U.S. Court of International Trade

Slip Op. 24–76

NINESTAR CORPORATION, ZHUHAI NINESTAR INFORMATION TECHNOLOGY CO., LTD., ZHUHAI PANTUM ELECTRONICS CO., LTD., ZHUHAI APEX MICROELECTRONICS CO., LTD., GEEHY SEMICONDUCTOR CO., LTD., ZHUHAI G&G DIGITAL TECHNOLOGY CO., LTD., ZHUHAI SEINE PRINTING TECHNOLOGY CO., LTD., and ZHUHAI NINESTAR MANAGEMENT CO., LTD., Plaintiffs, v. UNITED STATES OF AMERICA; DEPARTMENT OF HOMELAND SECURITY; UNITED STATES CUSTOMS AND BORDER PROTECTION; FORCED LABOR ENFORCEMENT TASK FORCE; ALEJANDRO MAYORKAS, in his official capacity as the Secretary of the Department of Homeland Security; TROY A. MILLER, in his official capacity as the Senior Official Performing the Duties of the Commissioner for U.S. Customs and Border Protection; and ROBERT SILVERS, in his official capacity as Under Secretary for Office of Strategy, Policy, and Plans and Chair of the Forced Labor Enforcement Task Force, Defendants.

Before: Gary S. Katzmann, Judge
Court No. 23–00182
PUBLIC VERSION

[Plaintiffs' Motion to Unseal and Unredact is granted in part and denied in part. Plaintiffs' counsel and any person to whom Plaintiffs' counsel has disseminated the USTR and State Productions are ordered to immediately destroy all copies of such productions. The administrative record is not supplemented at this time. Defendants' request to redact the transcript of the public portion of the preliminary injunction hearing is denied.]

Dated: July 10, 2024

Gordon D. Todd, Sidley Austin LLP, of Washington, D.C., argued for Plaintiffs Ninestar Corporation, Zhuhai Ninestar Information Technology Co., Ltd., Zhuhai Pantum Electronics Co., Ltd., Zhuhai Apex Microelectronics Co., Ltd., Geehy Semiconductor Co., Ltd., Zhuhai G&G Digital Technology Co., Ltd., Zhuhai Seine Printing Technology Co., Ltd., and Zhuhai Ninestar Management Co., Ltd. With him on the briefs were *Cody M. Akins*, *Michael E. Murphy*, and *Michael E. Borden*.

Monica P. Triana, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., argued for Defendants United States of America, Department Of Homeland Security, United States Customs And Border Protection, Forced Labor Enforcement Task Force, Alejandro Mayorkas, in his official capacity as the Secretary of the Department of Homeland Security, Troy A. Miller, in his official capacity as the Senior Official Performing the Duties of the Commissioner for U.S. Customs and Border Protection; and Robert Silvers, in his official capacity as Under Secretary for Office of Strategy, Policy, and Plans and Chair

of the Forced Labor Enforcement Task Force . With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Claudia Burke*, Deputy Director, *Justin R. Miller*, Attorney-In-Charge International Trade Field Office, *Guy Eddon*, Trial Attorney, and *Luke Mathers*, Trial Attorney.

OPINION

Katzmann, Judge:

Returning to the continuing litigation in this case involving the Uyghur Forced Labor Prevention Act ("UFLPA"), Pub. L. No. 117–78, 135 Stat. 1525 (2021), the court now considers layered questions pertaining to confidential evidence on the agency record, the informant privilege, and disclosure pursuant to the Freedom of Information Act. As the court noted in its prior two opinions, referenced below, Plaintiffs Ninestar Corporation and its corporate "affiliates (collectively, "Plaintiffs") are Chinese companies that manufacture and sell laser printers and printer-related products to U.S. companies and consumers. Defendants the United States and various federal agencies and officials ("Defendants") determined in June 2023 that Plaintiffs were working with the government of the Xinjiang Uyghur Autonomous Region ("XUAR") of the People's Republic of China ("China") to recruit, transport, transfer, harbor or receive forced labor or persecuted ethnic minorities out of the XUAR. The interagency Forced Labor Enforcement Task Force ("FLETF") accordingly added Plaintiffs to a list of embargoed entities (the "Entity List") under the

UFLPA.[1, 2] *See Notice Regarding the Uyghur Forced Labor Prevention Act Entity List*, 88 Fed. Reg. 38080, 38082 (DHS June 12, 2023) ("*Listing Decision*").

Following reports of forced labor and ongoing genocide in the XUAR, Congress passed and the President signed into law the UFLPA.[3] Per the text of the statute, the UFLPA is designed to "strengthen the prohibition against the importation of goods made with forced labor, including by ensuring that the Government of the People's Republic of China does not undermine the effective enforcement of section 307 of the Tariff Act of 1930." Pub. L. 177–78, § 1(1), 135 Stat. at 1525. Section 307 of the Tariff Act, as amended, moreover, prohibits the importation of merchandise created wholly or in part by

[1] The FLETF is composed of seven member agencies. The six original members are the U.S. Departments of Homeland Security ("DHS"), State, Justice, Labor, and Treasury, and the U.S. Trade Representative. *See* Executive Order No. 13923 § 2. DHS, as the FLETF Chair, may invite representatives from other executive departments or agencies to participate as either members or observers. *See id.* The U.S. Department of Commerce is the seventh member of FLETF as invited by DHS. See *Listing Decision*, 88 Fed. Reg. at 38081 n.1.

[2] For the reader's convenience, the court includes below a list of all acronyms used in the opinion:

APA:	Administrative Procedure Act
APO:	Amended Judicial Protective Order
CAR:	Confidential Administrative Record
DHS:	Department of Homeland Security
EEOC:	U.S. Equal Employment Opportunity Commission
FLETF:	Forced Labor Enforcement Task Force
FOIA:	Freedom of Information Act
LES:	Law Enforcement Sensitive
PAR:	Public Administrative Record
SOP:	FLETF's Standard Operating Procedures
UFLPA:	Uyghur Forced Labor Prevention Act
USCIT:	U.S. Court of International Trade
USTR:	U.S. Trade Representative
XUAR:	Xinjiang Uyghur Autonomous Region

[3] The State Department has characterized the atrocities in the XUAR as genocide. *See* Press Release, A. Blinken, Sec'y of State, The Signing of the Uyghur Forced Labor Prevention Act (Dec. 23, 2021), https://www.state.gov/the-signing-of-the-uyghur-forced-labor-prevention-act/ ("[The President] today signed the [UFLPA], underscoring the United States' commitment to combatting forced labor, including in the context of the ongoing genocide in Xinjiang."); Press Release, M. Pompeo, Sec'y of State, Determination of the Secretary of State on Atrocities in Xinjiang (Jan. 19, 2021), https://2017–2021.state.gov/determination-of-the-secretary-of-state-on-atrocities-in-xinjiang/ (concluding that the atrocities in the XUAR constituted "genocide against the predominantly Muslim Uyghurs and other ethnic and religious minority groups in Xinjiang" and that "this genocide is ongoing").

forced labor. *See* Tariff Act of 1930, Pub. L. 71–361, § 307, 46 Stat. 590, 689–90 (as amended at 19 U.S.C. § 1307) ("Section 307"). The FLETF's addition of Ninestar to the Entity List of the UFLPA presumptively prohibits, under section 307, the importation into the United States of any goods produced by Ninestar. *See* UFLPA § 3(a), 135 Stat. at 1529. The FLETF also provided a procedure for listed entities to request removal. *See Listing Decision*, 88 Fed. Reg. at 38082.

Plaintiffs filed suit before the U.S. Court of International Trade ("USCIT") challenging the Listing Decision as arbitrary and capricious agency action in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. *See* Compl., Aug. 22, 2023, ECF No. 8. In its first opinion dated November 30, 2023, the court held that Plaintiffs were likely to establish the USCIT's subject matter jurisdiction under 28 U.S.C. § 1581(i). *See Ninestar Corp. v. United States* ("*Ninestar I*"), 47 CIT __, 666 F. Supp. 3d 1351 (2024), ECF No. 58. In in its second opinion dated February 27, 2024, the court denied Plaintiffs' Motion for Preliminary Injunction, which requested a stay of the Listing Decision. *See Ninestar Corp. v. United States* ("*Ninestar II*"), 48 CIT __, 687 F. Supp. 3d 1308 (2024), ECF No. 121 (public version). The embargo against Plaintiffs remains in force.

Now before the court are three distinct but interrelated procedural questions about the Confidential Administrative Record ("CAR"), the Fourth Amended Judicial Protective Order ("APO"),[4] and the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.[5] This omnibus opinion resolves all three outstanding issues. Additionally, much of this litigation in the last few months has proceeded entirely under seal. This opinion brings those developments, as well as important questions concerning agency coordination in the context of a newly enacted statute, to public light.

First, in their Motion to Unseal and Unredact the CAR, Dec. 4, 2023, ECF No. 60, Plaintiffs request that (i) the court unseal the CAR for public docketing, and (ii) the court review, and unredact, Defendants' assertions of informant privilege in the CAR. As that motion was pending before the court, one member agency of the FLETF produced documents containing privileged information in response to a FOIA request filed by Plaintiffs' counsel. Another member agency

[4] The procedural history of this litigation includes multiple iterations of the CAR and the APO. As discussed later in the opinion, *see infra* Background section I, the operative versions are the Fourth CAR, Jan. 19, 2024, ECF No. 100–2, and the Fourth APO, June 27, 2024, ECF No. 161. All references to the CAR and APO in this opinion, unless specified otherwise, refer to the operative versions.

[5] FOIA requires federal agencies to disclose their records upon request by private citizens, subject to nine exemptions that can be asserted by the agency producing responsive documents. *See generally infra* Discussion section I.C.2.

produced more documents that contained the same privileged information about three months later. Plaintiffs contend that these FOIA productions resulted in partial waiver of the informant privilege in the CAR here. Defendants maintain that waiver should not result and further request that the court order the return and destruction of all copies of the FOIA productions.

Plaintiffs' Motion to Unseal and Unredact the CAR is granted in part and denied in part. As to the Motion to Unseal, one portion of the CAR is unsealed for public docketing. As to the Motion to Unredact, certain formerly redacted portions of the CAR are now unredacted to Plaintiffs' counsel. Those newly unredacted portions otherwise remain confidential to Plaintiffs themselves and the general public. As part of that holding, the court reasons that Defendants' FOIA productions were inadvertent but nonetheless resulted in a partial waiver of the informant privilege. That waiver is carefully limited and subject to the APO's strictures. In addition, the court exercises its inherent authority to order Plaintiffs' counsel and any person to whom Plaintiffs' counsel has disseminated the FOIA productions to destroy all copies of such productions. That order serves a compelling end of preserving the integrity of the APO, is reasonably tailored, and is without prejudice to any future litigation arising out of FOIA, 5 U.S.C. § 552. *See infra* Discussion part I.

Second, the FOIA productions and the court's *in camera* review have given rise to ancillary questions concerning the CAR's completeness. The court declines to supplement the CAR at this stage of the litigation, without prejudice to other issues of completeness that may ripen at a later time. *See infra* Discussion part II.

Third and finally, Defendants petition the court to redact a statement made by Plaintiffs' counsel at a prior public hearing from the public transcript. Defendants argue that the statement tended to reveal sealed information in the CAR. The court denies the request and clarifies the standard for violating the APO's terms on confidentiality. *See infra* Discussion part III.

BACKGROUND

The court presumes familiarity with the legal background and the facts of this case. *See Ninestar II*, 687 F. Supp. 3d at 1315–21. What follows here are the facts and procedural history that are necessary to resolve Plaintiffs' Motion to Unseal and Unredact and other ripe issues relating to the agency record.

I. Motion to Unseal and Unredact

On August 22, 2023, Plaintiffs filed the initial Complaint initiating this action before the USCIT. *See* Compl. Plaintiffs stated that they were "unaware of any facts relating to their respective businesses or otherwise supporting such an allegation," and that "[w]ithout learning the bases upon which Defendants added Plaintiffs to the UFLPA Entity List, Plaintiffs [were] unable meaningfully to seek removal from the list or otherwise challenge this final agency action." *See id.* ¶ 45. The initial Complaint pleaded one cause of action for arbitrary and capricious agency action violating the APA, 5 U.S.C. § 706(2)(A), for failure to provide "*any* explanation[] for adding Plaintiffs to the UFLPA Entity List." Compl. ¶ 62. Plaintiffs further asserted that they were not "able to seek relief under the APA challenging the action as contrary to the evidence in the administrative record, as Plaintiffs know neither the bases for the charge, nor the contents of the record." *Id.* ¶ 46. "After filing," they continued, "Plaintiffs will seek the record and, when appropriate, seek additional relief." *Id.*

On August 28, 2023, the parties also filed a stipulated protective order. *See* Mot. for Protective Order, Aug. 28, 2023, ECF No. 14. The court issued the first protective order on August 31, 2023. *See* Order, Aug. 31, 2023, ECF No. 18.

A. Filing of the CAR and APO

In USCIT cases involving an agency record that fall within the jurisdiction of 28 U.S.C. § 1581(i), the agency must file the record within forty days after the date of service of the summons and complaint. *See* 28 U.S.C. § 2635(d)(1). Defendants timely filed public and confidential versions of the administrative record on October 3, 2023. *See* Pub. Admin. R., Oct. 3, 2023, ECF No. 24–1 ("PAR"); First CAR, Oct. 3, 2023, ECF No. 25–1. That version of the CAR was almost entirely redacted under the label of "Confidential/[Law Enforcement Sensitive]." *See* ECF No. 25–1. Plaintiffs moved to compel production of a fuller record, *see* Mot. to Compel Production of the Admin. R., Oct. 17, 2023, ECF No. 33, and Defendants the next day moved to amend the protective order, *see* Mot. to Am. the Protective Order, Oct. 18, 2023, ECF No. 34. The court held a status conference and later ordered (i) that an amended version of the protective order be deemed as filed, (ii) that Defendants produce an updated CAR, (iii) that Plaintiffs' motion to compel was dismissed as moot, and (iv) that Defendants file a privilege log of all information withheld in the updated CAR. *See* Status Conference, Oct. 24, 2023, ECF No. 38; Order, Oct. 24, 2023, ECF No. 39; First APO, Oct. 24, 2023, ECF No. 40.

Defendants filed the Second CAR pursuant to that First APO. *See* Second CAR, Oct. 24, 2023, ECF No. 41. Most of the information in the Second CAR that was formerly redacted as "Confidential/[Law Enforcement Sensitive]" in the First CAR was accessible to Plaintiffs' counsel but not Plaintiffs themselves. Certain other portions of that record remained redacted and therefore inaccessible to Ninestar's counsel and the court. As ordered by the court, Defendants filed a privilege log asserting "Law Enforcement Privilege/Informant Privilege" as to all redacted information in the record. *See* Priv. Redaction Log at 1–2, Oct. 26, 2023, ECF No. 43.[6] The next day, pursuant to 28 U.S.C. § 2635(d)(2)[7] and USCIT Administrative Order No. 21–01, the court ordered Defendants to file paper copies of the fully unredacted Second CAR and to move to treat such submissions as highly sensitive documents.[8] *See* Order, Oct. 27, 2023, ECF No. 44. Defendants so moved, *see* Mot. to Treat Subm. as Highly Sensitive Doc., Oct. 30, 2023, ECF No. 45, and the court granted that motion, *see* Order, Oct. 30, 2023, ECF No. 49. Paper copies of the fully unredacted administrative record are now stored securely with the court for *in camera* review.

