value (where normal value is based on price), the Secretary will use a price that is net of any price adjustment, as defined in § 351.102(b)" In § 351.102(b), the Department's regulations provide that "[p]rice adjustment' means any change in the price charged for the subject merchandise or the foreign like product, such as discounts, rebates, and post-sale price adjustments, that are [*sic*] reflected in the purchaser's net outlay." 19 C.F.R. § 351.102(b)(38).

The court noted that Commerce found, both impliedly and expressly, that Koehler made the monthly rebates at issue in its sales of the foreign like product in its home market. *Papierfabrik I*, 38 CIT __, 971 F. Supp. 2d at 1251. The Department's own findings, as stated in the issues and decision memorandum accompanying the *Final Results*, caused the court to conclude that Commerce was required to recognize the monthly rebates as "price reductions" that were "reflected in the purchaser's net outlay" within the meaning of the Department's regulations. *Id.* at __, 971 F. Supp. 2d at 1251–52.

In the Remand Redetermination, Commerce described the court's holding as follows: "The court held that the Department's decision to disallow an adjustment to Koehler's normal value for its monthly home market rebates ('monatsbonus') was unsupported by law because the governing regulations did not give the Department the discretion not to allow for such an adjustment." *Remand Redetermination* 1 (footnote omitted). Commerce added that "[w]hile we respectfully disagree with the Court's finding, based on the Court's reasoning, we find that there is no alternative but to alter our *ARI*

[first administrative review] *Final Results* and allow Koehler's monthly home market rebate adjustment on remand." *Remand Redetermination* 4–5. Commerce further explained that:

[T]he court stated that “the regulations do not merely ‘allow,’ but require, Commerce to treat these rebates as post-sale price adjustments,” and that “Commerce lacked the discretion not to recognize a reduction in the purchaser’s net outlay for the foreign like product that satisfied the definition of a ‘price adjustment’ in § 351.102(b)(38). 19 C.F.R. § 351.401(c).”

Remand Redetermination 9–10 (footnote omitted).

The court will affirm the Department’s decision on remand to recognize the monthly rebates as price adjustments to home market sales of the foreign like product. Commerce complied with the court’s remand order, correctly reasoning that its own regulations, as construed by the court, did not allow it to refuse to recognize the monthly rebates as downward price adjustments.

B. The Court Rejects Appvion’s Arguments in Opposition to the Remand Redetermination

In the Final Results, Koehler reported that during the POR it issued monthly rebates for home market sales of only one lightweight thermal paper product, “KT 48 F20.” *Koehler’s First Supplemental Questionnaire Resp.* 17; *Koehler’s Second Supplemental Sales Questionnaire Resp.* 9 (Aug. 5, 2010) (Pub. Admin.R.Doc. No. 71) (Conf. Admin.R.Doc. No. 24) (“*Koehler’s Second Supplemental Questionnaire Resp.*”); *Koehler’s Third Supplemental Sales Questionnaire Resp.* 2 (Nov. 15, 2010) (Pub. Admin.R.Doc. No. 78) (Conf. Admin.R.Doc. No. 27) (“*Koehler’s Third Supplemental Questionnaire Resp.*”). Record documents indicate that the rebate was calculated as a percentage of the total monthly sales of KT 48 F20 that were made to an individual customer, that the monthly calculation resulted in issuance of a credit to that customer for the calculated amount, and that the rebate percentage generally varied from month to month during the POR. See *Koehler’s First Supplemental Questionnaire Resp.*, Ex. S-14 (conf. version) (email communications concerning rebates); *Koehler’s Second Supplemental Sales Questionnaire Resp.* 9; *Koehler’s Third Supplemental Sales Questionnaire Resp.*, Exs. 1, 2 (conf. version) (sample credits).

In comments on the draft version of the Remand Redetermination, Appvion argued that Commerce should allocate the amount of the monthly rebates across all sales of the foreign like product to the customer during the particular month rather than only to sales of KT

48 F20. *Appvion's Comments on the Draft Remand Redetermination* 9–12 (May 23, 2014) (Pub. Remand Admin.R.Doc. No. 13). In the final version of the Remand Redetermination, Commerce rejected Appvion's suggested reallocation and recognized the monthly rebates as Koehler had reported them, i.e., by making downward adjustments only to the prices paid for KT 48 F20. *Remand Redetermination* 9.

Appvion opposes the Remand Redetermination, arguing that the redetermination misinterpreted the court's remand order in *Papierfabrik I* by erroneously concluding that Commerce lacked the authority to reallocate the rebates. Appvion's Comments 1, 4–5. Appvion contends that Commerce erroneously concluded it lacked discretion under the court's order to reallocate the rebates to address what Appvion alleges is “manipulation” by Koehler in applying the monthly rebates to KT 48 F20 solely to reduce the dumping margin. *Id.* at 5–7. Next, Appvion contends that in the Remand Redetermination Commerce improperly failed to consider whether the allocation methodology used by Koehler resulted in “inaccuracies or distortions,” contrary to the requirement of 19 C.F.R. § 351.401(g). *Id.* at 8–11. Seeking a second remand, Appvion argues that Commerce has authority under 19 C.F.R. § 351.401(g) to reallocate the monthly rebates in order to “prevent manipulation,” that the court's decision in *Papierfabrik I* did not hold otherwise, and that Commerce should reallocate Koehler's monthly rebates to all sales of the foreign like product made to the relevant home market customer during the month. *Id.* at 11. The court concludes that the Department's decision not to reallocate the monthly rebates was lawful and, accordingly, that a second remand is not warranted.

The issue of whether the rebates should be recognized as applying only to sales of KT 48 F20 or reallocated to a wider group of home market sales was not raised previously in this litigation and, therefore, was not addressed by the court in *Papierfabrik I*.⁵ It follows that Commerce could not correctly have interpreted the court's opinion and order in *Papierfabrik I* to limit its discretion in resolving that issue on remand. Nor is warranted to conclude that Commerce believed it was limited by the court's ruling in deciding the issue. Although certain language in the Remand Redetermination, when

⁵ Although Appvion raised this allocation challenge during the administrative proceeding, Commerce did not address the question in the Final Results because Commerce had chosen not to adjust home market sales prices to account for the monthly rebates. See *Issues & Decision Mem. for the Final Results of the First Admin. Review of the Antidumping Duty Order on Lightweight Thermal Paper from Germany* 23, A-428–840, ARP 10–09 (Apr. 13, 2011) (Pub. Admin.R.Doc. No. 109), available at <http://enforcement.trade.gov/frn/summary/GERMANY/2011–9574–1.pdf> (last visited Dec. 23, 2014); *Final Results of Redetermination Pursuant to Court Remand* 9 (June 23, 2014), ECF No. 104–1 (“*Remand Redetermination*”).

read in isolation, could be construed to indicate that Commerce believed the court's ruling did not allow it to address "manipulation" by reallocating the monthly rebates, a reading of the entire Remand Redetermination in context casts some doubt on such a construction.

In the Remand Redetermination, Commerce clarified that it had not considered the reallocation issue in the Final Results. *Remand Redetermination* 9 ("[B]ecause we disallowed Koehler's rebates in their entirety, we did not address petitioner's arguments at that time [i.e., during the Final Results]."). Commerce proceeded to address the allocation issue on the merits and came to its own determination on this issue. *Id.* ("Thus, we address these comments now in the first instance."). Quoting from the court's opinion, Commerce correctly understood that the court in *Papierfabrik I* held that in the situation presented Commerce was not authorized under 19 C.F.R. § 351.401(c) and § 351.102(b)(38) to refuse to recognize the monthly rebates as post-sale price adjustments. *Remand Redetermination* 9–10. The sentence in the Remand Redetermination that follows this discussion reads as follows: "Therefore, under this interpretation of 19 CFR 351.102(b)(38) and 351.401(c), the Department does not have the discretion to consider the legitimacy of, and therefore the possible manipulation of the dumping margin through, such rebates." *Id.* at 10 (footnote omitted). If read apart from the related discussion in the Remand Redetermination, this sentence might be interpreted to mean that Commerce considered the court to have limited the Department's discretion to address the question of "manipulation" through reallocation of the rebates. Nevertheless, the discussion in the Remand Redetermination that follows consists of two paragraphs in which Commerce presented its reasons for not performing the reallocation urged by Appvion. *Id.* at 9–10. None of the reasons provided pertains to the court's opinion and order in *Papierfabrik I*. Moreover, Commerce grounded its reasoning in 19 C.F.R. § 351.401(g) rather than the two regulatory provisions it mentioned in the sentence in question, 19 C.F.R. § 351.401(c) and § 351.102(b)(38). *Id.* If Commerce considered itself bound by the court's order in addressing the reallocation issue, it did not unambiguously make that point in the Remand Redetermination. Commerce instead decided as a matter of first impression the issue Appvion had raised with respect to allocation. In any event, the court concludes that Commerce did so in a way that was within its regulatory discretion and supported by substantial record evidence.