B. Procedural History

On December 4, 2023, Plaintiffs filed the instant Motion to Unseal and Unredact the Administrative Record. *See* Mot. to Unseal & Unredact Admin. R., Dec. 4, 2023, ECF No. 60 ("Pls.' Br."). The court held a status conference on the following day to discuss the next steps in the litigation, *see* Status Conference, Dec. 5, 2023, ECF No. 63, after which Plaintiffs moved to amend the initial Complaint to add three new causes of action, *see* Mot. for Leave to File Am. Compl., Dec. 6, 2023, ECF No. 64. The court granted the motion the next day, and the Amended Complaint was deemed filed. *See* Order, Dec. 6, 2023, ECF

[6] Defendants note in that filing that "[a]dministrative records do not include privileged materials" and "therefore privilege logs are not typically required." *See id.* at 1 n.1. "Courts have allowed discovery, however, in situations where," like here, "'those challenging agency action have contended the record was incomplete.'" *Tafas v. Dudas*, 530 F. Supp. 2d 786, 794 (E.D. Va. 2008) (quoting *Pub. Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982)).

[7] "The agency shall identify and transmit under seal to the clerk of the court any document, comment, or other information that was obtained on a confidential basis and that is required to be transmitted to the clerk under paragraph (1) of this subsection. . . . The confidential or *privileged* status of such material shall be preserved in the civil action, but the court may examine such material in camera and may make such material available under such terms and conditions as the court may order." *Id.* § 2635(d)(2) (emphasis added).

[8] Per USCIT Administrative Order 21–01, highly sensitive documents "are limited to documents containing information that has such a high level of sensitivity as to present a clear and compelling need to avoid filing on the existing CM/ECF system, such as certain privileged information or information the release of which could pose a danger of physical harm to any person." Admin. Order 21–01, at 1. Due to their sensitive nature, such documents "must be filed in paper format" and "may not be uploaded to CM/ECF." *Id.* at 2.

No. 68; *see also* Am. Compl., Dec. 6, 2023, ECF No. 69. Count Two of the Amended Complaint alleges arbitrary and capricious agency action as unsupported by substantial evidence; Count Three alleges agency action in excess of statutory authority for FLETF's use of a burden of proof that is below preponderance of the evidence; and Count Four alleges agency action in excess of statutory authority for having applied the UFLPA's provisions retroactively. *See* Am. Compl. ¶¶ 69–79.

Defendants filed their response to Plaintiffs' Motion to Unseal and Unredact on January 8, 2024. *See* Defs.' Resp. in Opp. to Mot. to Unseal & Unredact, Jan. 8, 2024, ECF No. 85 ("Defs.' Resp."). In their response, Defendants agreed to the disclosure of certain portions of the confidential record to not only Plaintiffs' counsel but also Plaintiffs themselves. *See id.* at 3. On January 9, 2024, Plaintiffs filed a motion seeking immediate leave for such disclosure. *See* Mot. for Leave to Disclose Non-Conf. Info., Jan. 9, 2024, ECF No. 88. The court denied the motion as premature and requested a proposal for modifying the First APO. *See* Paperless Order, Jan. 10, 2024, ECF No. 90. Plaintiffs also formally replied to Defendants' response brief on January 15, 2024. *See* Pls.' Reply in Supp. of Mot. to Unseal & Unredact, Jan. 15, 2024, ECF No. 92 ("Pls.' Reply").

The parties each filed proposed modifications to the First APO. *See* Pls.' Resp. to Order, Jan. 16, 2024, ECF No. 94; Defs.' Resp. to Order, Jan. 16, 2024, ECF No. 95. Defendants also filed the Third CAR, Jan. 16, 2024, ECF No. 96. The Third CAR redesignated particular portions of the Second CAR under a new label of "Ninestar Confidential Information," which referred to a new designation of confidentiality under the proposed new APO that would remain sealed from public view but become accessible to Plaintiffs' corporate directors and officers. The court adopted Defendants' modifications, which included the "Ninestar Confidential Information" designation and in turn allowed Plaintiffs' counsel to share certain sealed information with their clients. *See* Order, Jan. 16, 2024, ECF No. 97. The Second APO was deemed filed on the same day. *See* Second APO, Jan. 16, 2024, ECF No. 98.

On January 18, 2024, the court held a hearing on Plaintiffs' Motion to Unseal and Unredact that was closed in its entirety. *See* Hearing, Jan. 18, 2024, ECF No. 99.[9] Defendants filed the Fourth CAR, which

[9] The Motion to Unseal and Unredact was argued in the second half of that hearing. The first half of the hearing, which was open in part and closed in part, concerned Plaintiffs' Motion for Preliminary Injunction. As has been noted, the court denied the Motion for Preliminary Injunction in a previous opinion. *See Ninestar II*, 687 F. Supp. 3d at 1345.

corrected a few clerical errors in the Third CAR, the next day. *See* ECF No. 100–2. The Fourth CAR, hereinafter referred to as simply the CAR, is the currently operative version of the administrative record.[10]

II. Request to Redact the Transcript of the Preliminary Injunction Hearing

On March 4, 2024, Defendants filed a request to redact a portion of the transcript of the public portion of the hearing on the Motion for Preliminary Injunction and Motion to Unseal and Unredact occurring on January 18, 2024. *See* Defs.' Request to Redact, Mar. 4, 2024, ECF No. 122. The request was filed pursuant to USCIT Administrative Order No. 08–01, which sets out a procedure for redacting "sensitive information." Defendants sought to redact the following statement by Plaintiffs' counsel at the public hearing:

> There is no Ninestar document that says that Ninestar hires Uygh[u]r laborers in Xinjiang and transports them to Ninestar facilities and works with the government to do so. There is no PRC document and no media document to substantiate that.

Proposed Transcript, Mar. 4, 2024, ECF No. 122–1. Plaintiffs filed a brief opposing Defendants' request on March 5, 2024. *See* Pls.' Opp'n to Defs.' Request, Mar. 5, 2024, ECF No. 123.

III. FOIA Productions and Later Proceedings

On August 6, 2023, Plaintiffs' counsel submitted requests pursuant to FOIA, 5 U.S.C. § 552, to the U.S. Trade Representative ("USTR") and U.S. Department of State ("State Department"), among other agencies. ECF No. 131, at 4 n.1. Plaintiffs' counsel's requests sought agency records "regarding the decision of the Forced Labor Enforcement Task Force to add Ninestar Corporation and eight Zhuhai-based entities to the Uyghur Forced Labor Prevention Act Entity List." *See* Email at 1, Mar. 20, 2024, ECF No. 124–3. Those FOIA requests were submitted nearly two weeks before filing the complaint initiating this litigation. *See* Compl., Aug. 22, 2023, ECF No. 8.

A. Production by the U.S. Trade Representative

On March 14, 2024, counsel for Defendants became aware of a production of documents by USTR to Plaintiffs' counsel in response to

[10] The court also requested that the parties file letters recounting all authorities cited at the hearing and invited the parties to make post-hearing submissions. All parties made such filings on January 25, 2024. *See* Pls.' Post-Hearing Subm., Jan. 25, 2024, ECF No. 104; Pls.' Post-Hearing Letter, Jan. 25, 2024, ECF No. 103; Defs.' Post-Hearing Subm., Jan. 25, 2024, ECF No. 106; Defs.' Post-Hearing Subm., Jan. 25, 2024, ECF No. 107.

a request filed by Plaintiffs' counsel pursuant to FOIA. *See* Email at 1, Mar. 20, 2024, ECF No. 124–4. That FOIA production ("USTR Production") occurred on January 24, 2024. *See id.*

Defendants stated that the USTR Production contained documents that, "at minimum, inadvertently disclosed information that would tend to identify the confidential informant in this case," *id.*, thereby potentially undermining the informant privilege that Defendants asserted over the redacted portions of the CAR. They further represented that "[i]mmediately after learning of this inadvertent disclosure, counsel for the Government conferred with the FLETF member agencies, including USTR, to ascertain the extent of the disclosure and whether any additional disclosures were made to Ninestar's counsel, by any agency, that could impact this case." *Id.*[11]

On March 18, 2024, USTR emailed Plaintiffs' counsel stating that it had "inadvertently disclosed information that could reasonably be expected to disclose the identity of a confidential source," citing to 5 U.S.C. § 552(b)(7)(D), and requesting that Plaintiffs' counsel disregard references to an identifying word on various pages of the USTR production. *See* Email at 1, Mar. 20, 2024, ECF No. 124–2. One day later, the USTR FOIA Office emailed Plaintiffs' counsel and "instruct[ed]" them, as well as "any person to whom you have disseminated the FOIA production, to immediately destroy all copies of such production." ECF No. 124–3, at 1.

Defendants' counsel notified the court of the January 24, 2024 production via email on March 19, 2024. *See* ECF No. 124–2, at 1. Plaintiffs' counsel did not notify the court or Defendants of the USTR Production before that date. On the day after Defendants' email, Plaintiffs filed their Confidential Motion for Leave to File a Supplemental Brief in Support of Their Motion to Unseal and Unredact the Administrative Record, Mar. 20, 2024, ECF No. 124. Plaintiffs argued that the USTR Production resulted in waiver of the redactions in the CAR, and that the USTR's instruction to destroy the documents was without authority and could not be enforced by this court. *See id.* The court ordered the parties to continue briefing the waiver and clawback issues, deemed Plaintiffs' Supplemental Brief to be filed, ordered the delivery of the USTR Production pursuant to USCIT Administrative Order 21–01, scheduled a status conference for the following week, and stayed all briefing regarding Plaintiffs' Motion for Judgment on the Agency Record, Jan. 31, 2024, ECF No. 109, and Motion

[11] USTR is not a named defendant in the Complaint but is a member agency of the FLETF. *See supra* note 1.

to Complete or Supplement the Administrative Record, Jan. 31, 2024, ECF No. 108. *See* Order at 2, Mar. 20, 2024, ECF No. 125. The court noted that it "may, at a later date, issue a public order discussing the USTR Documents." *Id.* at 2 n.2.

Defendants responded to Plaintiffs' Supplemental Brief, *see* Defs.' Suppl. Resp., Mar. 25, 2024, ECF No. 128, to which Plaintiffs replied, *see* Pls.' Suppl. Reply, Mar. 29, 2024, ECF No. 131. Defendants also filed a notice, which included a letter dated March 27, 2024 from Ninestar's Chairman to the FLETF. *See* Defs.' Notice re: Status Conference, Mar. 29, 2024, ECF No. 132. The court then held a status conference on April 1, 2024. *See* Conf. Status Conference, Apr. 2, 2024, ECF No. 134. That same day, Plaintiffs also filed the email, sent from USTR to Plaintiffs' counsel on January 24, 2024, that constituted USTR's final response to Plaintiffs' counsel's FOIA request. *See* Email from M. Ricker, Apr. 1, 2024, ECF No. 133.

At the April 1, 2024 status conference, Plaintiffs' counsel also represented to the court that Plaintiffs will file an administrative petition to the FLETF requesting Plaintiffs' delisting from the Entity List. *See* ECF No. 134. The following day, the court ordered Plaintiffs to file a status report concerning their delisting request within ten days. *See* Order at 2, Apr. 2, 2024, ECF No. 136. Without intimating a view by the court, the court also inquired about whether such a delisting request could result in a stay or resolution of the immediate litigation. *See id.* Plaintiffs' status report indicated that Plaintiffs were "working on that petition expeditiously but [could not] at [that] time commit to filing by a particular date." Pls.' Status Report at 2, Apr. 12, 2024, ECF No. 143.

B. Missing Document in the Unredacted CAR

In its April 2, 2024 procedural order, the court also identified references to a missing document in the unredacted CAR (the "Footnote Document") and stated that "it appear[ed] that the CAR requires the addition of a document for judicial review of the 'whole record.'" Order at 2, ECF No. 136 (quoting 5 U.S.C. § 706). Those references were discoverable only by the court's *in camera* review; Plaintiffs' counsel could not have accessed information that was redacted pursuant to the informant privilege as then asserted. *See id.* The court ordered Defendants to deliver the Footnote Document to the court pursuant to USCIT Administrative Order 21–01 so that the court could, after *in camera* review, determine whether the Footnote Document was part

of the FLETF's administrative record. *See id.* at 2–3.[12] Defendants did so. *See* Defs.' Mot. to Treat Subm. as Highly Sensitive Doc., Apr. 4, 2024, ECF No. 139.

Defendants separately argued that the Footnote Document should not form part of the CAR. *See* Defs.' Resp. to Ct.'s Order, Apr. 4, 2024, ECF No. 138. The court reviewed the Footnote Document *in camera*. In a subsequent order, the court stated that, "[i]ntimating no view at this time," it "will resolve whether the [Footnote] Document is part of the CAR and, if so, whether such privileges are validly asserted upon its resolution of Plaintiffs' Motion to Unseal and Unredact." Order at 2, Apr. 4, 2024, ECF No. 140.

C. Production by the U.S. Department of State

On April 19, 2024, the State Department produced nine pages of partially redacted documents to Plaintiffs' counsel pursuant to the same FOIA request that Plaintiffs' counsel had submitted to USTR (the "State Production"). *See* Letter from J. Rosenbaum at 1, Apr. 23, 2024, ECF No. 147–2. Plaintiffs' counsel notified the court and Defendants' counsel of the State Production via its notice filed on April 23. *See* Pls.' Notice re: Additional FOIA Production, Apr. 23, 2024, ECF No. 147.[13]

The court ordered that Defendants respond to Plaintiffs' notice, *see* Paperless Order, Apr. 23, 2024, ECF No. 148, and Defendants did so, *see* Defs.' Resp. to Pls.' Notice, Apr. 25, 2024, ECF No. 149. Per that filing, the State Department learned of the State Production on April 23, 2024. *See id.* at 4. Among other arguments, Defendants argued that the State Production was "a by-product" of the USTR Production and, "like that prior disclosure, was inadvertent." *Id.* at 2. On the same day of Defendants' response brief, the State Department sent an email to Plaintiffs' counsel "instruct[ing]" them, "and any person to whom [they] have disseminated the FOIA production, to immediately destroy all copies of such production." Decl. of S.C. Weetman Ex. 6, Apr. 25, 2024, ECF No. 149–1. The court ordered further briefing

[12] In particular, the court stated:
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Conf. Order at 2–3, Apr. 2, 2024, ECF No. 135 (footnote omitted).