According to Appvion's interpretation of 19 C.F.R. § 351.401(g), Commerce did not satisfy the requirement in its regulations to determine whether Koehler's allocation of the monthly rebates to only one

product, KT 48 F20, resulted in “inaccuracies or distortion” before adopting that allocation. Appvion’s Comments 8 (arguing that 19 C.F.R. § 351.401(g)(1) “mean[s] that Commerce *may not* accept a proposed allocation unless it first finds that the allocation does not cause inaccuracies or distortion.”) (emphasis in original). The Department’s regulations provide that “[t]he Secretary may consider allocated expenses and price adjustments when transaction-specific reporting is not feasible, provided the Secretary is satisfied that the allocation method used does not cause inaccuracies or distortions.” 19 C.F.R. § 351.401(g)(1). The regulations further provide that “[a]ny party seeking to report an expense or a price adjustment on an allocated basis must demonstrate to the Secretary’s satisfaction that the allocation is calculated on as specific a basis as is feasible, and must explain why the allocation methodology used does not cause inaccuracies or distortions.” *Id.* § 351.401(g)(2). The regulations also state that in “determining the feasibility of transaction-specific reporting or whether an allocation is calculated on as specific a basis as is feasible, the Secretary will take into account the records maintained by the party in question in the ordinary course of its business, as well as such factors as the normal accounting practices in the country and industry in question and the number of sales made by the party during the period of investigation or review.” *Id.* § 351.401(g)(3).

The court disagrees with Appvion’s contention that Commerce failed to consider whether Koehler’s directing the monthly rebates only to home market sales of KT 48 F20 caused “inaccuracies or distortions” within the meaning of 19 C.F.R. § 351.401(g)(1) and (2). Because of the nature of the express findings Commerce made in the Remand Redetermination, the court must consider Commerce to have decided any question of whether Koehler’s “allocation,” i.e., its application of the rebate only to KT 48 F20, created an inaccuracy or a distortion. Commerce identified an inaccuracy that would result were it to adopt Appvion’s proposed alternative, finding that that “[a]pplying the total rebate amounts to all sales as suggested by petitioner would be unrelated to Koehler’s actual commercial practices” *Remand Redetermination* 11. Commerce noted that Koehler reported the rebate as being paid only on the KT 48 F20 product, *id.*, and record evidence consisting of commercial documents, including price lists and communications to the customer, supports the finding that the monthly rebates were calculated each month based solely on sales of this product. *See Koehler’s Sections B & C Questionnaire Resp.*, Ex. B-4 (Feb. 16, 2010) (Conf. Admin.R.Doc. No. 3) (price lists); *Koehler’s First Supplemental Questionnaire Resp.*, Ex. S-14 (conf. version)

(email communications); *Koehler's Third Supplemental Sales Questionnaire Resp.*, Exs. 1, 2 (conf. version) (sample credits).

Applying the requirement in § 351.401(g)(2) that the allocation be “calculated on as specific a basis as is feasible,” Commerce justifiably found on the record evidence that “Koehler’s reported allocation methodology is on as specific a basis as is feasible, based on how it [Koehler] tracks these rebates in its normal course of business,” *Remand Redetermination* 11, and that Appvion’s proposed alternative would be “less specific than currently reported,” *id.* The record evidence demonstrating that Koehler granted the rebate only on sales of KT 48 F20 supports these findings.

Based on the record evidence concerning Koehler’s monthly rebates, the court concludes that the implication of Appvion’s argument is that Commerce was required to find “inaccuracy” and “distortion” in Koehler’s decision to grant the rebate only on sales of the KT 48 F20 product. Appvion’s argument appears to be directed to that decision, and Koehler’s motivation for doing so, rather than to whether that decision was accurately reflected in those of Koehler’s ordinary business records that were relevant to the “allocation” issue Appvion raised. Appvion argues that “[i]n this case, Koehler *arbitrarily* ascribed the rebate to sales of KT 48 F20, resulting in an *artificial* specificity,” Appvion’s Comments 9 (emphasis in original), that “had no commercial justification and was done solely to manipulate the margin calculations,” *id.* Appvion submits that Commerce “should have reallocated the monthly credit amounts using the most specific methodology that would not result in ‘inaccuracies or distortions,’ *i.e.*, assigning the aggregate rebate amount for each month to all sales of the foreign like product (including non-matching models)” *Id.* This Commerce permissibly declined to do.

Nothing in the record evidence *compelled* Commerce to find “inaccuracy” or “distortion” in connection with Koehler’s granting rebates only on the KT 48 F20 product. On this record, the court finds nothing unreasonable in the Department’s interpreting 19 C.F.R. § 351.401(g) so as not to require a reallocation of the monthly rebate amounts based on Appvion’s notion of “inaccuracy” or “distortion.”

Implying that it did not routinely apply its regulation as Appvion urged it to, Commerce stated that “we do not have any clear practice with respect to reallocating these rebates as suggested by petitioner.” *Id.* The court need not, and does not, decide the question of whether Commerce could have reallocated the rebates as Appvion urged in its comments (and advocates before the court), had Commerce desired to do so. It is sufficient that Commerce, in deciding against Appvion’s proposed course of action, permissibly construed the pertinent regu-

lations and reached relevant findings that were supported by record evidence, including Koehler's business records. The court concludes, therefore, that a second remand is not warranted in this case.

III. CONCLUSION

For the reasons stated in the foregoing, the court will affirm the Department's Remand Redetermination and enter judgment accordingly.

Dated: December 31, 2014

New York, NY

/s/ Timothy C. Stanceu

TIMOTHY C. STANCEU

CHIEF JUDGE

Slip Op. 14-161

ETHAN ALLEN GLOBAL, INC. and ETHAN ALLEN OPERATIONS, INC.,
Plaintiffs, v. UNITED STATES and UNITED STATES INTERNATIONAL TRADE
COMMISSION, Defendants.

Before: Timothy C. Stanceu, Chief Judge
Court No. 13-00183

[Dismissing an action for failure to state a claim upon which relief can be granted in an action seeking distributions under the Continued Dumping and Subsidy Offset Act of 2000]

Dated: December 31, 2014

Jill A. Cramer, Kristin H. Mowry, Jeffrey S. Grimson, Sarah Wyss, and Daniel R. Wilson, Mowry & Grimson, PLLC, of Washington, DC, for plaintiffs Ethan Allen Global, Inc. and Ethan Allen Operations, Inc.

Franklin E. White, Jr., Assistant Director, *Martin M. Tomlinson*, Trial Attorney, *Jeanne E. Davidson*, Director, and *Joyce R. Branda*, Acting Assistant Attorney General, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant United States.

Robin L. Turner, Acting Assistant General Counsel for Litigation, *Patrick V. Gallagher, Jr.*, Attorney-Advisor, and *Dominic L. Bianchi*, General Counsel, Office of the General Counsel, U.S. International Trade Commission, of Washington, DC, for defendant U.S. International Trade Commission.

OPINION

Stanceu, Chief Judge:

This case arose from the actions of two agencies, the U.S. International Trade Commission (the "Commission" or "ITC") and U.S. Customs and Border Protection ("Customs" or "CBP"), that denied plaintiffs Ethan Allen Global, Inc. and Ethan Allen Operations, Inc.

(collectively, “Ethan Allen”) certain monetary benefits under the now-repealed Continued Dumping and Subsidy Offset Act of 2000 (the “CDSOA” or “Byrd Amendment”), §§ 1001–03, 114 Stat. 1549, 19 U.S.C. § 1675c (2000) (repealed 2006, effective 2007). Compl. ¶¶ 1, 27–34 (May 8, 2013), ECF No. 4 (“Compl.”). The ITC determined that Ethan Allen did not qualify for “affected domestic producer” (“ADP”) status, which would have made Ethan Allen eligible to receive distributions of duties collected under an antidumping duty order on wooden bedroom furniture from the People’s Republic of China (“PRC” or “China”) because Ethan Allen, in responding to an ITC questionnaire, stated that it took no position on the petition that resulted in the order. Compl. ¶¶ 22, 27, 28. Customs made no CDSOA distributions to Ethan Allen for Fiscal Years 2011 and 2012. Compl. ¶¶ 32–33.

Plaintiffs brought this case alleging various facial and as-applied constitutional challenges to the CDSOA and claiming that the actions by the ITC and Customs violated the Administrative Procedure Act (“APA”), 5 U.S.C. § 706 (2006). Compl. ¶¶ 37–55. Plaintiffs seek declaratory and injunctive relief to establish Ethan Allen as eligible for a distribution of antidumping duties collected on the relevant order for Fiscal Years 2011 and 2012, as well as for future distributions under the CDSOA, and mandating the distribution of Ethan Allen’s pro rata share of such distributions. Compl. ¶ 1, Prayer for Relief (1), (2). Plaintiffs also seek declaratory relief “that the conduct of CBP and the ITC in limiting eligibility for disbursement of funds to those ADPs that expressed supported for antidumping petitions and denying eligibility to those ADPs that supported the Petition through their conduct is unlawful, arbitrary, capricious, an abuse of discretion, not supported by substantial evidence, and in violation of Ethan Allen’s constitutional rights.” Compl. ¶ 1, Prayer for Relief (4). Finally, plaintiffs seek damages as a result of being excluded from past and current CDSOA distributions and reasonable attorney’s fees and costs. Compl. ¶ 1, Prayer for Relief (3), (5).

Before the court is defendants’ motion to dismiss under USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted. Defs.’ Mot. to Dismiss (Apr. 24, 2014), ECF No. 23 (“Defs.’ Mot.”). The court determines that no relief is available on any of plaintiffs’ claims and will enter judgment dismissing this action.

I. BACKGROUND

Background on this action is provided in the court’s prior opinion, *Ethan Allen Global, Inc. v. United States*, 38 CIT ___, Slip Op. 14–76

(June 27, 2014) (“*Ethan Allen I*”) (denying motion to stay), and is supplemented herein.

A. *The CDSOA*

The CDSOA amended the Tariff Act of 1930 (“Tariff Act”) by establishing an annual distribution of assessed antidumping and countervailing duties to eligible ADPs as reimbursement for qualifying expenses. 19 U.S.C. § 1675c(a)-(d) (2000). ADP status is limited to petitioners and interested parties, *id.* § 1675c(b)(1), that indicated support for the petition that gave rise to the pertinent antidumping or countervailing duty order “by letter or through questionnaire response,” *id.* § 1675c(d)(1). Under the CDSOA, within sixty days after the International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”) issued an antidumping order, the ITC would forward to Customs a list of ADPs potentially eligible for CDSOA distributions of duties collected under that order and Customs would publish that list in the Federal Register. *Id.* § 1675c(d)(1). Customs was then responsible for making the annual distributions to qualifying ADPs that file certifications with Customs. *Id.* § 1675c(d)(3), (e).

B. *Administrative Actions at Issue*

In 2003, the ITC commenced an investigation to determine whether imports of wooden bedroom furniture from the People’s Republic of China (“China”) were causing or threatening to cause material injury to the domestic industry. *Initiation of Antidumping Duty Investigation: Wooden Bedroom Furniture from the People’s Republic of China*, 68 Fed. Reg. 70,228 (Int’l Trade Comm’n Dec. 17, 2003). Ethan Allen domestically manufactures and distributes wooden bedroom furniture. Compl. ¶ 2. In response to an ITC questionnaire issued during this investigation, Ethan Allen stated that it took no position on the petition that triggered the investigation. Compl. ¶ 22. In 2005, Commerce issued an antidumping duty order on imports of wooden bedroom furniture from China. *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture From the People’s Republic of China*, 70 Fed. Reg. 329 (Int’l Trade Admin. Jan. 4, 2005).

For Fiscal Years 2011 and 2012, Customs published individual lists of ADPs that the ITC determined were potentially eligible for CDSOA distributions and did not include Ethan Allen on either list. *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 76 Fed. Reg. 31,020 (Dep’t of Homeland Sec. May 27,

2011) (concerning Fiscal Year 2011); *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 77 Fed. Reg. 32,718 (Dep't of Homeland Sec. June 1, 2012) (concerning Fiscal Year 2012). On July 20, 2011, Ethan Allen filed a certification with Customs requesting CDSOA distributions for Fiscal Year 2011. Compl. ¶ 32. On June 27, 2012, Ethan Allen filed another certification with Customs, this time requesting CDSOA distributions for Fiscal Year 2012. Compl. ¶ 33. Customs did not grant Ethan Allen CDSOA distributions for either Fiscal Years 2011 or 2012. Compl. ¶¶ 32, 33.

C. Procedural History

Plaintiffs commenced this action on May 8, 2013. Summons, ECF No. 1; Compl. Defendants filed a motion to dismiss the action on April 24, 2014. Defs.' Mot. 1. Plaintiffs filed a response to defendants' motion on June 2, 2014,¹ Pl. Ethan Allen Global. Inc. & Ethan Allen Operations, Inc.'s Resp. to Defs.' Mot. to Dismiss, ECF No. 24, and defendants filed a reply in support of the motion on August 22, 2014, Defs.' Reply in Supp. of Mot. to Dismiss, ECF No. 37. On June 17, 2014, the court denied a motion by plaintiffs to stay this action pending final resolution of a petition for a writ of certiorari to the U.S. Supreme Court in a case concerning the denial of Ethan Allen's CDSOA distribution requests for Fiscal Years 2006 through 2010. *Ethan Allen I*, 38 CIT at __, Slip Op. 14–76 at 4–5. Defendants filed a status report on October 20, 2014, following the U.S. Supreme Court's denial of the petition for a writ of certiorari that was the subject of plaintiffs' motion to stay. Defs. United States & U.S. Customs & Border Prot.'s Status Report, ECF No. 39; see *Ashley Furniture Indus., Inc., et al. v. United States*, 135 S. Ct. 72 (2014) (denying certiorari).

II. DISCUSSION

The court exercises jurisdiction over this matter pursuant to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(i) (2006), which grants this Court exclusive jurisdiction over various civil actions not falling under the jurisdictional grants of subsections (a)-(h) of section 201 but that arise out of a law of the United States, such as the CDSOA, that provides for the administration of duties (including antidumping duties) on the importation of merchandise.

¹ Plaintiffs' response to defendants' motion to dismiss asserts only that the court should deny defendants' motion and reiterates its position that the court should stay this case pending the U.S. Supreme Court's consideration of a writ of certiorari, a request the court denied. Pl. Ethan Allen Global. Inc. & Ethan Allen Operations, Inc.'s Resp. to Defs.' Mot. to Dismiss 1–2 (June 2, 2014), ECF No. 24.

“[A] judge ruling on a defendant’s motion to dismiss a complaint ‘must accept as true all of the factual allegations contained in the complaint.’” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (“*Twombly*”) (citations omitted). However, a complaint must be dismissed if it does not “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“*Iqbal*”) (quoting *Twombly*, 550 U.S. at 570). “Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.*, 556 U.S. at 679.

In Counts One and Two of the complaint, plaintiffs challenge the CDSOA, both facially and as applied to Ethan Allen, on First Amendment grounds. Compl. ¶¶ 37–50. In Count Three, plaintiffs claim that the actions of the ITC and Customs violate the APA and Ethan Allen’s constitutional rights. Compl. ¶¶ 51–54.

A. *No Relief Can be Granted on Plaintiffs’ Constitutional Challenges*

Counts One and Two of plaintiffs’ complaint bring several constitutional challenges grounded in the First Amendment guarantees of free speech and belief and the right to petition the government for redress of grievances. Compl. ¶¶ 37–50; see U.S. Const. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”). In Count Three, plaintiffs allege that the agencies’ actions “violate[] Ethan Allen’s constitutional rights,” Compl. ¶ 53, but offer no additional constitutional grounds on which the court may evaluate plaintiffs’ claims. See Compl. ¶¶ 51–54.