[13] Like the USTR, the State Department is not a named defendant in the Complaint but is a member agency of the FLETF. *See supra* note 1.

concerning the State Production, *see* Paperless Order, Apr. 26, 2024, ECF No. 150; Order, May 8, 2024, ECF No. 153, and the parties filed a reply and sur-reply, *see* Pls.' Reply re: Pls.' Notice, Apr. 30, 2024, ECF No. 151; Defs.' Sur-Reply, May 13, 2024, ECF No. 154.

D. Later Filings Regarding the Delisting Petition and APO

On May 3, 2024, Plaintiffs submitted another status report stating that they were still unable to specify a timeline by which they would file a delisting petition to the FLETF but would be "in a better position to do so" by the end of May. *See* Pls.' Status Report at 2, May 3, 2024, ECF No. 152. The court then ordered that briefing on Plaintiffs' Motion for Judgment on the Agency Record and Motion to Complete or Supplement the Administrative Record remain stayed and that Plaintiffs file another status report regarding the delisting request by June 3. *See* Order, May 8, 2024, ECF No. 153.

On May 17, 2024, the parties jointly moved to amend the Second APO in order to clarify that sealed information may be used in preparing the delisting petition to the FLETF by July 1, 2024. *See* Joint Mot. to Am. the Second APO, May 17, 2024, ECF No. 155. The court granted and docketed the Third APO, May 20, 2024, ECF No. 157. On June 27, 2024, Plaintiffs moved to amend the Third APO in order to extend the delisting petition deadline to July 22, 2024. *See* Pls.' Mot. to Am. the Third APO, June 27, 2024, ECF No. 159. The court granted and docketed the Fourth APO, June 27, 2024, ECF No. 161. The Fourth APO, hereinafter referred to as simply the APO, is the currently operative judicial protective order.

DISCUSSION

Plaintiffs have established the court's subject matter jurisdiction under 28 U.S.C. § 1581(i). *See Ninestar I*, 666 F. Supp. 3d at 1363; *Ninestar II*, 687 F. Supp. 3d at 1322.

This omnibus opinion proceeds in three parts. First, the court grants in part and denies in part Plaintiffs' Motion to Unseal and Unredact. All ancillary issues relating to the USTR and State Productions are resolved. Next, the court evaluates related questions of whether the CAR requires supplementation and concludes that the record, at this juncture, is complete. Finally, the court denies Defendants' request to redact the public transcript and clarifies the applicable standard under the APO.

I. Motion to Unseal and Unredact

The court addresses Plaintiffs' Motion to Unseal and Unredact in two parts. First, in the Motion to Unseal component, Ninestar requests that the court unseal the entire CAR, excluding any redacted privileged material, and make the record available to the public. *See* Pls.' Br. at 4–5. Second, in the Motion to Unredact component, Ninestar challenges the Government's assertion of informant privilege in the CAR and asks that the court unredact the CAR where the privilege does not apply. *See id.* at 14–15.

With important qualifications, both requests are granted in part and denied in part. Defendants shall file a revised administrative record consistent with this opinion. At this stage of the litigation, the court expresses no view as to the quantum or overall weight of any record evidence supporting the FLETF's decision to add Plaintiffs to the UFLPA Entity List. The court's analysis in this opinion is limited to determining the appropriate contents, scope, and informational restrictions of the administrative record.

A. Overview of APO and Privilege

Before proceeding to the merits of Plaintiffs' motion, the court summarizes the various tiers of restricted information at play in this case.

The administrative record in this case is composed of "non-privileged documents that were submitted by DHS to the voting Member Agencies of the [FLETF] in support of DHS's recommendation to add [Plaintiffs] to the [UFLPA] Entity List and which reflect the FLETF Member Agencies final vote and decision to add Ninestar to the UFLPA Entity List." ECF No. 100–2, at 2–3. Certain of these documents, or portions thereof, are either (1) sealed pursuant to the APO or (2) redacted pursuant to an evidentiary privilege. The rest of the record is public. Whereas the PAR comprises all public information, the CAR comprises all public information plus all information sealed pursuant to the APO. By contrast, any information redacted pursuant to an evidentiary privilege is not part of the record.

The two types of restricted information in the record warrant further explanation. The first type is sealed information. Sealed information is designated under one of two labels: "Confidential Information" and "Ninestar Confidential Information." The APO defines the two sealing designations as follows:

1. *Confidential Information*. If a document or portion thereof contains "law enforcement sensitive information or other similarly sensitive government information, including information designated as 'for official use only,'" then it is desig-

nated as "Confidential Information." APO ¶ 1.[14] Confidential Information is accessible only to the parties' counsel and certain associated personnel. *See id.* ¶¶ 2–4. The APO prohibits sharing Confidential Information with anyone else, including any officer, director, shareholder, or employee of Plaintiffs Ninestar and its corporate affiliates. *See id.* ¶ 6.

2. *Ninestar Confidential Information*. Like Confidential Information, "Ninestar Confidential Information" also includes "law enforcement sensitive information or other similarly sensitive government information, including information designated as 'for official use only.'" *See id.* ¶¶ 1, 7. The difference is that the parties have agreed to make Ninestar Confidential Information accessible not only to the parties' counsel (and certain associated personnel), but also to "officers or directors" of Plaintiffs Ninestar and its corporate affiliates. *Id.* ¶ 7; *see also* ECF No. 85. The APO prohibits sharing Ninestar Confidential Information with anyone else. *See* APO ¶¶ 7, 10.

Additionally, "[t]he burden rests on the Designating Party," which is the Government, "to demonstrate that the designation is proper." *Id.* ¶ 25. If a document or portion thereof is not sealed under either of these designations, it is publicly available and forms part of the PAR.

The second type of restricted information is privileged information. In particular, Defendants assert the informant privilege over certain record evidence. *See* ECF No. 43. The informant privilege refers to "the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." *Roviaro v. United States*, 353

[14] The APO more fully defines "Confidential Information" to mean:

> [I]nformation, data, and documents the disclosure of which to or by the receiving party would, in the good faith belief of the producing party, result in the disclosure of one or more of the following categories of information: (1) proprietary, business, financial, technical, trade secret, or commercially sensitive information; (2) information that any party or person is prohibited from releasing publicly pursuant to contracts, applicable statutes, or applicable regulations, or directives from the Government concerning classified or other similarly sensitive information; (3) law enforcement sensitive information or other similarly sensitive government information, including information designated as "for official use only;" (4) private information that is otherwise protected from disclosure under applicable law including, but not limited to, personnel files; and (5) other confidential research, development, or commercial information as set forth in USCIT Rule 26(c)(1)(G).

Id. Only the third basis for "Confidential Information" concerning law enforcement sensitive information is at issue in Plaintiffs' Motion to Unseal and Unredact. As discussed later in the opinion, the parties dispute whether particular information on the record qualifies as "law enforcement sensitive" and, in turn, whether the "Confidential Information" designation is proper. *See infra* Discussion section I.A.

U.S. 53, 59 (1957); *see also infra* Discussion section I.C.1. Any information in the CAR that lawfully falls within Defendants' asserted privilege is redacted from the view of Plaintiffs, including clients and counsel, as well as the public. Privileged information may be redacted in documents that are otherwise designated as Confidential Information or Ninestar Confidential Information. It is the privilege, not the APO designations, that governs whether information should be redacted. *See* APO ¶ 13 ("This [APO] is not intended to address or govern claims of privilege or work product that may otherwise be asserted by any of the parties.").

The below table summarizes the four categories of informational restriction in this case and who can access each category:

Table 1: Categories of Restricted Information

Category	Privileged?	APO Designation	Who Can Access This Record Evidence?
1.	Privileged	Not applicable	Defendants' counsel
2.	Not privileged	Confidential Information	Plaintiffs' counsel Defendants' counsel
3.	Not privileged	Ninestar Confidential Information	Plaintiffs' directors and officers Plaintiffs' counsel Defendants' counsel
4.	Not privileged	None	General public

For ease of reference, the court will refer to these enumerated categories throughout the opinion.

B. Motion to Unseal

Plaintiffs first move to unseal the entire CAR, excluding any privileged information. That would represent a shift to Category 4 of all information currently in Categories 2 and 3. *See supra* Table 1: Categories of Restricted Information. The court denies their request to unseal in large part and grants it only as to one document detailing the FLETF's standard operating procedures. *See* CAR 220–28. Next, Plaintiffs request that any Confidential Information be redesignated as Ninestar Confidential Information. That would represent a move from Category 2 to Category 3. *See supra* Table 1: Categories of Restricted Information. That request is denied.

1. The Sealed Information in Pages 1 Through 219 of the CAR Is Law Enforcement Sensitive and Therefore Remains Sealed

First, Plaintiffs argue that Defendants have not established that the sealed information is "law enforcement sensitive" ("LES") and, in turn, that the sealed information fails to qualify as either Confidential Information or Ninestar Confidential Information under the

APO. *See* Pls.' Br. at 4–14. As explained above, *see supra* section I.A, the "Confidential Information" and "Ninestar Confidential Information" designations apply to "[LES] information or other similarly sensitive government information, including information designated as 'for official use only.'" APO ¶ 1. Information that is neither LES nor "other similarly sensitive government information," then, cannot be designated as either Confidential Information or Ninestar Confidential Information and must be made public. In Plaintiffs' view, because the sealed information falls in neither category, the Confidential Information and Ninestar Confidential Information designations should be removed from the entire CAR.

As to pages 1 to 219 of the CAR, Defendants have met their burden of establishing that the sealed information is LES. In a declaration, Defendants accurately describe the sealed information in those pages as constituting "open-source documents, information that a confidential source provided to CBP and that CBP shared with the FLETF, details of CBP's communications with the confidential source, CBP's analysis of information provided by the confidential source and assessment that Ninestar meets the UFLPA Entity List criteria, and internal FLETF analysis of the evidence gathered." *See* Decl. of C. Brzozowski ¶ 9, Jan. 8, 2024, ECF No. 85–2 ("Brzozowski Declaration") (footnote omitted). That declaration goes on:

> If disclosed, the information would reveal the FLETF's sources, methods, and significant insights into how it conducts investigations. It would also reveal the FLETF's judgments and decision-making, including the facts and evidence the FLETF or its members deem credible and relevant when making UFLPA Entity List determinations. Accordingly, and particularly when taken as a whole, disclosure of this information would allow the PRC government and corporations that engage in forced labor practices to evade FLETF investigations and undermine the FLETF's mission.

Id. That context establishes that the sealed information is LES or, at the very least, similarly sensitive government information.

Plaintiffs' rebuttal is unconvincing. They contend that the sealed information is not LES because public disclosure would not risk circumvention of the FLETF's efforts. In particular, "the law enforcement techniques used by FLETF here—speaking with a confidential informant and mining public records—are hardly a secret." Pls.' Br. at 6. That may be so, but disclosure of statements made by an informant or public records will reveal the FLETF's deliberative process and

judgment, as Defendants note. *See* ECF No. 85–2 ¶ 9. And while it is well known that intelligence agencies "routinely rely on public and open-source information," *ACLU of Mich. v. FBI*, 734 F.3d 460, 464 n.3 (6th Cir. 2013), Defendants in the same declaration discuss sealed evidence that strongly suggests that disclosure of this case's open-source record information presents a heightened circumvention risk. *See* ECF No. 85–2 ¶ 10.[15] Because public disclosure of the sealed material would, if disclosed, lead to circumvention of the FLETF's law enforcement efforts, all sealed information in pages 1 through 219 is properly designated as LES and, by extension, either Confidential Information or Ninestar Confidential Information. *See* APO ¶ 1.

2. The Sealed Information in Pages 220 Through 228 of the CAR Is Not Law Enforcement Sensitive and Therefore Is Unsealed

Defendants have not, however, established why pages 220 through 228 of the CAR are LES or similarly sensitive government information. Those pages constitute a document outlining the FLETF's standard operating procedures ("SOP Document"), which describe the step-by-step logistics of how the FLETF's member agencies add entities to the Entity List and reconsider such additions. *See* CAR 220–28. Whereas the disclosure of sealed information in pages 1 through 219 would reveal the FLETF's deliberative process as to the merits of adding an entity to the Entity List, disclosing the SOP Document would reveal only logistical information about how the FLETF member agencies coordinate with one another. Because a soon-to-be listed entity has no ability to affect the interagency logistics preceding its addition, disclosing the SOP Document is not likely to reveal techniques and procedures used by law enforcement that could be used to circumvent the law. The SOP Document is therefore not LES.

The SOP Document does include a watermark stating "for official use only." *See* CAR 220–28. That watermark may qualify the SOP Document "as other similarly sensitive government information, including information designated as 'for official use only.'" APO ¶ 1. But in discussing the APO, Defendants' counsel stated at the October 24,

[15] In particular, the Brzozowski Declaration explains that [[
]] and that [[
]]. *Id.* Plaintiffs object to this reasoning on two grounds, neither of which is availing. *See* Pls.' Reply at 8. [[

]].

2023 status conference that Defendants did not "intend[] to give [themselves] the capability of . . . broadly identifying everything as confidential." Status Conference at 18:08–16, Oct. 24, 2023, ECF No. 38. Beyond the fact that the SOP Document was stamped with the watermark, Defendants offer no substantive reason for why it was stamped either in their filing or in their appended declaration. *See* ECF No. 85 (omitting any discussion of pages 220 to 228); ECF No. 85–2 (same). Defendants have not independently met their burden to demonstrate that the SOP Document should be sealed. *See* APO ¶ 25. Pages 220 to 228 of the CAR are accordingly unsealed.

3. The CAR Correctly Apportions Record Evidence Designated as Confidential Information and Record Evidence Designated as Ninestar Confidential Information

Plaintiffs also contend that record evidence currently designated as Confidential Information should be redesignated as Ninestar Confidential Information. Whereas the prior two subsections considered redesignating sealed Confidential Information and Ninestar Confidential Information (Categories 2 and 3) as unsealed information (Category 4), this subsection discusses whether sealed Confidential Information (Category 2) should be redesignated as sealed Ninestar Confidential Information (Category 3). *See supra* Table 1: Categories of Restricted Information. The key difference is that Confidential Information is for attorneys' eyes only, whereas Ninestar Confidential Information may also be accessed by Plaintiffs' directors and officers. *See supra* section I.A.

The court denies Plaintiffs' request to redesignate Confidential Information as Ninestar Confidential Information. The court is generally "free to tailor [a] protective order to the circumstances presented" as it relates to the disclosure of law enforcement sensitive documents. *In re the City of New York*, 607 F.3d 923, 949 (2d Cir. 2010); *cf. also* USCIT R. 26(c)(1). A sizable portion of the CAR is already designated as Ninestar Confidential Information. Plaintiffs' request, then, more specifically concerns the two discrete types of record evidence that remain designated as Confidential Information, which are (1) sources over which the Chinese government exercises control and (2) internal agency documents. *See* ECF No. 85, at 3.