In Count One, plaintiffs bring various as-applied challenges to the CDSOA under the First Amendment. Compl. ¶ 37–43. Plaintiffs claim specifically that the CDSOA unlawfully discriminates against those, such as Ethan Allen, who did not express support for the antidumping petition. Compl. ¶ 39. They claim, further, that such an application of the CDSOA is overbroad and not narrowly tailored to achieve a compelling government objective. Compl. ¶ 40. Plaintiffs claim, further, that the CDSOA as applied to Ethan Allen impermissibly compels speech by requiring manufacturers such as plaintiffs to articulate support for a specific policy, Compl. ¶ 41, and imposes viewpoint discrimination in a designated public form for political speech in a way that is not narrowly drawn to any compelling state interest. Compl. ¶ 42.

Plaintiffs bring, in Count Two, various facial challenges to the CDSOA under the First Amendment. Compl. ¶¶ 44–50. Plaintiffs claim specifically that the CDSOA engages in impermissible viewpoint discrimination and conditions a government benefit on the content of political speech, i.e., expression of support for an antidumping petition. Compl. ¶ 46. They claim, further, that the CDSOA is overbroad and not narrowly tailored to achieve a compelling government objective, Compl. ¶ 47, and that the statute imposes an unconstitutional condition on the receipt of a government benefit by requiring domestic manufacturers to articulate support for a particular policy in a designated public forum for political speech, Compl. ¶¶ 48–49.

The court concludes that plaintiffs' constitutional challenges are foreclosed by binding precedent and, therefore, must be dismissed. In *Ashley Furniture Industries, Inc.*, 734 F.3d 1306 (Fed. Cir. 2013) (“*Ashley*”), the U.S. Court of Appeals for the Federal Circuit (“Court of Appeals”) denied the relief requested on First Amendment grounds in a joint decision addressing the appeals of two related decisions of this Court. One of the decisions on appeal was *Ethan Allen Global Inc. v. United States*, 36 CIT __, 816 F. Supp. 2d 1330 (2012) (“*Ethan Allen*”), in which Ethan Allen challenged the ITC's refusal to designate Ethan Allen as an ADP and CBP's refusal to disburse to Ethan Allen funds collected under the relevant antidumping order, but with respect to CDSOA distributions for Fiscal Years 2006 through 2010. *Id.* at __, 816 F. Supp. 2d at 1333. In *Ashley*, the Court of Appeals rejected both Ethan Allen's facial and as-applied challenges under the First Amendment, which were brought on nearly identical grounds to the challenges Ethan Allen now brings. The Court of Appeals stated that “the government did not deny Byrd Amendment distributions to Appellants solely on the basis of abstract expression,” *Ashley*, 734 F.3d at 1310, and that Ethan Allen's facial First Amendment challenges in that case were precluded by the holding in *SKF USA, Inc. v. U.S. Customs & Border Prot.*, 556 F.3d 1337, 1382 (Fed. Cir. 2009) (“*SKF*”), *cert. denied*, 130 S. Ct. 3273 (2010). *See Ashley*, 734 F.3d at 1310 (“We are bound to follow this precedent and are not free to revisit the First Amendment arguments that were before the *SKF* panel.”). In *SKF*, the Court of Appeals held broadly that the CDSOA is “valid under the First Amendment” because it “is within the constitutional power of Congress to enact, furthers the government's substantial interest in enforcing the trade laws, and is not overly broad.” *SKF*, 556 F.3d at 1360.

In summary, plaintiffs have failed to allege facts sufficient to demonstrate that its constitutional claims are not foreclosed by the bind-

ing precedents of *Ashley* and *SKF*. As to these claims, therefore, the complaint does not “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 662, 129 S. Ct. 1937 (citation omitted). The court must dismiss these claims pursuant to defendants’ motion under USCIT Rule 12(b)(5).

B. No Relief Can be Granted on Plaintiffs’ Statutory Challenges

Plaintiffs’ complaint alleges that the actions of the ITC and Customs violated the Administrative Procedure Act (“APA”), 5 U.S.C. § 706, and that the conduct of the two agencies was “arbitrary, capricious, and an abuse of discretion.” *Id.* ¶¶ 51–54. Specifically, plaintiffs allege that the agencies “inappropriately treated similarly-situated domestic producers differently, without any rational basis for doing so,” and unlawfully “limit[ed] the definition of Affected Domestic Producer to include only those domestic producers who supported the Petition by their conduct and expressed support for the petition, while excluding from this definition those domestic producer who likewise supported the Petition by their conduct but did not express support for the petition.” *Id.* ¶ 53. Relying on a decision of the Court of Appeals, plaintiffs assert that such an interpretation conflicts with the purpose of the CDSOA, which, according to plaintiffs, is “to reward domestic producers who support the Petition through their conduct.” *Id.* (citing *PS Chez Sidney, L.L.C. v. U.S. Int’l Trade Comm’n*, 684 F.3d 1374, 1382 (Fed. Cir. 2012) (“*PS Chez Sidney*”).

The court concludes that, on the facts as pled in the complaint, no relief can be granted on plaintiffs’ statutory claims. The CDSOA provision relevant to these claims is the directive that the ITC, in providing its list of ADPs to Customs, include “a list of persons that indicate support of the petition by letter or through questionnaire response.” 19 U.S.C. § 1675c(d)(1) (emphasis added). Plaintiffs admit that in its questionnaire responses, “Ethan Allen took no position on the petition” Compl. ¶ 22. The court must dismiss plaintiffs’ statutory claims that the actions by the two agencies violated the APA because plaintiffs have admitted that Ethan Allen did not support the petition in its questionnaire response—a fact disqualifying Ethan Allen from receiving CDSOA distributions under the plain meaning of the statute—and present no other facts from which the court could reach a conclusion that the agencies’ actions must be set aside.

Plaintiffs’ contention that the purpose of the CDSOA is “to reward domestic producers who support the Petition through their conduct,” Compl. ¶ 53, does not save plaintiffs’ statutory claims. In neither *SKF*

nor *PS Chez Sidney* did the Court of Appeals construe the CDSOA such that a domestic producer may take no position on a petition in its ITC questionnaire responses and still be eligible to receive CDSOA distributions. To the contrary, the Court of Appeals in *SKF* reasoned that in enacting the petition support requirement, Congress had permissibly, and rationally, concluded that those who did not support a petition through a letter or questionnaire response should not be rewarded. *SKF*, 556 F.3d at 1357, 1359 (“At best the role of parties opposing (or not supporting) the petition in responding to questionnaires is similar to the role of opposing or neutral parties in litigation who must reluctantly respond to interrogatories or other discovery. . . . It was thus rational for Congress to conclude that those who did not support the petition should not be rewarded.”). The Court of Appeals’ decision in *PS Chez Sidney* is not applicable to this action because it concerned a different factual pattern from the instant case. The party in *PS Chez Sidney* checked a box in one questionnaire indicating its support for the petition and indicated that it took no position in a subsequent questionnaire. *PS Chez Sidney*, 684 F.3d at 1377. The holding in *PS Chez Sidney* did not qualify the holding in *SKF* to the benefit of parties that did not take a position in support of the petition. *Id.*, 684 F.3d at 1381.

In *Ashley*, the Court of Appeals explained that “under the plain meaning of the Byrd Amendment . . . [i]t is not enough . . . merely to supply the answers to the questionnaires,” *Ashley*, 734 F.3d at 1311, because “[t]he plain language of the statute requires ‘support of the petition’ in order to obtain a distribution,” *id.* (citing 19 U.S.C. § 1675c(b)(1)(A)), and “[a] producer meets that requirement when it ‘indicate[s] support . . . by letter or through questionnaire response,’” *id.* (citing 19 U.S.C. § 1675c(d)(1)). Referring to the same questionnaire responses at issue here, the Court of Appeals stated that “[t]he conclusion that a producer who indicates that it ‘takes no position’ in a questionnaire is a supporter is [] incongruous [with the plain language of the statute] because such a producer has not ‘indicated support.’” *Ashley*, 734 F.3d at 1311; *see also* Compl. ¶ 22 (“Ethan Allen took no position on the petition . . .”). Plaintiffs fail to plead any facts that would allow the court to distinguish the application of the CDSOA to Ethan Allen in this case from its application to Ethan Allen in *Ashley*. Ethan Allen’s expression that it took no position on the anti-dumping duty petition did not satisfy the plain meaning of the statute and properly resulted in Ethan Allen’s disqualification from receiving distributions under the CDSOA.