Preventing the disclosure of these two types of record evidence to Plaintiffs' directors and officers is not a trivial concern. Defendants establish that all Chinese "organizations and citizens are required to support, assist, and cooperate with national intelligence efforts under the PRC National Intelligence Law," which was adopted in 2017. ECF No. 85–2 ¶ 16 (internal quotation marks omitted). Disclosure of either

open-source sources or internal agency documents to Plaintiffs' directors and officers would be susceptible to demands by the Chinese government pursuant to China's 2021 Data Security Law and its 2021 Anti-Foreign Sanctions Law. *Id.* ¶ 16. Release of those materials would hamper the FLETF's investigations into the use of forced labor by other, non-Ninestar entities.

Plaintiffs' counsel argues that the Confidential Information designations—which, again, prohibit disclosure to their client—hinder necessary communication between counsel and client.[16] But there appears to be no authority compelling a level of disclosure to the client greater than what is provided here. Plaintiffs are foreign companies with insufficient contacts in the United States to accrue constitutional rights, *see People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999), and the APA does not appear to demand a particular level of disclosure to the client as opposed to counsel. "[F]ree to tailor the protective order to the circumstances presented," *City of New York*, 607 F.3d at 949, the court concludes that the current apportionment of Confidential Information and Ninestar Confidential Information in the record— which reserves (1) sources over which the Chinese government exercises control and (2) internal agency documents, for attorneys' eyes only—strikes the appropriate balance.

4. Summary and Order

The court concludes that Defendants have established the designation of certain record evidence in pages 1 through 219 of the CAR as Confidential Information and Ninestar Confidential Information was proper. That record evidence will remain sealed from public view. Moreover, no changes from Confidential Information to Ninestar Confidential Information will be made.

That said, Defendants have not established that the designation of pages 220 through 228 of the CAR as Ninestar Confidential Information was proper. It is hereby **ORDERED** that pages 220 through 228 of the CAR be unsealed and form part of the PAR. The below table summarizes the information being unsealed.

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[16] As an example, Ninestar argues that [[

]] But under this court's review for arbitrary and capricious action on an agency record, Plaintiffs' counsel's requests for client input are hardly essential when the client's input would largely constitute evidence from outside the record. Moreover, Plaintiffs' counsel can, pursuant to the APO's terms, [[

]].

Table 2: Summary of Unsealed Record Evidence						
	Description of Portion of CAR	**CAR Pages**	**Prior Category**	**New Category**	**Who Can Now Access These Documents?**	**Description of Change**
1.	FLETF Operating Procedure	220–28	3 (Not Privileged & Ninestar Confidential Information)	4 (Not Privileged & No APO Designation)	General Public	Unsealed because not LES or similarly sensitive government information. *See infra* section I.B.2.

C. Motion to Unredact

Plaintiffs next challenge Defendants' assertion of the informant privilege in the CAR and request that the purportedly privileged information be unredacted. To the extent that privileged material remains after that inquiry, Plaintiffs also argue that the USTR and State Productions, issued to Plaintiffs in response to their FOIA requests, resulted in partial waiver of the informant privilege over the CAR.

The court concludes that the informant privilege applies to certain portions of the CAR and that the USTR and State Productions resulted in a limited waiver of the informant privilege over other portions of the CAR. All unredacted information, however, will be designated as Confidential Information under the APO and accordingly sealed from public view.

1. The Informant Privilege Applies to Certain Portions of the CAR and Does Not Apply to Other Portions

Defendants formally assert the "Law Enforcement Privilege/ Informant Privilege" over certain portions of the CAR. *See* Priv. Log at 1–2. They state that the redacted information "reveals or has the reasonable tendency to reveal the identity of a confidential informant and third-party sources that have provided information about the existence of Uyghur labor at plaintiffs' facilities to U.S. Customs and Border Protection under an assurance of confidentiality." *Id.* Plaintiffs contend that the informant privilege does not apply in this case. Exercising its jurisdiction over the issue,[17] the court concludes that

[17] All parties agree that the APO does not "address or govern claims of privilege or work product that may otherwise be asserted by any of the parties." APO ¶ 13. Instead, the Federal Rules of Evidence and federal common law supply the rule of decision in privilege disputes in this case. *See* Fed. R. Evid. 501, 1101(c); *see also* 28 U.S.C. § 2641(a). The USCIT has the power to enforce the privilege as a federal court that possesses powers coterminous with those of U.S. district courts. *See* 28 U.S.C. § 1585 ("The [USCIT] shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States."); *see also Daido Corp. v. United States*, 16 CIT 987, 992, 807 F. Supp. 1571, 1575 (1992) (holding that the USCIT "clearly has jurisdiction to enforce" the informant privilege in a case arising under 28 U.S.C. § 1581(f)).

the informant privilege is properly invoked in part and improperly invoked in part.

The informant privilege refers to "the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." *Roviaro*, 353 U.S. at 59. "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." *Id.* While *Roviaro* was a criminal case, the privilege also applies in civil cases. *See, e.g.*, *In re Perez*, 749 F.3d 849, 855–57 (9th Cir. 2014); *Westinghouse Elec. Corp. v. City of Burlington*, 351 F.2d 762, 769–70 (D.C. Cir. 1965). That said, the informant privilege "is not an instrument by which law enforcement agencies may shield themselves from public scrutiny. Therefore, courts must vigilantly review an assertion of the privilege and must often conduct an *in camera* inspection of the materials in question." *Floyd v. City of New York*, 739 F. Supp. 2d 376, 379 (S.D.N.Y. 2010); *see also* 28 U.S.C. § 2635(d)(2) (authorizing the court to review privileged material *in camera* and to "make such material available under such terms and conditions as the court may order").

Determining whether the informant privilege applies requires a two-step inquiry. First, the court must determine whether the withheld information is within the privilege's scope. Specifically, "where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged." *Roviaro*, 353 U.S. at 60 (footnote omitted). Second, even if the withheld information falls within the privilege's scope, the privilege must yield to "fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Id.* at 60–61 (footnote omitted). Specifically, the court must weigh "the public interest in protecting the flow of information against the individual's right to prepare his defense." *Id.* at 62. This balancing test, subject to "no fixed rule," varies depending on the "particular circumstances of each case." *Id.*; *see also McCray v. Illinois*, 386 U.S. 300, 311 (1967).

Turning first to scope, the court concludes that the information being asserted as privileged in the CAR, in large part, "tend[s] to reveal the identity of an informer" and is within the informant privilege's scope. *Rovario*, 353 U.S. at 60. Having reviewed the materials

in camera, *see* 28 U.S.C. § 2635(d)(2); *Floyd*, 739 F. Supp. 2d at 379, the court broadly sorts the redacted information into three categories: words that describe the informant, statements supplied by the informant, or descriptions of the time and place of statements by the informant. The scope of the informant privilege covers the redacted information as asserted in the first two categories. *See Rovario*, 353 U.S. at 60 (protecting the disclosure of "an informer's identity" or "the contents of his communication"). As for the third category, however, the privilege's scope does not extend to all of Defendants' asserted redactions. The dates and locations of an informant's activities may constitute privileged information so long as the dates tend to identify the informant. *See United States v. Moon*, 802 F.3d 135, 151 (1st Cir. 2015) (affirming district court's extension of informant privilege over "detail about the transactions" of a confidential informant in controlled drug buys, including "dates and locations"). Here, references to the days and months of the informant's activities in China and meetings with the FLETF are covered because they are likely to aid the recall of Plaintiffs' personnel in attempting to identify the informant. *See United States v. Wilburn*, 581 F.3d 618, 624 (7th Cir. 2009) (affirming informant privilege over "the date of the controlled buy" because the defendant "could search his memory and recall to whom he had sold drugs on that day"). But the record's references to the years—as opposed to days and months—of the informant's activities and meetings are not so revealing. Those references are unredacted.

Turning next to fairness, the court determines that the privilege must yield in part because the informant's communications are essential to a fair determination of Plaintiffs' APA causes of action. The informant privilege tends to yield where informant communications are directly relevant to the "transaction charged" rather than unrelated to the underlying cause of action. *Compare Roviaro*, 353 U.S. at 64 (concluding that disclosure was appropriate where the informer "was the sole participant, other than the accused, in the transaction charged"), *with Moon*, 802 F.3d at 151 (upholding privilege where informant had knowledge of defendant's drug trafficking, but drug trafficking was not the crime being charged). That is the case here. The court has already explained that "the redacted information" from the informant "constitutes record evidence of post-enactment violations of the UFLPA at Ninestar's Zhuhai facilities." *Ninestar II*, 687 F. Supp. 3d at 1336. Moreover, that evidence appears central to the FLETF's ultimate conclusion, even though the FLETF also considered other sources such as "PRC government documents, Ninestar's company documents, and media reports." PAR 4. Some disclosure of privileged information is therefore warranted.

But Plaintiffs' right to present adequate APA challenges is not unqualified. Importantly, "danger to the informant's life must be given significant weight in striking the *Roviaro* balance." *United States v. Straughter*, 950 F.2d 1223, 1232 (6th Cir. 1991). Defendants have stated, and Plaintiffs do not appear to dispute, that the disclosure of identifying details beyond counsel could subject informants to harm and retaliation in China. *See* ECF No. 85–1 ¶ 11. That danger may well also extend to the forced laborers themselves. And while Plaintiffs argue that this danger may be mitigated by the APO's prohibition on sharing information beyond counsel, the APO does not render danger to life entirely irrelevant. Even the most careful of procedures and best of intentions—of any party—do not guarantee against the inadvertent release of information. Indeed, an attorneys'-eyes-only designation for such privileged information is insufficient where, as here, "the consequences of accidental disclosure are too severe." *City of New York*, 607 F.3d at 936; *see also Goodloe v. City of New York*, 136 F. Supp. 3d 283, 303 (E.D.N.Y. 2015). Moreover, the informant privilege must "not yield to permit a mere fishing expedition." *Dole v. Loc. 1942, Int'l Bhd. of Elec. Workers, AFL-CIO*, 870 F.2d 368, 373 (7th Cir. 1989) (citations omitted). While the court does not suggest that Plaintiffs are requesting a fishing expedition, a similar principle nonetheless applies here. In an APA action that must be limited to the agency record, Plaintiffs' requests to unredact information cannot yield to permit mere extra-record discovery.

The court accordingly concludes that the informant privilege yields for all generalized information about Uyghur workers in the CAR.[18] The unredacted statements are not particularized to any one person, which will allow Plaintiffs' counsel to challenge the informant's substantive credibility. But disclosure of more identifying details, such as times or specific statements that can be traced to one person, would greatly increase the risk of danger to the informant's life and is therefore not warranted here.

Finally, the newly unredacted (i) references to years and (ii) generalized information about Uyghur workers will not be made public. Even if not privileged, that information is clearly LES for the reasons established by Defendants in the Brzozowski Declaration. *See supra* section I.B.1. All unredacted text will be nonetheless sealed under the designation of Confidential Information and, consistent with that designation's attendant prohibitions, will be limited to the parties' attorneys' eyes only. As to those two subsets of the CAR, this change

[18] In particular, all references to the fact that Uyghur workers [[ ]] shall be unredacted. The court orders the same for general statements about [[ ]].

represents a shift from Category 1 to Category 2. *See supra* Table 1: Categories of Restricted Information.[19]

2. The FOIA Productions by USTR and State Department Resulted in a Partial Waiver of the Informant Privilege in the CAR

Along a different vein, Plaintiffs argue that the disclosure of information tending to reveal the informant's identity in the USTR and State Productions resulted in waiver of the informant privilege over overlapping information in the CAR. *See* ECF No. 124, at 3; ECF No. 147, at 2. Defendants respond that those productions were "obviously inadvertent" and occurred despite reasonable steps taken by agency personnel and defense counsel to prevent and remedy inadvertent disclosure. ECF No. 128, at 2; *see also id.* at 5–11; ECF No. 149, at 2; ECF No. 154, at 2–4.[20] The court agrees in part and disagrees in part. While it appears that the USTR and State Productions were indeed inadvertent, the State Production in particular did not follow reasonable attempts at preventing inadvertent disclosure. The court therefore concludes that the informant privilege has been partly waived in the CAR. The scope of that waiver, however, is carefully limited. All newly unredacted information will be designated as Confidential Information and therefore sealed from public view. *See infra* section I.C.3. Put differently, the newly unredacted information will be redesignated from Category 1 to Category 2. *See supra* Table 1: Categories of Restricted Information.

As an initial matter, when the informant's identity becomes known to the adverse party, the informant privilege can no longer apply. *See Rovario*, 353 U.S. at 60 & n.8. Like other privileges, the informant privilege can be waived by the Government. *See, e.g.*, *Dole*, 870 F.2d at 375–76; *Chao v. Westside Drywall, Inc.*, 254 F.R.D. 651, 659 (D. Or. 2009). But while the voluntary or intentional disclosure of privileged information is sure to result in waiver, the effect of an inadvertent disclosure is less certain. *See e.g.*, *Fla. House of Representatives v.*

[19] Additionally, the Confidential Information designation over this newly unredacted information will apply no matter the privilege or APO designation of the surrounding context.

[20] Defendants also take issue with the fact that Plaintiffs did not notify the court or Defendants of the USTR Production until nearly two months after receipt. In particular:

> Ninestar [had] possessed information it received through a [FOIA] request, and over which it knew the Government had asserted the informant's privilege. . . . Rather than immediately inform the Government or the Court of this obviously inadvertent disclosure, Ninestar's counsel said nothing for nearly two months, waiting to file a supplemental brief until the day after the Government brought the issue to the Court's attention.

ECF No. 128, at 2 & n.1. But Defendants make no motion or legal argument that depends on the question of whether Plaintiffs' actions were improper or caused undue delay. The court therefore does not reach that issue.

U.S. Dep't of Com., 961 F.2d 941, 946 (11th Cir. 1992); *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 955 & n.9 (N.D. Ill. 1982) (citing, ultimately, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

Per Plaintiffs, the method of waiver here was through FOIA. FOIA requires federal agencies to disclose their records upon request by private citizens, subject to nine exemptions that can be asserted by the agency producing responsive documents. *See* 5 U.S.C. § 552; *see also Knight First Amend. Inst. at Columbia Univ. v. CIA*, 11 F.4th 810, 813 (D.C. Cir. 2021). FOIA's "basic purpose" is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). For those reasons, FOIA mandates "broad disclosure." *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007). That said, "FOIA was *not* intended to function as a private discovery tool" in administrative proceedings or litigation. *Robbins*, 437 U.S. at 242 (emphasis in original) (holding that FOIA disclosure of prehearing witness statements would interfere with an NLRB hearing); *see also Baldrige v. Shapiro*, 455 U.S. 345, 360 n.14 (1982).

As mentioned, in January 2024 and April 2024, respectively, USTR and the State Department produced documents responsive to Plaintiffs' counsel's FOIA request to the USTR filed in August 2023. The USTR and State Productions, as initially produced to Plaintiffs' counsel, each refer to the informant—the very same informant at issue in the CAR of this litigation—using an identifying word ("Identifying Word").[21] Exemption 7(D) of FOIA allows agencies to exclude or redact any "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to disclose the identity of a confidential source." 5 U.S.C. § 552(b)(7)(D). While USTR and the State Department asserted FOIA exemptions as to other parts of the productions that are not relevant here,[22] neither agency asserted Exemption 7(D) over the Identifying Word or over other information involving the Identifying Word.

Whether a FOIA production results in waiver is a highly context-specific inquiry. Most cases discussing whether waiver occurred after an inadvertent FOIA production arise out of FOIA's own cause of

[21] The Identifying Word refers to [[ ]].

[22] The agencies asserted FOIA Exemption 5, which excludes certain deliberative agency materials, and Exemption 6, which excludes personally private information. *See* 5 U.S.C. § 552(b)(5)–(6). Neither of those asserted exemptions are relevant to Defendants' assertion of the informant privilege in this litigation.

action,[23] and those cases typically concern whether the producing agency can reassert a FOIA exemption after the inadvertent disclosure has occurred. *See, e.g.*, *Memphis Pub. Co. v. FBI*, 879 F. Supp. 2d 1, 2 (D.D.C. 2012). But that is not the procedural posture here. Plaintiffs' action arises out of the APA, not FOIA. *See* Am. Compl. ¶¶ 61–79. They argue that the Government's failure to assert Exemption 7(D) in the USTR and State Productions, which occurred independent of and outside this litigation, has waived Defendants' assertion of the informant privilege in this APA litigation.

Judicial treatment of similarly postured cases is scattered but suggests that the disclosure of privileged information through a legally independent FOIA production can indeed result in the waiver of privilege in the immediate case before the court. *See, e.g.*, *Ga. ForestWatch v. U.S. Forest Serv.*, No. 2:19-CV-77-RWS, 2020 WL 13594964, at *4 (N.D. Ga. Apr. 22, 2020) ("[D]isclosure under FOIA waives the deliberative process privilege as to the document's inclusion in the record for judicial review under the APA."); *UnitedHealthcare Ins. Co. v. Azar*, 316 F. Supp. 3d 339, 349 (D.D.C. 2018) ("[A] document that was privileged as part of the deliberative process can lose its privilege when revealed outside the agency."); *Cnty. of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 75 (D.D.C. 2008) (reasoning that "by producing these documents pursuant to the FOIA request, the Service has waived any privilege and protection from disclosure" in seeking to exclude documents from the administrative record); *see also, e.g.*, *Eden Isle Marina, Inc. v. United States*, 89 Fed. Cl. 480, 506–08 (2009) (finding waiver of privilege via FOIA in contract and Fifth Amendment takings actions); *Melendez-Colon v. United States*, 56 F. Supp. 2d 142, 145 (D.P.R. 1999) (finding same, in Federal Tort Claims Act action).

The reasoning used by courts to find waiver varies. Two of these decisions suggest that FOIA disclosure is a voluntary action by the Government that must result in waiver, but those cases are largely distinguishable; in neither case did the district court consider whether the Government's FOIA disclosure was inadvertent. *See, e.g.*, *Ga. ForestWatch*, 2020 WL 13594964, at *5 & n.6 (declining to consider whether the Government's FOIA disclosure was inadvertent for

[23] FOIA expressly provides:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.

5 U.S.C. § 552(a)(4)(B).

lack of argumentation); *UnitedHealthcare*, 316 F. Supp. 3d at 349 (no inadvertence defense raised by the Government). Another case takes the opposite approach, suggesting that FOIA disclosures are per se inadvertent but may nonetheless result in waiver due to unreasonable precautions and remedial actions. *See Eden Isle*, 89 Fed. Cl. at 507. But that case, too, is not easily applicable here because it relies heavily on the framework of inadvertent disclosures governed by Federal Rule of Evidence 502(b), which applies only to the attorney-client privilege and work product doctrine. *See id.* Finally, as far the court can identify, there is only one comparable case where a court has held that waiver did *not* occur after inadvertent disclosure by the agency via FOIA. *See Scott v. PPG Indus., Inc.*, 142 F.R.D. 291, 294 (N.D. W. Va. 1992). There, the court was satisfied that the agency was not careless because the agency had a policy against releasing privileged documents. *See id.* Amid this scattershot precedent, any decision on waiver is best focused on the particular facts before the court.

As a threshold matter, the court concludes that the inclusion of the Identifying Word in the USTR and State Productions was inadvertent. Defendants' actions make that clear. They have formally asserted and vigorously defended the informant privilege over the CAR since October 26, 2023, when the privilege log was first filed. *See* Privilege Redaction Log at 1–2. The USTR review process began in October 2023 and was concluded in January 2024 by agency officials who were "unaware" that disclosed information "was the subject of a claim of informant's privilege and a pending motion to unredact in this litigation." M.R. Affidavit ¶ 14, ECF No. 128–1. Defendants' counsel was not even aware of the USTR Production on January 24, 2024, let alone its inclusion of the Identifying Word, until March 14. *See* ECF No. 124–4, at 1. Next, the State review process, which followed a referral from the USTR in January 2024, was finalized in April 2024 by agency officials who, again, "were not aware of [this] litigation at the time of processing." S.W. Affidavit ¶ 11, ECF No. 149–1. And once again, Defendants were not aware of the State Production on April 19 until April 23, when Plaintiffs notified the court and all parties of the production. *See* ECF No. 149, at 4.

Defendants and their counsel simply did not have the intent of voluntarily disclosing the Identifying Word in this litigation. *Cf. Fla. House of Representatives*, 961 F.2d at 946 (finding it "difficult to characterize the court-ordered disclosure of the data . . . as a voluntary waiver . . . , especially considering that the Department attempted to exercise the very privilege it is supposed to have waived"). The intention of Defendants and their counsel here is different from the intention of the USTR and State officials responsible for FOIA

disclosures.[24] Plaintiffs largely presume, without further explanation, that the actions of USTR and the State Department, which are FLETF member agencies but not named parties in this litigation, may be fairly considered to be voluntary actions by the FLETF in this litigation. *See, e.g.*, *Ga. ForestWatch*, 2020 WL 13594964, at *5 & n.6 (finding FOIA disclosure voluntary where the disclosing agency was the same one in litigation); *UnitedHealthcare*, 316 F. Supp. 3d at 349 (same); *cf. also EEOC v. Whiting-Turner Contracting Co.*, No. 3:21-CV-00753, 2022 WL 3221825, at *6 & n.4 (M.D. Tenn. Aug. 9, 2022) (accepting as uncontroverted that FOIA disclosure by agency was inadvertent, even when the FOIA request letter mentioned ongoing litigation and enclosed a copy of the complaint). And more generally, holding that a FOIA disclosure is always voluntary would create an overbroad rule that invariably prioritizes access to information, even if improperly divulged, over other important government interests like the informant privilege. *Cf. Rocky Mountain Wild, Inc. v. U.S. Forest Serv.*, 56 F.4th 913, 930 (10th Cir. 2022) (reasoning that, in order for FOIA's weighty transparency principles "to control, the agency must have properly divulged the documents"). In creating the FOIA regime, Congress did not "intend[] that the weighty policies underlying discovery privileges could be so easily circumvented." *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 801 (1984).

But determining that a FOIA disclosure is inadvertent is not the end of the inquiry. Courts have found waiver where the Government failed to take reasonable steps to prevent inadvertent disclosure. *See Scott*, 142 F.R.D. at 294 (concluding that "the EEOC was [not] careless in releasing the document" and finding no waiver of deliberative process privilege); *Eden Isle*, 89 Fed. Cl. at 507 ("[A]ssuming the disclosure was inadvertent, the court's inquiry is not over. Work-product protection may still be waived if defendant did not take 'reasonable steps to prevent disclosure' and did not 'promptly' take 'reasonable steps to rectify the error.'" (quoting Fed. R. Evid. 502(b))). And in somewhat analogous cases arising from FOIA, courts have evaluated other factors surrounding the production where the Government inadvertently disclosed information that it later sought to assert a FOIA exemption over. *See, e.g.*, *Memphis Pub.*, 879 F. Supp. 2d at 13– 14 (emphasizing the "belated and tepid claim of inadvertent disclosure," the lack of "any of the usual conduct that accompanies an

[24] When considering the intentions of the USTR and State Department, the production of documents by those agencies "may have been a mistake of judgment" rather than "an unintended act." *Spanierman Gallery, Profit Sharing Plan v. Merritt*, 2003 WL 22909160, at *3 (S.D.N.Y. Dec. 9, 2003). But that inquiry, which is better suited for a FOIA action challenging the USTR and State Department's productions, is not before the court. Today's decision is without prejudice to such potential future FOIA action, which will have to be filed in U.S. district court by Plaintiffs' counsel. See infra section I.D.2.

inadvertent disclosure," the "high profile nature" of the FOIA requests, the small size of the FOIA productions, the fact that the FOIA production was already partly redacted for the informant-protecting exemption, and the agency's repeated production by filing on a public court docket).

Despite being inadvertent, the circumstances leading up to the State Production reflect a failure to take reasonable steps to prevent disclosure of the Identifying Word. Following the USTR Production, Defendants' counsel represented via email on March 19, 2024, to Plaintiffs and the court that "[i]mmediately after learning of this inadvertent disclosure, counsel for the Government conferred with the FLETF member agencies, including USTR, to ascertain the extent of the disclosure and whether any additional disclosures were made to Ninestar's counsel, by any agency, that could impact this case." ECF No. 124–4, at 1. One month after that email, Plaintiffs received the State Production, which included the Identifying Word. ECF No. 149, at 2. Waiver may have been a closer call if inadvertent disclosure via FOIA had occurred only once in the USTR Production. But a second disclosure, as evidenced by the State Production, suggests that the Government failed to take reasonable precautions, leading to waiver. *See Audubon Soc'y of Portland v. Zinke*, No. 1:17-CV-00069-CL, 2018 WL 1522691, at *4 (D. Or. Mar. 27, 2018) (reasoning that disclosure of a comment "in three separate iterations of the record and in a FOIA request" in an APA case, despite an immense agency record, did not suggest that reasonable steps were taken to prevent disclosure); *Eden Isle*, 89 Fed. Cl. at 510 ("Because defendant disclosed the pages to plaintiff more than once, and via more than one mechanism, the court concludes that defendant's disclosure was so careless that it cannot be construed as inadvertent."); *cf. Memphis Pub. Co.*, 879 F. Supp. 2d at 13–14 (finding waiver, in part because the agency filed privileged information on a public court docket after having disclosed the same via FOIA).

Defendants frame the facts differently, arguing that the State Production was inadvertent and followed reasonable efforts to prevent inadvertent disclosure. Defendants explain that the State Production is composed entirely of documents that were collected by USTR in response to Plaintiffs' request to USTR. *See* ECF No. 149, at 2–3. The USTR had referred a subset of its collected documents to the Statutory Compliance and Research Division of the State Department's Office of Information Programs Services so that the subset of documents could be assessed for agency-specific sensitivities. *See id.* at 3; ECF No. 149–1 ¶ 11. Under ordinary agency procedure, the State Department was responsible for producing those documents after

that point. *See* ECF No. 149–1 ¶ 15. But it was a particular division of the State Department's Office of Information Programs Services that dealt with referrals from other agencies, not the typical "Case Processing" team that processed FOIA requests directly addressed to the State Department, that was responsible for releasing the State Production. *See id.* ¶ 11. And crucially, Defendants' counsel had informed the latter Case Processing team, but not the former referral team, of this litigation after the inadvertent USTR Production. *See id.* ¶ 11.

Accordingly, Defendants urge that the State Production is best understood as an unintended "by-product of USTR's prior disclosure of similar information" rather than a second, separately inadvertent event. *See* ECF No. 149, at 2. But even accepting Defendants' representations as to their internal process, there appear to have been two gaps in that process. First, the State Department's Case Processing team knew about this litigation—presumably made aware by Defendants' counsel after the USTR Production, *see* ECF No. 124–4, at 1—but the referrals team did not. *See* ECF No. 149–1 ¶ 12. And second, the USTR FOIA office, which learned of this litigation after the USTR Production and which had sent the subset of documents to the State Department for review, *see* ECF No. 124–4, at 1; ECF No. 128–1 ¶¶ 14, 18–20; ECF No. 149–1 ¶ 10, did not reach out to the State Department to prevent the disclosure downstream. *See also* ECF No. 149–1 ¶ 10 (indicating that the last communication between USTR and the State Department regarding the responsive FOIA documents was on February 23, 2024). It follows that reasonable precautions were not taken to prevent disclosure of the State Production.[25] Defendants' assertion of informant privilege over the Identifying Word is therefore waived, subject to the limitations explained in the next section, *see infra* section I.C.3.

Finally, it is appropriate to note that in addressing these matters, the court in no way impugns the integrity or conscientiousness of Defendants' counsel here, nor suggests anything less than professional conduct, as they deal with issues that have involved a newly enacted statute for which processes governing diverse agencies are

[25] Plaintiffs also argue that the USTR Production itself followed a failure by Defendants to take reasonable precautions. *See* ECF No. 131, at 8–11. The court is not convinced. While personnel issues played a role in the USTR's inadvertent disclosure, Defendants have clearly established that the USTR FOIA office was acting independently without knowledge of the ongoing litigation and that Defendants themselves were unaware of the USTR's actions. *See* ECF No. 128–1 ¶¶ 14–15. Plaintiffs contend that litigation-specific knowledge is irrelevant to whether disclosure is required. *See* ECF No. 131, at 10–11. But the behavior of these Defendants in this case did not reflect a "[c]arelessness with privileged material" that would typically serve as an "indication of waiver." *Gray v. Bicknell*, 86 F.3d 1472, 1484 (8th Cir. 1996). The court rests its holding of waiver, then, only on the circumstances leading up to the State Production.

apparently in development. If anything, perhaps cases like this one may offer lessons for thinking about paths for institutional coordination, including the handling of information that implicates sensitive issues of safety and privacy.

3. Waiver of the Informant Privilege Is Limited to the Identifying Word and Is Otherwise Limited by the APO

Two outstanding points regarding waiver remain. First is the question of scope. Both parties appear to contend that the court should unredact only those portions of the CAR that specifically overlap with the disclosed information that results in waiver. *See* ECF No. 128, at 5– 6; ECF No. 131, at 5–6. The court agrees.