Because the statute precludes ADP status to parties that did not support the petition through letter or questionnaire response, plain-

tiffs can receive no relief on their statutory claims on the facts pled and the court, therefore, must dismiss these claims pursuant to USCIT Rule 12(b)(5).

III. CONCLUSION

For the foregoing reasons, defendants' motion to dismiss this case under USCIT Rule 12(b)(5) for failure to state a claim must be granted. The court will enter judgment dismissing this action.

Dated: December 31, 2014

New York, NY

/s/ Timothy C. Stanceu

TIMOTHY C. STANCEU
CHIEF JUDGE

Slip Op. 14–162

ASHLEY FURNITURE INDUSTRIES, INC., Plaintiff, v. UNITED STATES and
UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendants.

Before: Timothy C. Stanceu, Chief Judge
Court No. 13–00201

[Dismissing an action for failure to state a claim upon which relief can be granted in an action seeking distributions under the Continued Dumping and Subsidy Offset Act of 2000]

Dated: December 31, 2014

Jill A. Cramer, Kristin H. Mowry, Jeffrey S. Grimson, Sarah Wyss, and Daniel R. Wilson, Mowry & Grimson, PLLC, of Washington, DC, for plaintiff Ashley Furniture Industries, Inc.

Martin M. Tomlinson, Trial Attorney, Franklin E. White, Jr., Assistant Director, Joyce R. Branda, Acting Assistant Attorney General, and Jeanne E. Davidson, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant United States.

Patrick V. Gallagher, Jr., Attorney-Advisor, Robin L. Turner, Acting Assistant General Counsel for Litigation, Dominic L. Bianchi, General Counsel, Office of the General Counsel, U.S. International Trade Commission, of Washington, DC, for defendant U.S. International Trade Commission.

OPINION

Stanceu, Chief Judge:

This case arose from the actions of two agencies, the U.S. International Trade Commission (the “Commission” or “ITC”) and U.S. Customs and Border Protection (“Customs” or “CBP”), that denied plaintiff Ashley Furniture Industries, Inc. (“Ashley”), a domestic producer of wooden bedroom furniture, certain monetary benefits under the

now-repealed Continued Dumping and Subsidy Offset Act of 2000 (the “CDSOA” or “Byrd Amendment”), §§ 1001–03, 114 Stat. 1549, 19 U.S.C. § 1675c (2000) (repealed 2006, effective 2007). Compl. ¶¶ 5, 14 (May 14, 2013), ECF No. 4 (“Compl.”). The ITC determined that Ashley did not qualify for “affected domestic producer” (“ADP”) status, which would have made Ashley eligible for distributions of duties collected under an antidumping duty order on wooden bedroom furniture from the People’s Republic of China (“PRC” or “China”), because Ashley, in responding to an ITC questionnaire, had opposed the petition that resulted in the order. Compl. ¶¶ 24, 35–40. Customs denied Ashley’s requests for CDSOA distributions for Fiscal Years 2011 and 2012. Compl. ¶¶ 37, 40.

Plaintiff brought this case claiming that the actions by the ITC and Customs violated the CDSOA and the Administrative Procedure Act (“APA”), 5 U.S.C. § 706 (2006), and alleging various facial and as-applied constitutional challenges to the CDSOA. Compl. ¶¶ 47–59. Plaintiff asks that this court order the ITC to add Ashley to the list of ADPs for Fiscal Years 2011 and 2012 and require Customs to disburse to Ashley a pro rata portion of CDSOA distributions for Fiscal Years 2011 and 2012. Compl. ¶¶ 60.

Before the court is defendants’ motion to dismiss under USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted. Defs.’ Mot. to Dismiss (Apr. 24, 2014), ECF No. 23 (“Defs.’ Mot.”). The court determines that relief is not available on any of plaintiff’s claims and will enter judgment dismissing this action.

I. BACKGROUND

Background on this action is provided in the court’s prior opinion and order, *Ashley Furniture Indus., Inc. v. United States*, 38 CIT __, Slip Op. 14–67 (June 17, 2014) (“*Ashley I*”) (denying motion to stay), and is supplemented herein.

A. The CDSOA

The CDSOA amended the Tariff Act of 1930 (“Tariff Act”) by establishing an annual distribution of assessed antidumping and countervailing duties to eligible ADPs as reimbursement for qualifying expenses. 19 U.S.C. § 1675c(a)-(d) (2000). ADP status is limited to petitioners and interested parties, *id.* § 1675c(b)(1), that indicated support for the petition that gave rise to the pertinent antidumping or countervailing duty order “by letter or through questionnaire response,” *id.* § 1675c(d)(1). Under the CDSOA, within sixty days after the International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”) issued an antidumping

order, the ITC would forward to Customs a list of ADPs potentially eligible for CDSOA distributions of duties collected under that order and Customs would publish that list in the Federal Register. *Id.* § 1675c(d)(1). Customs was then responsible for making the annual distributions to qualifying ADPs that file certifications with Customs. *Id.* § 1675c(d)(3), (e).

B. *Administrative Actions at Issue*

In 2003, the ITC commenced an investigation to determine whether imports of wooden bedroom furniture from the People's Republic of China ("China") were causing or threatening to cause material injury to the domestic industry. *Initiation of Antidumping Duty Investigation: Wooden Bedroom Furniture from the People's Republic of China*, 68 Fed. Reg. 70,228 (Int'l Trade Comm'n Dec. 17, 2003). In response to an ITC questionnaire issued during this investigation, Ashley stated that it opposed the petition that triggered the investigation. Compl. ¶ 24. In 2005, Commerce issued an antidumping duty order on imports of wooden bedroom furniture from China. *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture From the People's Republic of China*, 70 Fed. Reg. 329 (Int'l Trade Admin. Jan. 4, 2005).

For Fiscal Years 2011 and 2012, Customs published individual lists of ADPs that the ITC determined were potentially eligible for CDSOA distributions and did not include Ashley on either list. *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 76 Fed. Reg. 31,020 (Dep't of Homeland Sec. May 27, 2011) (concerning Fiscal Year 2011); *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 77 Fed. Reg. 32,718 (Dep't of Homeland Sec. June 1, 2012) (concerning Fiscal Year 2012). On June 18, 2011, Ashley filed a certification with Customs requesting CDSOA distributions for Fiscal Year 2011, which Customs subsequently denied. Compl. ¶ 36–37. On July 19, 2012, Ashley filed another certification with Customs, this time requesting CDSOA distributions for Fiscal Year 2012, which Customs also denied. Compl. ¶¶ 39–40.

C. *Procedural History*

Plaintiff commenced this action on May 14, 2013. Summons, ECF No. 1; Compl. Defendants filed a motion to dismiss the action on April 24, 2014. Defs.' Mot. 1. Plaintiff filed a response to defendants' motion

to dismiss on June 2, 2014,¹ Pl. Ashley Furniture Indus., Inc.’s Resp. to Defs.’ Mot. to Dismiss, ECF No. 24, and defendants filed a reply in support of the motion on August 22, 2014, Defs.’ Reply in Supp. of Mot. to Dismiss, ECF No. 37. On June 17, 2014, the court denied a motion by plaintiff to stay this action pending final resolution of a petition for a writ of certiorari to the U.S. Supreme Court in a case concerning the denial of Ashley’s CDSOA distribution requests for Fiscal Years 2007 through 2010. *Ashley I*, 38 CIT at ___, Slip Op. 14–67 at 5. Defendants filed a status report on October 20, 2014, following the U.S. Supreme Court’s denial of the petition for a writ of certiorari that was the subject of plaintiff’s motion to stay. Defs. United States & U.S. Customs & Border Prot.’s Status Report, ECF No. 39; see *Ashley Furniture Indus., Inc., et al. v. United States*, 135 S. Ct. 72 (2014) (denying certiorari).

II. DISCUSSION

The court exercises jurisdiction over this matter pursuant to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(i) (2006), which grants this Court exclusive jurisdiction over various civil actions not falling under the jurisdictional grants of subsections (a)-(h) of section 201 but that arise out of a law of the United States, such as the CDSOA, that provides for the administration of duties (including antidumping duties) on the importation of merchandise.

“[A] judge ruling on a defendant’s motion to dismiss a complaint ‘must accept as true all of the factual allegations contained in the complaint.’” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (“*Twombly*”) (citations omitted). However, a complaint must be dismissed if it does not “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“*Iqbal*”) (quoting *Twombly*, 550 U.S. at 570). “Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.*, 556 U.S. at 679.

Plaintiff’s complaint has five counts. Count 1 brings statutory challenges, Count 2 brings both statutory and constitutional challenges, and Counts 3, 4, and 5 bring constitutional challenges. Compl. ¶¶ 47–59.

¹ Plaintiff’s response to defendants’ motion to dismiss asserts only that the court should deny defendants’ motion and reiterates its position that the court should stay this case pending the U.S. Supreme Court’s consideration of a writ of certiorari, a request the court denied. Pl. Ashley Furniture Indus., Inc.’s Resp. to Defs.’ Mot. to Dismiss (June 2, 2014), ECF No. 24.

A. No Relief Can be Granted on Plaintiff's Statutory Challenges

Plaintiff's complaint alleges that the actions of the ITC and Customs violated the CDSOA and the APA and that the conduct of the two agencies was "arbitrary, capricious, and an abuse of discretion." Compl. ¶¶ 47–51. Specifically, plaintiff alleges that the agencies "inappropriately treated similarly situated domestic producers differently, without any rational basis for doing so," Compl. ¶ 51, and unlawfully "limited the definition of 'affected domestic producer' to include only those domestic producers who checked the support box on the Commission's questionnaire, while excluding from the definition those domestic producers who supported the petition through their conduct but did not express support for the petition," Compl. ¶ 51. Relying on two decisions of the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals"), plaintiff asserts that such an interpretation conflicts with the purpose of the CDSOA, which, according to plaintiff, is "to reward domestic producers who support the petition through their conduct." *Id.* (citing *SKF USA, Inc. v. U.S. Customs & Border Prot.*, 556 F.3d 1337, 1382 (Fed. Cir. 2009) ("*SKF*"), *cert. denied*, 130 S. Ct. 3273 (2010); *PS Chez Sidney, L.L.C. v. U.S. Int'l Trade Comm'n*, 684 F.3d 1374, 1382 (Fed. Cir. 2012) ("*PS Chez Sidney*")).

The court concludes that no relief can be granted on plaintiff's statutory claims. The CDSOA provision relevant to these claims is the directive that the ITC, in providing its list of ADPs to Customs, include "a list of persons that *indicate support of the petition* by letter or through questionnaire response." 19 U.S.C. § 1675c(d)(1) (emphasis added). Plaintiff admits that "[in] its questionnaire responses, Ashley indicated that it opposed the petition." Compl. ¶ 24. The court must dismiss plaintiff's statutory claims that the actions by the two agencies violated the CDSOA and APA because plaintiff has admitted that it opposed the petition in its questionnaire response—a fact disqualifying Ashley from receiving CDSOA distributions under the plain meaning of the statute—and alleges no other facts from which the court could reach a conclusion that the agencies' actions must be set aside.

Plaintiff's contention that the purpose of the CDSOA is "to reward domestic producers who support the petition through their conduct," Compl. ¶ 51, does not save plaintiff's statutory claims. In neither *SKF* nor *PS Chez Sidney* did the Court of Appeals construe the CDSOA such that a domestic producer may express opposition to a petition in its ITC questionnaire responses and still be eligible to receive CDSOA distributions. To the contrary, the Court of Appeals in *SKF* reasoned that in enacting the petition support requirement, Congress had

permissibly, and rationally, concluded that those who did not support a petition through a letter or questionnaire response should not be rewarded. *SKF*, 556 F.3d at 1357, 1359 (“At best the role of parties opposing (or not supporting) the petition in responding to questionnaires is similar to the role of opposing or neutral parties in litigation who must reluctantly respond to interrogatories or other discovery. . . . It was thus rational for Congress to conclude that those who did not support the petition should not be rewarded.”). The Court of Appeals’ decision in *PS Chez Sidney* is not applicable to this action because it concerned a different factual pattern from the instant case. The party in *PS Chez Sidney* checked a box in one questionnaire indicating its support for the petition and indicated that it took no position in a subsequent questionnaire. *PS Chez Sidney*, 684 F.3d at 1377. The holding in *PS Chez Sidney* did not qualify the holding in *SKF* to the benefit of parties that expressed opposition to a petition. *Id.*, 684 F.3d at 1381.

Because the statute precludes ADP§ status to parties that did not support the petition through letter or questionnaire response, plaintiff can receive no relief on its statutory claims and the court, therefore, must dismiss these claims pursuant to USCIT Rule 12(b)(5).

B. No Relief Can be Granted on Plaintiff’s Constitutional Challenges

Plaintiff’s complaint also brings several challenges on constitutional grounds. Counts 3 and 5 bring claims grounded in the First Amendment guarantees of free speech and the right to petition the government for redress of grievances. Compl. ¶¶ 52–54, 58–59. Count 4 brings claims grounded in the equal protection guarantee under the due process clause of the Fifth Amendment. Compl. ¶¶ 55–57. Count 2 alleges that the agencies’ actions “violate[] Ashley’s constitutional rights,” Compl. ¶ 51, but offers no additional constitutional grounds on which the court may evaluate plaintiff’s claims.

Plaintiff claims, in Count 3, that “[d]efendants’ application of the CDSOA . . . conditions receipt of a government benefit on a private speaker expressing a specific viewpoint—support for an antidumping duty petition through checking a ‘support’ box—and, therefore, is viewpoint discrimination in contravention of the First Amendment.” Compl. ¶ 54. Plaintiff claims, in Count 5, that the CDSOA petition support requirement “violates the First Amendment to the Constitution as applied to Ashley because it discriminates against Ashley based on expression of [Ashley’s] views,” Compl. ¶ 59, towards the antidumping petition “rather than [Ashley’s] action (its litigation support),” Compl. ¶ 59. Plaintiff also claims in Count 5 that “[d]efen-

dants' application of the CDSOA further violates the First Amendment's petition clause by unconstitutionally abridging Ashley's right to petition the government for redress of grievances." Compl. ¶ 59; see U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

In Count 4 of the complaint, plaintiff claims that the agencies violated constitutional equal protection guarantees because the agencies' actions "created a classification that implicates Ashley's fundamental right of speech," Compl. ¶ 56, and were "not narrowly tailored to a compelling government objective," Compl. ¶ 56. Plaintiff also claims that the agencies violated Fifth Amendment equal protection guarantees because the agencies' application of the CDSOA "impermissibly discriminates between Ashley and other similarly-situated domestic producers who expressed support for the relevant antidumping petition . . . denying a benefit to Ashley." Compl. ¶ 57.

The court concludes that plaintiff's constitutional challenges are foreclosed by binding precedent established by *SKF* and, therefore, must be dismissed. In *SKF*, the Court of Appeals held broadly that the CDSOA is "valid under the First Amendment" because it "is within the constitutional power of Congress to enact, furthers the government's substantial interest in enforcing the trade laws, and is not overly broad." *SKF*, 556 F.3d at 1360. The Court of Appeals also held that the CDSOA, as applied to the plaintiff SKF USA, Inc. ("SKF"), violated neither First Amendment principles nor equal protection principles under the Fifth Amendment when SKF had expressed opposition to the relevant antidumping duty petition in its ITC questionnaire response. *SKF*, 556 F.3d at 1343 ("SKF also responded to the ITC's questionnaire, but stated that it opposed the antidumping petition."). Like SKF, Ashley expressed opposition to antidumping duty petition in an ITC questionnaire response. Compl. ¶ 24. Plaintiff fails to plead any facts that would allow the court to distinguish the application of the CDSOA to Ashley in this case from the application of the statute in *SKF*. In all material respects, Ashley's expression of opposition to an antidumping duty petition was equivalent to that made by SKF and properly resulted in Ashley's disqualification from receiving distributions under the CDSOA.

In summary, plaintiff has failed to allege facts sufficient to demonstrate that its constitutional claims are not foreclosed by the binding precedent of *SKF*. As to these claims, therefore, the complaint does not "contain sufficient factual matter, accepted as true, to 'state a

claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 663 (citation omitted). The court must dismiss these claims pursuant to defendants’ motion under USCIT Rule 12(b)(5).