The waiver in this case is limited to any redacted information in the CAR that was revealed by the State Production. The only privileged information in the State Production is the Identifying Word. Every instance of the Identifying Word, as well as essential context surrounding the use of the Identifying Word in the CAR, is therefore unredacted. Moreover, because the Identifying Word describes, but does not reveal, the identity of the informant, Defendants' other assertions of informant privilege remain intact. *See Rovario*, 353 U.S. at 60 & n.8 (reasoning that the informant privilege can no longer apply when the informant's identity becomes known "to those who would have cause to resent the communication"); *cf. also Dole*, 870 F.2d at 375 ("In the absence of an express identification, death, or perhaps overwhelming evidence as to the identity of the informant, it cannot be assumed that the privilege has been waived . . . ."); *Chao*, 254 F.R.D. at 660 (reasoning that the disclosure of information tending to reveal the informant's identity "does not necessarily waive the informant's privilege regarding the . . . statements" of the informant).

Second, Defendants urge the court to consider that the actions of "USTR and the State Department should not be held against the informant, who[] has risked their safety to assist the FLETF and whose outing would discourage future informants from coming forward." ECF No. 149, at 4. The court takes very seriously the difficult circumstances that an informant can face in informing law enforcement of potential violations of the UFLPA in China. To that end, like the other newly unredacted information, the Identifying Word will not be publicly revealed. Even if not privileged, the Identifying Word is clearly LES for the reasons established by Defendants in the Brzozowski Declaration. *See supra* section I.B.1. All instances of the Identifying Word will be sealed under the designation of Confidential Information and, consistent with that designation's attendant prohi-

bitions, will be limited to the parties' attorneys' eyes only. This change represents the Identifying Word's shift from Category 1 to Category 2. *See supra* Table 1: Categories of Restricted Information.[26]

4. Summary and Order

The court concludes that the informant privilege applies to certain portions of the CAR but excludes (i) references to years, which fall outside the privilege's scope, and (ii) generalized information about Uyghur workers, which is essential to a fair determination of Plaintiffs' APA causes of action. Furthermore, the State Production, despite being inadvertent, resulted in a limited waiver of the informant privilege over the Identifying Word. These three newly unredacted portions of the CAR are determined to be LES, designated as Confidential Information, and sealed from public view.

The below table summarizes the three portions of the record being unredacted:

Table 2: Summary of Unsealed Record Evidence

	Description of Portion of CAR	CAR Pages	Prior Category	New Category	Who Can Now Access These Documents?	Description of Change
1.	References to years of meetings between the FLETF and informant	Passim	1 (Privileged)	2 (Not Privileged & Confidential Information)	Pls.' counsel Defs.' counsel	Unredacted because not within scope of informant privilege. *See infra* section I.C.1.
2.	Generalized information about Uyghur workers	Passim	1 (Privileged)	2 (Not Privileged & Confidential Information)	Pls.' counsel Defs.' counsel	Unredacted because informant privilege must yield, in part, to fairness concerns. *See infra* section I.C.1.
3.	Identifying Word	Passim	1 (Privileged)	2 (Not Privileged & Confidential Information)	Pls.' counsel Defs.' counsel	Unredacted because of limited waiver. *See infra* sections I.C.2–.3.

Also appended to this opinion is a list, filed under seal as Confidential Information, that specifies the language to be unredacted from the record. *See infra* Conf. App.

D. Request to Destroy the USTR and State Productions

Relatedly, Defendants request that the court enforce the instruction contained in two emails—the first from USTR on March 19, 2024, *see* ECF No. 124–3, at 1, and the second from the State Department on April 25, 2024, *see* ECF No. 149–1, Ex. 6—that Plaintiffs' counsel and any person to whom Plaintiffs' counsel has disseminated the FOIA productions "immediately destroy all copies" of the FOIA productions.

[26] Additionally, the Confidential Information designation for the Identifying Word will apply regardless of the privilege or APO designation of the surrounding context.

The court's analysis proceeds in two parts. It first concludes that it has the authority to grant Defendants' request. It then concludes that the destruction of the USTR and State Productions is required to preserve the integrity of the instant litigation.

1. The Inherent Powers of the USCIT Include the Power to Order the Destruction of Documents Inadvertently Produced via FOIA

Faced with an issue of first impression before the USCIT, the court must first determine whether it has the authority to grant Defendants' request that the court order Plaintiffs' counsel to destroy the USTR and State Productions. The inquiry begins with FOIA, which supplies a cause of action to aggrieved requesters that may be brought only in a U.S. district court. 5 U.S.C. § 552(a)(4)(B). That cause of action is limited to petitioning the court "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." *Id.*

Plaintiffs suggest that the inquiry ends there because the USCIT "operates within precise and narrow jurisdictional limits and cannot exercise jurisdiction over actions not addressed by a specific jurisdictional grant." *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1051 (Fed. Cir. 2012) (internal quotation marks and citation omitted). Not quite. The USCIT's subject matter jurisdiction is indeed narrow and does not include causes of action arising from FOIA.[27] But a "distinction exists between a court's subject matter jurisdiction and its inherent powers, i.e., those incidental powers necessary and proper to an exercise of that jurisdiction." *See Rhone Poulenc, Inc. v. United States*, 880 F.2d 401, 402 (Fed. Cir. 1989). Two strands of case law establish the USCIT's inherent powers over Defendants' request here.

First, the U.S. Court of Appeals for the Federal Circuit has affirmed that the USCIT may exercise, where appropriate, the same inherent powers as a U.S. district court. *See Heartland By-Products, Inc. v. United States*, 424 F.3d 1244, 1251 (Fed. Cir. 2005); *United States v. Hanover Ins. Co.*, 82 F.3d 1052, 1054 (Fed. Cir. 1996); *Rhone Poulenc*, 880 F.2d at 402. The court has subject matter jurisdiction over this action under 28 U.S.C. § 1581(i). *See Ninestar I*, 666 F. Supp. 3d at 1363. Emanating from that lawful jurisdictional basis, the USCIT

[27] That said, the USCIT "has previously asserted jurisdiction under 28 U.S.C. § 1581(i) to consider claims implicating the affirmative publication provisions of FOIA." *U.S. Ass'n of Importers of Textiles & Apparel v. United States*, 29 CIT 323, 325 n.2, 366 F. Supp. 2d 1280, 1282 n.2 (2005) (collecting cases).

then "possess[es] all the powers in law and equity of . . . a district court of the United States," including all of its inherent powers. 28 U.S.C. § 1585.

Second, all parties agree that FOIA's text does not authorize an order to return or destroy inadvertently disclosed documents. But U.S. district courts considering such orders have relied not on FOIA's text but on the court's inherent powers. *See, e.g.*, *Whiting-Turner*, 2022 WL 3221825, at *2; *Sierra Club v. EPA*, 505 F. Supp. 3d 982, 988–89 (N.D. Cal. 2020); *ACLU v. U.S. Dep't of Def.*, No. 09-CIV-8071, 2012 WL 13075284, at *5 (S.D.N.Y. Mar. 20, 2012); *Hersh & Hersh v. U.S. Dep't of Health & Hum. Servs.*, No. C 06–4234 PJH, 2008 WL 901539, at *9 (N.D. Cal. Mar. 31, 2008). At least one such decision involves the court's exercise of its inherent authority over a non-FOIA cause of action to order the return of a FOIA production. *See Whiting-Turner*, 2022 WL 3221825, at *2 (arising from violations of Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991).[28] These cases also all cohere with the directive that "Congress did not intend to limit the court's exercise of its inherent equitable powers where consistent with the FOIA." *Long v. IRS*, 693 F.2d 907, 909 (9th Cir. 1982) (citing *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 19 (1974)).[29]

Putting it all together: If the USCIT is to "possess all the powers in law and equity of . . . a district court of the United States," 28 U.S.C. § 1585, then the USCIT must have the inherent power to order the return or destruction of documents inadvertently produced via FOIA. Federal courts may exercise "certain implied powers" that are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (internal quotation marks omitted) (first quoting *United States v. Hudson*, 7 Cranch 32, 34 (1812); then quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 630–631 (1962)). And whether the case arises from the Civil Rights Act in the Middle District of Tennessee, or from FOIA in the Northern District of California, or from the APA in the USCIT, those powers may extend to the return or destruction of documents inadvertently produced via FOIA. *See, e.g.*, *Whiting-*

[28] Plaintiffs distinguish this case by noting that the FOIA request in *Whiting-Turner* "was filed after the agency initiated federal court litigation." ECF No. 131, at 13. The FOIA requests here were submitted two weeks before the complaint's filing. *See* ECF No. 124–1, at 2. But it is unclear why that distinction is material, let alone why it would present a categorical bar to the court's exercise of its inherent powers.

[29] To be sure, the Supreme Court in *Renegotiation Board* stated that FOIA, "to a definite degree, makes the District Court the enforcement arm of the statute." 415 U.S. at 19. But the decision also clarified that Congress did not seek "to limit the inherent powers of an equity court," which would include the USCIT. *See* 28 U.S.C. § 1585.

Turner, 2022 WL 3221825, at *2; *Sierra Club*, 505 F. Supp. 3d at 988–89. It is therefore within the court's power to grant Defendants' request that Plaintiffs' counsel destroy all copies of the USTR and State Productions.

2. The Destruction of the USTR and State Productions Is Necessary and Reasonably Tailored to Protect the Integrity of These Proceedings

Defendants ask the court to exercise its inherent authority to order the destruction of the USTR and State Productions. As the court concluded above, the USTR and State Productions were inadvertent. *See supra* section I.C.2. Defendants have repeatedly affirmed, since December 2023, their position on the privileged and sensitive nature of the now-unredacted information. *See supra* pp. 37–38. And once notice of disclosure reached Defendants' counsel, they acted quickly with the appropriate USTR and State Department officials to request destruction of the inadvertent productions. *See id.*

Inadvertence is the start, not end, of the inquiry. The court's inherent authority is premised on its need "to control and preserve the integrity of [its] judicial proceedings." *Pub. Citizen Health Rsch. Grp. v. FDA*, 953 F. Supp. 400, 404 (D.D.C. 1996) (internal quotation marks and citation omitted). That power must be exercised with "restraint and discretion," *Chambers*, 501 U.S. at 44; *see also Pickholtz v. Rainbow Techs., Inc.*, 284 F.3d 1365, 1378 (Fed. Cir. 2002), and is "not an appropriate tool to undo all . . . errors" by litigants, *Sierra Club*, 505 F. Supp. 3d at 991. Accordingly, Defendants must "offer a compelling rationale for holding that a court should wield its inherent authority to compel the return or destruction of documents produced under FOIA any time the producing agency could have invoked a statutory exemption but inadvertently failed to do so." *Id.*; *see also Whiting-Turner*, 2022 WL 3221825, at *2. Moreover, the court's order must "be a reasonable response to the problems and needs that provoke it." *Degen v. United States*, 517 U.S. 820, 823–24 (1996).[30]

In assessing whether a compelling rationale exists, courts have broadly considered the impact of denying the agency's request to destroy the FOIA production on the ongoing proceedings. In *Sierra Club*, the court reasoned that the FOIA requester's continued possession of three lobbyists' names and email addresses, which the agency had inadvertently disclosed, would not result in any "serious and

[30] Additionally, in determining whether an exercise of its inherent authority for destruction of inadvertent documents is warranted, the court need not reach the question of whether information in the USTR and State Productions may be validly withheld under Exemption 7(D). *See Whiting-Turner*, 2022 WL 3221825, at *6; *Sierra Club*, 505 F. Supp. 3d at 991.

non-speculative harm." 505 F. Supp. 3d at 991. More to the point, in that FOIA case, it was not clear how denying the request for destruction of inconsequential information "would undermine the Court's ability to see all questions directly raised under FOIA in this action . . . through to a just resolution." *Id.* By contrast, the court in *Whiting-Turner*, a Civil Rights Act enforcement action filed by the U.S. Equal Employment Opportunity Commission ("EEOC"), ordered the return of the EEOC's inadvertent FOIA production where the production risked meaningfully affecting the integrity of standard civil discovery proceedings. *See* 2022 WL 3221825, at *4–6. And in *ACLU*, another FOIA case, the court reasoned that the inadvertent production, which "implicate[d] national security" and was classified, was issued pursuant to a court-supervised production process that, by extension, also empowered the court to order the return of documents. *See* 2012 WL 13075284, at *5.

The issue with denying Defendants' request here is easy to discern. Hypothetically speaking, viewed in a vacuum, Plaintiffs' counsel could arguably disseminate the FOIA productions as they please. *See Nat'l Archives & Recs. Admin. v. Favish*, 541 U.S. 157, 174 (2004) ("[O]nce there is disclosure, the information belongs to the general public."). That result would clearly be in conflict with the careful, multi-tiered scheme of informational restriction in this case, particularly considering that the court holds today that, in light of serious non-speculative security and privacy harms, the Identifying Word is to be designated as Confidential Information, sealed from public view, and limited to attorneys' eyes only. *See supra* section I.C.3.

Avoiding that unrestricted dissemination preserves the APO's integrity and is therefore a sufficiently compelling rationale for invoking the court's inherent power. Permitting that unrestricted dissemination would meaningfully undermine the court's central role in the APO's procedures governing confidentiality, *see* APO ¶¶ 23–25, much like how the inadvertent disclosures in *Whiting-Turner* risked interfering with standard civil discovery procedures, *see* 2022 WL 3221825, at *4–6. That is sufficient to trigger the court's inherent authority "to protect [its] proceedings and judgments in the course of discharging [its] traditional responsibilities." *Degen*, 517 U.S. at 823. Moreover, the privacy harms here are not minimal. Revealing the information in question would risk not only diminishing the FLETF's sources for enforcing the UFLPA moving forward, but also would risk harm and retaliation to an informant for their knowledge of forced labor activity in China. That constitutes "serious and non-speculative harm" justifying the exercise of incidental powers. *Sierra Club*, 505 F. Supp. 3d at 991. Finally, it bears repeating that FOIA's transparency

principles, which Plaintiffs' counsel would otherwise be entitled to, do not apply where, as here, the agency has not "properly divulged the documents." *Rocky Mountain Wild*, 56 F.4th at 930. In that circumstance, an order to destroy the FOIA productions coheres well with precedent discussing the relationship between FOIA, transparency, and civil discovery. *See Weber Aircraft Corp.*, 465 U.S. at 801 (1984) (reasoning that obtaining via FOIA "material that is normally privileged would create an anomaly in that the FOIA could be used to supplement civil discovery"); *see also Pub. Citizen*, 953 F. Supp. at 405 (entering protective order over inadvertently produced FOIA documents and reasoning that transparency principles must "be balanced with the court's power to regulate the use of information or documents, obtained through means other than discovery, in a proceeding before the court").

Having determined that it serves a compelling end, the court next concludes that ordering the destruction of the USTR and State Productions is "a reasonable response to the problems and needs that provoke it." *Degen*, 517 U.S. at 823–24. Since Defendants first notified the court of the USTR Production in March 2024, the USTR and State Productions have caused considerable procedural confusion about the authorities governing confidentiality in this litigation. By removing the existence of duplicate information outside of this case, this order will restore the APO as that authority. This order to destroy the FOIA productions is narrow and must also be understood alongside the parallel decisions (1) to unredact certain portions of the CAR and (2) to designate the newly unredacted portions of the CAR as Confidential Information under the APO.