III. CONCLUSION

For the foregoing reasons, defendants’ motion to dismiss this case under USCIT Rule 12(b)(5) for failure to state a claim must be granted. The court will enter judgment dismissing this action.

Dated: December 31, 2014

New York, NY

/s/ Timothy C. Stanceu

TIMOTHY C. STANCEU
CHIEF JUDGE

Slip Op. 14–163

STANDARD FURNITURE MANUFACTURING CO., INC., Plaintiff, v. UNITED STATES and UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendants.

Before: Timothy C. Stanceu, Chief Judge
Court No. 13–00202

[Dismissing an action for failure to state a claim upon which relief can be granted in an action seeking distributions under the Continued Dumping and Subsidy Offset Act of 2000]

Dated: December 31, 2014

Jill A. Cramer, Kristin H. Mowry, Jeffrey S. Grimson, Sarah Wyss, and Daniel R. Wilson, Mowry & Grimson, PLLC, of Washington, DC, for plaintiff Standard Furniture Manufacturing Co., Inc.

Martin M. Tomlinson, Trial Attorney, *Franklin E. White, Jr.*, Assistant Director, *Joyce R. Branda*, Acting Assistant Attorney General, and *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant United States.

Patrick V. Gallagher, Jr., Attorney-Advisor, *Robin L. Turner*, Acting Assistant General Counsel for Litigation, and *Dominic L. Bianchi*, General Counsel, Office of the General Counsel, U.S. International Trade Commission, of Washington, DC, for defendant U.S. International Trade Commission.

OPINION

Stanceu, Chief Judge:

This case arose from the actions of two agencies, the U.S. International Trade Commission (the “Commission” or “ITC”) and U.S. Customs and Border Protection (“Customs” or “CBP”), that denied plaintiff Standard Furniture Manufacturing Co., Inc. (“Standard”), a

domestic producer of wooden bedroom furniture, certain monetary benefits under the now-repealed Continued Dumping and Subsidy Offset Act of 2000 (the “CDSOA” or “Byrd Amendment”), §§ 1001–03, 114 Stat. 1549, 19 U.S.C. § 1675c (2000) (repealed 2006, effective 2007). Compl. ¶¶ 5, 14 (May 14, 2013), ECF No. 4 (“Compl.”). The ITC determined that Standard did not qualify for “affected domestic producer” (“ADP”) status, which would have made Standard eligible for distributions of duties collected under an antidumping duty order on wooden bedroom furniture from the People’s Republic of China (“PRC” or “China”), because Standard, in responding to an ITC questionnaire, had opposed the petition that resulted in the order. Compl. ¶¶ 24, 35–40. Customs denied Standard’s requests for CDSOA distributions for Fiscal Years 2011 and 2012. Compl. ¶¶ 37, 40.

Plaintiff brought this case claiming that the actions by the ITC and Customs violated the CDSOA and the Administrative Procedure Act (“APA”), 5 U.S.C. § 706 (2006), and alleging various facial and as-applied constitutional challenges to the CDSOA. Compl. ¶¶ 47–59. Plaintiff asks that this court order the ITC to add Standard to the list of ADPs for Fiscal Years 2011 and 2012 and require Customs to disburse to Standard a pro rata portion of CDSOA distributions for Fiscal Years 2011 and 2012. Compl. ¶ 60.

Before the court is defendants’ motion to dismiss under USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted. Defs.’ Mot. to Dismiss (Apr. 24, 2014), ECF No. 28 (“Defs.’ Mot.”). The court determines that relief is not available on any of plaintiff’s claims and will enter judgment dismissing this action.

I. BACKGROUND

Background on this action is provided in the court’s prior opinion and order, *Standard Furniture Mfg. Co., Inc. v. United States*, 38 CIT ___, Slip Op. 14–77 (June 27, 2014) (“*Standard Furniture I*”) (denying motion to stay), and is supplemented herein.

A. *The CDSOA*

The CDSOA amended the Tariff Act of 1930 (“Tariff Act”) by establishing an annual distribution of assessed antidumping and countervailing duties to eligible ADPs as reimbursement for qualifying expenses. 19 U.S.C. § 1675c(a)-(d) (2000). ADP status is limited to petitioners and interested parties, *id.* § 1675c(b)(1), that indicated support for the petition that gave rise to the pertinent antidumping or countervailing duty order “by letter or through questionnaire response,” *id.* § 1675c(d)(1). Under the CDSOA, within sixty days after the International Trade Administration, U.S. Department of Com-

merce (“Commerce” or the “Department”) issued an antidumping order, the ITC would forward to Customs a list of ADPs potentially eligible for CDSOA distributions of duties collected under that order and Customs would publish that list in the Federal Register. *Id.* § 1675c(d)(1). Customs was then responsible for making the annual distributions to qualifying ADPs that file certifications with Customs. *Id.* § 1675c(d)(3), (e).

B. Administrative Actions at Issue

In 2003, the ITC commenced an investigation to determine whether imports of wooden bedroom furniture from the People’s Republic of China (“China”) were causing or threatening to cause material injury to the domestic industry. *Initiation of Antidumping Duty Investigation: Wooden Bedroom Furniture from the People’s Republic of China*, 68 Fed. Reg. 70,228 (Int’l Trade Comm’n Dec. 17, 2003). In response to an ITC questionnaire issued during this investigation, Standard stated that it opposed the petition that triggered the investigation. Compl. ¶ 24. In 2005, Commerce issued an antidumping duty order on imports of wooden bedroom furniture from China. *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture From the People’s Republic of China*, 70 Fed. Reg. 329 (Int’l Trade Admin. Jan. 4, 2005).

For Fiscal Years 2011 and 2012, Customs published individual lists of ADPs that the ITC determined were potentially eligible for CDSOA distributions and did not include Standard on either list. *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 76 Fed. Reg. 31,020 (Dep’t of Homeland Sec. May 27, 2011) (concerning Fiscal Year 2011); *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 77 Fed. Reg. 32,718 (Dep’t of Homeland Sec. June 1, 2012) (concerning Fiscal Year 2012). On June 18, 2011, Standard filed a certification with Customs requesting CDSOA distributions for Fiscal Year 2011, which Customs subsequently denied. Compl. ¶ 36–37. On July 19, 2012, Standard filed another certification with Customs, this time requesting CDSOA distributions for Fiscal Year 2012, which Customs also denied. Compl. ¶¶ 39–40.

C. Procedural History

Plaintiff commenced this action on May 14, 2013. Summons, ECF No. 1; Compl. Defendants filed a motion to dismiss the action on April 24, 2014. Defs.’ Mot. 1. Plaintiff filed a response to defendants’ motion

to dismiss on June 2, 2014,¹ Pl. Standard Furniture Mfg., Co., Inc.’s Resp. to Defs.’ Mot. to Dismiss, ECF No. 29, and defendants filed a reply in support of the motion on August 22, 2014, Defs.’ Reply in Supp. of Mot. to Dismiss, ECF No. 42. On June 27, 2014, the court denied a motion by plaintiff to stay this action pending final resolution of a petition for a writ of certiorari to the U.S. Supreme Court in a case in which two other domestic furniture manufacturers challenged the denial of CDSOA distributions. *Standard Furniture I*, 38 CIT at __, Slip Op. 14–77 at 5. Defendants filed a status report on October 20, 2014, following the U.S. Supreme Court’s denial of the petition for a writ of certiorari that was the subject of plaintiff’s motion to stay. Defs. United States & U.S. Customs & Border Prot.’s Status Report, ECF No. 44, see *Ashley Furniture Indus., Inc., et al. v. United States*, 135 S. Ct. 72 (2014) (denying certiorari).

II. DISCUSSION

The court exercises jurisdiction over this matter pursuant to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(i) (2006), which grants this Court exclusive jurisdiction over various civil actions not falling under the jurisdictional grants of subsections (a)-(h) of section 201 but that arise out of a law of the United States, such as the CDSOA, that provides for the administration of duties (including antidumping duties) on the importation of merchandise.

“[A] judge ruling on a defendant’s motion to dismiss a complaint ‘must accept as true all of the factual allegations contained in the complaint.’” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (“*Twombly*”) (citations omitted). However, a complaint must be dismissed if it does not “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“*Iqbal*”) (quoting *Twombly*, 550 U.S. at 570). “Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.*, 556 U.S. at 679.

Plaintiff’s complaint has five counts. Count 1 brings statutory challenges, Count 2 brings both statutory and constitutional challenges, and Counts 3, 4, and 5 bring constitutional challenges. Compl. ¶¶ 47–59.

¹ Plaintiff’s response to defendants’ motion to dismiss asserts only that the court should deny defendants’ motion and reiterates its position that the court should stay this case pending the U.S. Supreme Court’s consideration of a writ of certiorari, a request the court denied. Pl. Standard Furniture Mfg., Co., Inc.’s Resp. to Defs.’ Mot. to Dismiss (June 2, 2014), ECF No. 29.

A. *No Relief Can be Granted on Plaintiff's Statutory Challenges*

Plaintiff's complaint alleges that the actions of the ITC and Customs violated the CDSOA and the APA and that the conduct of the two agencies was "arbitrary, capricious, and an abuse of discretion." Compl. ¶¶ 47–51. Specifically, plaintiff alleges that the agencies "inappropriately treated similarly situated domestic producers differently, without any rational basis for doing so," Compl. ¶ 51, and unlawfully "limited the definition of 'affected domestic producer' to include only those domestic producers who checked the support box on the Commission's questionnaire, while excluding from the definition those domestic producers who supported the petition through their conduct but did not express support for the petition," Compl. ¶ 51. Relying on two decisions of the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals"), plaintiff asserts that such an interpretation conflicts with the purpose of the CDSOA, which, according to plaintiff, is "to reward domestic producers who support the petition through their conduct." *Id.* (citing *SKF USA, Inc. v. U.S. Customs & Border Prot.*, 556 F.3d 1337, 1382 (Fed. Cir. 2009) ("*SKF*"), *cert. denied*, 130 S. Ct. 3273 (2010); *PS Chez Sidney, L.L.C. v. U.S. Int'l Trade Comm'n*, 684 F.3d 1374, 1382 (Fed. Cir. 2012) ("*PS Chez Sidney*")).

The court concludes that no relief can be granted on plaintiff's statutory claims. The CDSOA provision relevant to these claims is the directive that the ITC, in providing its list of ADPs to Customs, include "a list of persons that *indicate support of the petition* by letter or through questionnaire response." 19 U.S.C. § 1675c(d)(1) (emphasis added). Plaintiff admits that "[in] its questionnaire responses, Standard indicated that it opposed the petition." Compl. ¶ 24. The court must dismiss plaintiff's statutory claims that the actions by the two agencies violated the CDSOA and APA because plaintiff has admitted that it opposed the petition in its questionnaire response—a fact disqualifying Standard from receiving CDSOA distributions under the plain meaning of the statute—and alleges no other facts from which the court could reach a conclusion that the agencies' actions must be set aside.

Plaintiff's contention that the purpose of the CDSOA is "to reward domestic producers who support the petition through their conduct," Compl. ¶ 51, does not save plaintiff's statutory claims. In neither *SKF* nor *PS Chez Sidney* did the Court of Appeals construe the CDSOA such that a domestic producer may express opposition to a petition in its ITC questionnaire responses and still be eligible to receive CDSOA distributions. To the contrary, the Court of Appeals in *SKF* reasoned that in enacting the petition support requirement, Congress had

permissibly, and rationally, concluded that those who did not support a petition through a letter or questionnaire response should not be rewarded. *SKF*, 556 F.3d at 1357, 1359 (“At best the role of parties opposing (or not supporting) the petition in responding to questionnaires is similar to the role of opposing or neutral parties in litigation who must reluctantly respond to interrogatories or other discovery. . . . It was thus rational for Congress to conclude that those who did not support the petition should not be rewarded.”). The Court of Appeals’ decision in *PS Chez Sidney* is not applicable to this action because it concerned a different factual pattern from the instant case. The party in *PS Chez Sidney* checked a box in one questionnaire indicating its support for the petition and indicated that it took no position in a subsequent questionnaire. *PS Chez Sidney*, 684 F.3d at 1377. The holding in *PS Chez Sidney* did not qualify the holding in *SKF* to the benefit of parties that expressed opposition to a petition. *Id.*, 684 F.3d at 1381.

Because the statute precludes ADP status to parties that did not support the petition through letter or questionnaire response, plaintiff can receive no relief on its statutory claims and the court, therefore, must dismiss these claims pursuant to USCIT Rule 12(b)(5).

B. No Relief Can be Granted on Plaintiff’s Constitutional Challenges

Plaintiff’s complaint also brings several challenges on constitutional grounds. Counts 3 and 5 bring claims grounded in the First Amendment guarantees of free speech and the right to petition the government for redress of grievances. Compl. ¶¶ 52–54, 58–59. Count 4 brings claims grounded in the equal protection guarantee under the due process clause of the Fifth Amendment. Compl. ¶¶ 55–57. Count 2 alleges that the agencies’ actions “violate[] Standard’s constitutional rights,” Compl. ¶ 51, but offers no additional constitutional grounds on which the court may evaluate plaintiff’s claims.

Plaintiff claims, in Count 3, that “[d]efendants’ application of the CDSOA . . . conditions receipt of a government benefit on a private speaker expressing a specific viewpoint—support for an antidumping duty petition through checking a ‘support’ box—and, therefore, is viewpoint discrimination in contravention of the First Amendment.” Compl. ¶ 54. Plaintiff claims, in Count 5, that the CDSOA petition support requirement “violates the First Amendment to the Constitution as applied to Standard because it discriminates against Standard based on expression of [Standard’s] views,” Compl. ¶ 59, towards the antidumping petition “rather than [Standard’s] action (its litigation support),” Compl. ¶ 59. Plaintiff also claims in Count 5 that

“[d]efendants’ application of the CDSOA further violates the First Amendment’s petition clause by unconstitutionally abridging Standard’s right to petition the government for redress of grievances.” Compl. ¶ 59; *see* U.S. Const. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

In Count 4 of the complaint, plaintiff claims that the agencies violated equal protection guarantees of the Fifth Amendment’s due process clause because the agencies’ actions “created a classification that implicates Standard’s fundamental right of speech,” Compl. ¶ 56, and were “not narrowly tailored to a compelling government objective,” Compl. ¶ 56. Plaintiff also claims that the agencies violated Fifth Amendment equal protection guarantees because the agencies’ application of the CDSOA “impermissibly discriminates between Standard and other similarly-situated domestic producers who expressed support for the relevant antidumping petition . . . denying a benefit to Standard.” Compl. ¶ 57.

The court concludes that plaintiff’s constitutional challenges are foreclosed by binding precedent established by *SKF* and, therefore, must be dismissed. In *SKF*, the Court of Appeals held broadly that the CDSOA is “valid under the First Amendment” because it “is within the constitutional power of Congress to enact, furthers the government’s substantial interest in enforcing the trade laws, and is not overly broad.” *SKF*, 556 F.3d at 1360. The Court of Appeals also held that the CDSOA, as applied to the plaintiff SKF USA, Inc. (“SKF”), violated neither First Amendment principles nor equal protection principles under the Fifth Amendment when SKF had expressed opposition to the relevant antidumping duty petition in its ITC questionnaire response. *SKF*, 556 F.3d at 1343 (“SKF also responded to the ITC’s questionnaire, but stated that it opposed the antidumping petition.”). Like SKF, Standard expressed opposition to antidumping duty petition in an ITC questionnaire response. Compl. ¶ 24. Plaintiff fails to plead any facts that would allow the court to distinguish the application of the CDSOA to Standard in this case from the application of the statute in *SKF*. In all material respects, Standard’s expression of opposition to an antidumping duty petition was equivalent to that made by SKF and properly resulted in Standard’s disqualification from receiving distributions under the CDSOA.

In summary, plaintiff has failed to allege facts sufficient to demonstrate that its constitutional claims are not foreclosed by the binding

precedent of *SKF*. As to these claims, therefore, the complaint does not “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 663 (citation omitted). The court must dismiss these claims pursuant to defendants’ motion under USCIT Rule 12(b)(5).

III. CONCLUSION

For the foregoing reasons, defendants’ motion to dismiss this case under USCIT Rule 12(b)(5) for failure to state a claim must be granted. The court will enter judgment dismissing this action.

Dated: December 31, 2014

New York, NY

/s/ Timothy C. Stanceu

TIMOTHY C. STANCEU

CHIEF JUDGE