The court emphasizes that Plaintiffs' counsel will still be able to use the newly unredacted information in the CAR in both this litigation and any potential delisting request. *See* APO ¶¶ 2– 6, 12. Finally, it is appropriate to note that in ordering the destruction of the USTR and State Productions, the court in no way impugns the integrity or conscientiousness of Plaintiffs' counsel nor suggests anything less than professional conduct. Plaintiffs' counsel lawfully filed their FOIA requests in August 2023 and, upon receipt of Defendants' instructions to destroy the productions, promptly contested those instructions before the court.

3. Order

For the foregoing reasons, it is hereby **ORDERED** that Plaintiffs' counsel and any person to whom Plaintiffs' counsel has disseminated the USTR and State Productions immediately destroy all copies of such productions. This order is without prejudice to Plaintiffs' counsel filing suit under 5 U.S.C. § 552(a), once USTR and the State Depart-

ment produce revised versions of their prior productions. Plaintiffs' counsel will be able to litigate the asserted FOIA exemptions and any waiver issues in U.S. district court, subject to the other requirements of 5 U.S.C. § 552.

II. Completeness of Administrative Record

The parties' briefing concerning the USTR and State Productions has also led to questions about whether the CAR is complete.[31] First, Plaintiffs state that "USTR's production included numerous documents that were considered by FLETF members in reaching their decision, yet are not included in the Administrative Record compiled by the Government and submitted to the Court." ECF No. 124, at 3. Second, in response to a query by the court, Defendants object to the inclusion of the Footnote Document, which was cited three times in the footnotes of an agency memorandum in the CAR, in the CAR. *See* ECF No. 138; *see also supra* Background section III.B. The court declines to supplement the record on either basis.

In APA cases, "the court shall review the whole record." 5 U.S.C. § 706. "The whole administrative record . . . consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position." *Invenergy Renewables LLC v. United States*, 44 CIT __, __, 476 F. Supp. 3d 1323, 1355 (2020) (quoting *Thompson v. U.S. Dep't of Lab.*, 885 F.2d 551, 555 (9th Cir. 1989)). Also layered onto those general requirements is a USCIT-specific statute defining administrative records in cases arising under 28 U.S.C. § 1581(i), like this one, to include three categories of information:

> (A) a copy of the contested determination and the findings or report upon which such determination was based;
>
> (B) a copy of any reported hearings or conferences conducted by the agency; and
>
> (C) any documents, comments, or other papers filed by the public, interested parties, or governments with respect to the agency's action.

[31] Also currently stayed before the court is Plaintiffs' Motion to Complete or Supplement the Administrative Record. *See* ECF No. 108. That motion presents several arguments arising out of alleged deficiencies in the CAR. The court intimates no view on that motion at this time. Today's discussion of the record's completeness is limited to the parties' arguments arising out of the USTR and State Productions.

28 U.S.C. § 2635(d)(1). "[P]redecisional and deliberative documents," however, "are not part of the administrative record." *Oceana, Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019) (cleaned up). That said, when the record as presented is "insufficient to permit meaningful judicial review," supplementation may be appropriate. *Euzebio v. McDonough*, 989 F.3d 1305, 1322 (Fed. Cir. 2021) (quoting *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1381 (Fed. Cir. 2009)).

First, Plaintiffs suggest that the USTR Production included documents that were "directly or indirectly considered by the agency." ECF No. 124, at 3 (quoting *Invenergy*, 476 F. Supp. 3d at 1355). That argument falls short at the outset. The public disclosure of agency materials via FOIA "does not necessarily mandate inclusion in the administrative record." *UnitedHealthcare*, 316 F. Supp. 3d at 349 (collecting cases). "The challenger must still satisfy the requirements to show why completion (or supplementation) is warranted." *Ga. ForestWatch*, 2020 WL 13594964, at *4. Plaintiffs do not further develop their argument, so the court does not reach it. *See Z.A. Sea Foods Priv. Ltd. v. United States*, 46 CIT __, __, 606 F. Supp. 3d 1335, 1344 (2022) (collecting cases that decline to reach issue due to inadequate argument), *aff'd*, No. 2023–1469, 2024 WL 2873428 (Fed. Cir. June 7, 2024).[32]

Second, although the Footnote Document was cited in the unredacted CAR, the Footnote Document does not properly constitute part of the CAR. In response to the court's query about the Footnote Document, Defendants filed a declaration indicating that the Footnote Document "was not provided to the FLETF as part of the recommendation package" and that its substance otherwise "was unrelated to Ninestar and constituted sensitive law enforcement privileged information" that CBP "did not provide . . . to the FLETF." E. Choy Decl. ¶¶ 6–7, Apr. 5, 2024, ECF No. 142. In particular:

> CBP did not intend to include either the reference to or the [Footnote Document] itself in the FLETF Recommendation package. Specifically, CBP intended to remove all references to

[32] The court notes the broader and related question of whether "the internal, pre-decisional deliberations of USTR or of any other member agency of the FLETF that led such agency to vote in favor of Ninestar's listing" are excluded from the administrative record. ECF No. 128, at 10. Congress delegated the authority to develop a forced labor strategy to the FLETF, not to its component agencies. *See* UFLPA § 2(c), 135 Stat. at 1526. And because the FLETF operates by the vote of representatives from seven member agencies, *see* 19 U.S.C. § 4681(b)(1); Exec. Order No. 13923 § 2, 85 Fed. Reg. 30587, 30587 (May 20, 2020), communications between the agencies would appear to be deliberative. Moreover, any one member agency's internal memoranda would not necessary be reviewed by the entire FLETF. Because the documents in the USTR and State Productions concern both "the internal deliberative processes of the agency [and] the mental processes of individual agency members," addition to the record appears unwarranted. *Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d 1534, 1549 (9th Cir. 1993).

> the documents and sources that would not be directly provided to the FLETF as part of the recommendation. However, CBP neglected to remove the footnote from the final Recommendation Package that was transmitted to DHS for presentation to the FLETF.

Id. ¶ 9. Defendants accordingly argued that the Footnote Document should not form part of the CAR. *See* ECF No. 137, at 2. The court agrees. Because the Footnote Document was not among "the materials that were before the agency at the time its decision was made," *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997), it is not part of the CAR here.

III. Request to Redact the Transcript of the Preliminary Injunction Hearing

Finally, Defendants request to redact a portion of the transcript of the public portion of the preliminary injunction hearing. *See* ECF No. 122, at 2. Defendants seek to redact the following statement by Plaintiffs' counsel:

> There is no Ninestar document that says that Ninestar hires Uygh[u]r laborers in Xinjiang and transports them to Ninestar facilities and works with the government to do so. There is no PRC document and no media document to substantiate that.

ECF No. 122–1, at 17. The court denies Defendants' request.

First, Plaintiffs argue that Defendants' request was forfeited "because the Government failed to object to this statement when it was made in open court, with the media present, during the public portion of the hearing." ECF No. 123, at 2. While it is true that "[n]o procedural principle is more familiar . . . than that a . . . right may be forfeited . . . by the failure to make timely assertion of the right," *Yakus v. United States*, 321 U.S. 414, 444 (1944), Defendants' request here was properly filed pursuant to USCIT Administrative Order 08–01. That administrative order expressly allows attorneys to review an initial version of the transcript and, "by motion, request that . . . information be redacted, and no remote electronic public access to the transcript is to be allowed until the Court has ruled on any such motion." USCIT Admin. Order 08–01, at 2–3. Defendants availed themselves of that procedure, so there was no need to object in person.

Second, the parties disagree over whether Plaintiffs' counsel's statement "tends to reveal" the contents of the CAR. *See* ECF No. 122, at 2; ECF No. 123, at 2–3. It is initially worth emphasizing that Plain-

tiffs' counsel was engaged in the back-and-forth of oral advocacy. The court interpreted his statements to make arguments, rather than factual representations, as to the state of the record. In any event, the contention that his statement "tends to reveal" the contents of the CAR misstates the standard. The APO requires that "information contained in the Confidential Information portion of the administrative record" be treated as confidential "to the extent such information is not otherwise available in the public portion of the administrative record." APO ¶ 2. Plaintiffs' counsel's statement did not include "information contained in the Confidential Information portion of the administrative record," nor did it clearly reveal any such information by negative implication. It therefore did not run afoul of the APO. Defendants do not otherwise argue that confirming or denying the existence of other sources would itself reveal protected information in the CAR, nor does that appear to be the case here. *Cf. Bartko v. DOJ*, 62 F. Supp. 3d 134, 141 (D.D.C. 2014) (quoting *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 893 (D.C. Cir. 1995)).

Defendants' request is accordingly denied. That is not, however, an invitation to speak freely about what the CAR does not include. Immediately preceding his statement, Plaintiffs' counsel stated: "I can't say what is [in] the confidential record, but I can say what's not." ECF No. 122–1, at 17. That is not quite right. Any statements that clearly reveal the sealed contents of the CAR, either expressly or by implication, will be deemed violations of the APO. Considering the complexity of this case's informational restrictions, the court urges that the parties tread carefully when making public statements.

CONCLUSION

This opinion resolves all outstanding procedural issues in this litigation arising under the APA, 5 U.S.C. § 706, and involving the UFLPA, 135 Stat. 1525. As the court has observed, many of the issues here have involved a newly enacted statute for which processes governing the coordination of various agencies are apparently in development. This case may yield lessons, in the UFLPA context and beyond, for thinking about procedures governing institutional coordination, particularly as it relates to the handling of information that implicates sensitive issues of safety and privacy.

For the foregoing reasons, it is hereby:

ORDERED that the "Confidential Information" designation is removed from pages 220 through 228 of the CAR, which are hereby part of the PAR; and it is further

ORDERED that the portions of the CAR that are specified in the Confidential Appendix be unredacted and designated as Confidential

Information as defined in APO ¶ 1. The Confidential Appendix is attached to the sealed version of this opinion on the USCIT docket; and it is further

ORDERED that Plaintiffs' counsel, and any person to whom Plaintiffs' counsel has disseminated the USTR and State Productions, immediately destroy all physical and electronic copies of the USTR and State Productions, without prejudice to Plaintiffs' counsel's rights under 5 U.S.C. § 552; and it is further

ORDERED that Defendants shall refile new versions of the PAR and CAR, consistent with this opinion, by 5 p.m. ET on July 12, 2024; and it is further

ORDERED that, by 5 p.m. ET on July 19, 2024, the parties submit a joint status report and proposed scheduling order governing any subsequent proceedings in this case. The filing shall discuss Plaintiffs' stayed Motion for Judgment on the Agency Record, ECF No. 109, and stayed Motion to Complete or Supplement the Administrative Record, ECF No. 108, as well as the timing of Plaintiffs' delisting request. If the parties are unable to agree on a joint filing, Plaintiffs and Defendants may file each file a status report and proposed scheduling order.

SO ORDERED.

Dated: July 10, 2024
New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

Slip Op. 24–77

JIANGSU ALCHA ALUMINUM CO., LTD. and ALCHA INTERNATIONAL HOLDINGS LTD., Plaintiffs, v. UNITED STATES, Defendant, and ALUMINUM ASSOCIATION COMMON ALLOY ALUMINUM SHEET TRADE ENFORCEMENT WORKING GROUP AND ITS INDIVIDUAL MEMBERS, Defendant-Intervenors.

Before: Stephen Alexander Vaden, Judge
Court No. 1:22-cv-00290 (SAV)

[Sustaining Commerce's Final Determination and Denying Plaintiffs' Motion for Judgment on the Agency Record.]

Dated: July 11, 2024

Weronika Bukowski, Crowell & Moring, LLP, of New York, NY, for Plaintiffs Jiangsu Alcha Aluminum Co., Ltd. and Alcha International Holdings Ltd. With her on the brief was *Daniel J. Cannistra*, of Washington, DC.

Emma E. Bond, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, Commercial Litigation Branch, *Reginald T. Blades, Jr.*, Assistant Director, Commercial Litigation Branch, and *David W. Richardson*, Of Counsel, Department of Commerce, Office of Chief Counsel for Trade Enforcement & Compliance.

Maliha Khan, Kelley Drye & Warren, LLP, of Washington, DC, for Defendant-Intervenors Aluminum Association Common Alloy Aluminum Sheet Trade Enforcement Working Group and its individual members. With her on the brief was *John M. Herrmann*, *Paul C. Rosenthal*, and *Joshua R. Morey*.

OPINION

Vaden, Judge:

This case is about how one party's failure to participate in an administrative review can adversely affect another cooperating party. The Department of Commerce (Commerce) investigated aluminum sheet from China and issued a countervailing duty order. In the second administrative review of that order, Commerce chose Jiangsu Alcha Aluminum Co., Ltd. and its affiliated trading company (collectively, Alcha) as mandatory respondents. Commerce sent questionnaires to Alcha and the Chinese government requesting information about China's Export Buyer's Credit Program and China's provision of primary aluminum for less than adequate remuneration. Alcha answered, but China did not. In its Final Results, Commerce calculated a countervailing duty rate for Alcha including percentages based on Alcha's use of the Export Buyer's Credit Program and purchase of primary aluminum for less than adequate remuneration. Alcha claims that Commerce's findings were not supported by substantial evidence and asks this Court to remand the case back to the

agency. This Court finds that Commerce committed no error in concluding that Alcha benefitted from the Export Buyer's Credit Program because neither China nor Alcha put verifiable evidence on the record to support Alcha's claimed non-use. The Court also finds that Commerce properly relied on data China had provided in the underlying investigation to calculate the benefit conferred on Alcha from its purchases of primary aluminum. Although Alcha submitted data about its primary aluminum purchases, Commerce could not rely on it because the data failed to meet regulatory requirements. Therefore, Commerce's final determination is **SUSTAINED**; and Alcha's Motion for Judgment on the Agency Record is **DENIED**.

BACKGROUND

In 2018, Commerce conducted a countervailing duty investigation on aluminum sheet from China. *Countervailing Duty Investigation of Common Alloy Aluminum Sheet from the People's Republic of China: Final Affirmative Determination*, 83 Fed. Reg. 57,427 (Dep't of Com. Nov. 15, 2018). It found that both the Export Buyer's Credit Program and the Chinese government's provision of primary aluminum for less than adequate remuneration were countervailable subsidies. *See generally id.* at 57,429. In February 2019, Commerce published a corresponding countervailing duty order (Order). *Common Alloy Aluminum Sheet from the People's Republic of China: Countervailing Duty Order*, 84 Fed. Reg. 2,157 (Dep't of Com. Feb. 6, 2019). Two years later, Commerce initiated the Second Administrative Review of that Order. *Initiation of Antidumping and Countervailing Duty Administrative Reviews* (Notice of Initiation), 86 Fed. Reg. 17,124 (Dep't of Com. Apr. 1, 2021). The period of review was January 1, 2020 through December 31, 2020. *Id.* at 17,135.

Commerce's Questionnaires

Commerce selected Jiangsu Alcha Aluminum Co., Ltd. and its affiliated trading company[1] as mandatory respondents for individual

[1] Alcha International Holdings Limited (Alcha International) is an affiliated trading company of Jiangsu Alcha Aluminum Co., Ltd. (Jiangsu Alcha). Issues and Decisions Memorandum (Dep't of Com. Aug. 31, 2022) (IDM) at 2, J.A. at 14,187, ECF No. 36. Jiangsu Alcha also cross-owns Baotou Alcha Aluminum Co. Ltd. and Jiangsu Alcha New Energy Materials Co., Ltd. *Id.* at 2 n.4. For convenience, the Court will refer to both Plaintiffs — Alcha International and Jiangsu Alcha — as simply "Alcha."

examination in the Second Administrative Review.[2] *Id.* Commerce sent initial questionnaires to both China and Alcha, requesting information about government subsidies from which Alcha may have benefitted. China Questionnaire, J.A. at 1,083, ECF No. 36; Alcha Initial Questionnaire, J.A. at 1,132, ECF No. 36. China did not respond. Issues and Decisions Memorandum (Dep't of Com. Aug. 31, 2022) (IDM) at 21, J.A. at 14,206, ECF No. 36. Alcha answered and addressed the two subsidy programs at issue in this case: (1) China's Export Buyer's Credit Program and (2) China's provision of primary aluminum for less than adequate remuneration. Initial Questionnaire Resp. at 18–20, 27–29, J.A. at 80,056–58, 80,065–67, ECF No. 37.

First, Alcha denied that it or its sole U.S. customer used the Export Buyer's Credit Program. *Id.* at 28–29, J.A. at 80,066–67. The Export Buyer's Credit Program is a loan program intended to support the export of certain Chinese goods and services. Initial Questionnaire Resp., Ex. 50 (2000 Regulations), J.A. at 81,983, ECF No. 37. It allows a non-Chinese borrower who participates in the program to obtain a loan at a preferential interest rate from a Chinese bank. *Id.*, J.A. at 81,984–86. The borrower must then use the loan to buy goods or services from Chinese exporters. *Id.*, J.A. at 81,983–84.

In its initial questionnaire response, Alcha attached a copy of the Export Buyer's Credit Program's regulations issued in 2000. *Id.*, J.A. at 81,982. The 2000 Regulations state that the Export and Import Bank of China is the exclusive issuer of credit to Export Buyer's Credit Program users. *Id.*, J.A. at 81,986 ("China Eximbank shall disburse the loan to the borrower as prescribed in the loan agreement."). The Regulations also set a $2 million minimum threshold for underlying contracts and require the exporter under the commercial contract to buy export credit insurance. *Id.*, J.A. at 81,984.

Alcha proffered evidence to show that it did not benefit from the Export Buyer's Credit Program. It offered its own declaration stating it "did not receive the benefit under the Export Buyer's Credit[] [P]rogram during the [period of review]" and "did not provide any kind of assistance to [its] U.S. customers in obtaining export buyer credits." Initial Questionnaire Resp. at 28–29, J.A. at 80,066–67, ECF No. 37. Alcha also offered its sole customer's uncertified declaration. Alcha stated it asked its "U.S. customer[] whether they had used the Export Buyer[']s Credit [Program] during the [period of review]," and

[2] Commerce also selected Yinbang Clad Material Co., Ltd. (Yinbang) as a mandatory respondent. Notice of Initiation, 86 Fed. Reg. at 17,135. Yinbang filed suit in this Court, and the Court consolidated its action with Alcha's. ECF No. 26. Yinbang later voluntarily dismissed its suit. *Yinbang Clad Metal Material Co. v. United States*, No. 22–291, ECF No. 28.

"[t]he customer[] confirmed that they did not." *Id.* at 29, J.A. at 80,067. Alcha also asserted it did not purchase export credit insurance as required by the 2000 Regulations. *Id.*

Second, Alcha claimed that the value added tax rate for its purchases of primary aluminum was thirteen percent.[3] *See id.* at 18–19, J.A. at 80,056–57; Initial Questionnaire Resp., Exs. 39–40, J.A. at 81,881–04, ECF No. 37. A value added tax is "a consumption tax placed on a product whenever value is added at each stage of the supply chain, from production to the point of sale." *Jiangsu Zhongji Lamination Materials Co., (HK) v. United States*, 44 CIT __, 435 F. Supp. 3d 1273, 1274 n.1 (2020). Commerce accounts for this tax when calculating the benefit conferred on a respondent that purchases goods from a foreign government for less than adequate remuneration. *See* 19 C.F.R. § 351.511(a)(2)(iv) (directing Commerce to "adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product").

Alcha stated that it and one of its affiliates purchased primary aluminum from China during the period of review. Initial Questionnaire Resp. at 18, J.A. at 80,056, ECF No. 37. It attached two spreadsheets to its initial response and explained that the spreadsheets depict all the primary aluminum purchases Alcha and its affiliate made during the period. *Id.* at 18–19, J.A. at 80,056–57 (citing Exs. 39–40, J.A. at 81,881–904, ECF No. 37). Alcha recorded a value added tax rate of thirteen percent for each purchase. *See, e.g.*, Initial Questionnaire Resp., Exs. 39–40, J.A. at 81,881–904, ECF No. 37. It further stated that it was "not aware of any trade publications which specify the prices of the input within China and on the world market." Initial Questionnaire Resp. at 19, J.A. at 80,057, ECF No. 37.

Commerce sent several supplemental questionnaires to Alcha, which it answered. *See, e.g.*, Second Suppl. Questionnaire Resp., J.A. at 82,154, ECF No. 37; Sixth Suppl. Questionnaire Resp., J.A. at 83,450, ECF No. 37. Those questionnaires did not ask about the Export Buyer's Credit Program or the value added tax rate for primary aluminum, and Alcha provided no further information about either before Commerce published its Final Results.

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[3] The parties bracketed the spreadsheets providing the thirteen percent value added tax rate in the confidential joint appendix. *See* Initial Questionnaire Resp., Exs. 39–40, J.A. at 81,881–904, ECF No. 37. However, the parties waived any confidentiality claim by referring to the thirteen percent rate in their public briefs and in open court. *Compare CVB, Inc. v. United States*, 48 CIT __, 681 F. Supp. 3d 1314, 1317–19 (2024) (refusing to redact information for similar reasons), *with* Fed. Cir. R. 25.1(c) ("Material will lose its status ... if and when it ... has appeared in a filing without being marked confidential."), Pls.' Br. at 27, ECF No. 29, Def's Resp. at 40, ECF No. 31, Def.-Int.'s Br. at 14, ECF No. 32, *and* Oral Arg. Tr. at 40:25–41:1, ECF No. 42 (all referring to the thirteen percent figure in public court filings or a public court proceeding).

The Final Results

On March 4, 2022, Commerce published its Preliminary Results. *Common Alloy Aluminum Sheet from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review*, 87 Fed. Reg. 12,429 (Dep't of Com. Mar. 4, 2020). Commerce then published its Final Results on September 6, 2022, *Common Alloy Aluminum Sheet from the People's Republic of China: Final Results of Countervailing Duty Administrative Review*, 87 Fed. Reg. 54,462 (Sept. 6, 2022), along with its accompanying Issues and Decisions Memorandum, J.A. at 14,186–233, ECF No. 36. It assessed a total subsidy rate of 17.8 percent to Alcha. Final Results, 87 Fed. Reg. at 54,463.

The total subsidy rate included a 2.57 percent rate based on Commerce's conclusion that Alcha benefitted from the Export Buyer's Credit Program. *See* IDM at 11, J.A. at 14,196, ECF No. 36. Commerce explained that necessary information was missing from the record because of China's nonparticipation, and Commerce was therefore unable to verify whether Alcha used the program. *Id.* at 21, J.A. at 14,206. The agency found it appropriate to apply facts available with an adverse inference against China for failing to cooperate to the best of its ability. *Id.* at 29, J.A. at 14,214.

Commerce concluded that the 2000 Regulations Alcha provided were outdated because China previously indicated that the Export Buyer's Credit Program's operations changed in 2013. *Id.* at 19, J.A. at 14,204. In an unrelated investigation, China revealed that Export and Import Bank's 2013 internal guidelines were a key document governing the Export Buyer's Credit Program. *Id.* at 19–20, J.A. at 14,204–05. China refused to provide a copy of the new guidelines in that investigation claiming they were "internal to the bank," but its questionnaire responses indicated that the 2013 guidelines made important changes to how the program operates. *Id.* Commerce believes that the 2013 guidelines may have eliminated the $2 million contract minimum and allowed for disbursement of funds through third-party banks. *Id.*

Here, China once again failed to provide the 2013 guidelines; and Alcha only submitted the 2000 Regulations. Commerce explained that, without the 2013 guidelines and China's answers to its questions regarding third-party bank involvement, it could not verify the customer's non-use declaration. *Id.* at 24–27, J.A. at 14,209–12. If it attempted verification, Commerce reasoned, it would have no way of knowing for what banks to look in the customer's records because the Export Buyer's Credit Program loans might not come from the Export

and Import Bank. *Id.* at 24, J.A. at 14,209. Even if it did know for what banks to look, verification would be "meaningless" because Commerce did not know what underlying documentation to request absent more guidance from China regarding the loan's expected paper trail. *Id.* at 27, J.A. at 14,212. Commerce also observed that the customer declaration Alcha submitted was uncertified, making it "especially true" that Commerce could not complete a meaningful verification. *Id.* at 28–29, J.A. at 14,213–14 ("The narrative response [Alcha] provided ... falls short of the type of certifications ... provided by U.S. customers in other proceedings involving this program."). Based on these findings, Commerce concluded that (1) China failed to act to the best of its ability and created a gap in the record through its nonparticipation, (2) the gap could not be filled by the customer's uncertified declaration, and (3) it was appropriate to rely on facts available with an adverse inference. *Id.* at 29, J.A. at 14,214.

Commerce also assessed a 7.81 percent rate for China's provision of primary aluminum for less than adequate remuneration. *Id.* at 10, J.A. at 14,195. It used a value added tax rate of seventeen percent to make its calculation. *Id.* at 33–34, J.A. at 14,218–19. Commerce explained that China provided the seventeen percent tax rate in the underlying investigation and Alcha "ha[d] not provided any evidence to demonstrate that [China] has changed the ... rate ...." *Id.* at 33, J.A. at 14,218. Commerce acknowledged that Alcha reported paying a lower rate. *Id.* However, the only support Alcha offered to back that claim was its internal spreadsheets, which Commerce deemed insufficient to refute the rate the Chinese government had previously provided. *Id.* at 33–34, J.A. at 14,218–19.

Commerce also relied on 19 C.F.R. § 351.511(a)(2)(iv), which says that Commerce "will adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product." *Id.* at 34, J.A. at 14,219. Under the regulation, the comparison price must be based on what a respondent would have paid for imported primary aluminum; and Alcha's suggested thirteen percent rate did not comply with the regulation because it was not based on imports. *Id.* Finally, Commerce denied that its use of the seventeen percent rate was an application of facts available with an adverse inference, reasoning that the rate was information on the record and Alcha's alternative rate was unsupported. *Id.* at 33, J.A. at 14,218.

The Present Dispute

Alcha filed its Complaint against the United States on November 7, 2022. Compl., ECF No. 9. It raises two issues. First, it claims Commerce's finding that Alcha benefitted from the Export Buyer's Credit

Program is not supported by substantial evidence. *Id.* ¶¶ 13–14. Second, it alleges Commerce improperly applied facts available with an adverse inference to find Alcha purchased primary aluminum at a value added tax rate of seventeen percent. *Id.* ¶¶ 16–17. The Aluminum Association Common Alloy Aluminum Sheet Trade Enforcement Working Group and its individual members (the Association) intervened as Defendant-Intervenors to support Commerce's determination. Order Granting Intervention, ECF No. 17.

A.

Alcha filed a Motion for Judgment on the Agency Record pursuant to USCIT Rule 56.2, reiterating its two claims. Pls.' Mem. in Supp. of Mot. for J. on Agency R. (Pls.' Br.), ECF No. 29. Alcha makes three arguments to support its non-use claim regarding the Export Buyer's Credit Program. First, it argues that the Tariff Act of 1930 requires Commerce to affirmatively determine whether a financial contribution was provided to Alcha *before* it can find Alcha benefitted from the program. *Id.* at 13–16 (citing 19 U.S.C. § 1677(5)(B)). Because the record does not contain positive evidence proving participation, Alcha argues Commerce's finding of a benefit is not supported by substantial evidence. *Id.* at 14. Alcha asserts that Commerce owed it a "meaningful opportunity" to verify its non-use claims, which Commerce could have provided by issuing supplemental questionnaires about the Export Buyer's Credit Program or attempting to verify the information Alcha did submit. *Id.* at 15–16 (citing *Yama Ribbons and Bows Co. v. United States* (*Yama I*), 43 CIT __, 419 F. Supp. 3d 1341, 1356 (2019)); Pls.' Reply at 4, ECF No. 33. Moreover, Alcha argues that Commerce's treatment of the Export Buyer's Credit Program is unfair because Commerce permits respondents denying participation in other contexts to simply "state that they did not use the program." Pls.' Br. at 14–15, ECF No. 29.

Second, Alcha argues that this Court has repeatedly rejected the reasoning Commerce supplied in its Issues and Decisions Memorandum, and nothing in this case justifies a different outcome. *Id.* at 16–25. Alcha characterizes Commerce's analysis as a conflation of the operation and use of the Export Buyer's Credit Program that ignores the relevant question of whether record evidence shows that Alcha benefitted from the program. *Id.* at 18–19; Pls.' Reply at 2–3, ECF No. 33. Plaintiff outlines this Court's prior cases dealing with the program, opining that the Court has sometimes found reasoning similar to that offered here was unsupported by substantial evidence because it focused on the innerworkings of the program instead of the actual evidence submitted. Pls.' Br. at 19–24, ECF No. 29. Alcha does ac-

knowledge that this case is "somewhat different" than others because China "did not respond ... at all" to Commerce's request for information. *Id.* at 17. Nonetheless, it claims Commerce erred by applying facts available with an adverse inference instead of using the evidence of non-use Alcha submitted. *Id.* at 19 (citing *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1372 (Fed. Cir. 2014)) (affirming Commerce's findings where it "did not apply adverse inferences to substitute for any information that was actually submitted by the cooperating respondents").

Third, Alcha argues that Commerce's practice of requiring a respondent to provide non-use certifications from all its customers before Commerce will send supplemental questionnaires or attempt verification is unsupported by substantial evidence. *Id.* at. 25–27; Pls.' Reply at 4–6, ECF No. 33. Alcha claims a respondent could "eliminate[] any gap in the record" by providing other relevant information even if it does not submit a certification from every one of its customers. Pls.' Br. at 27, ECF No. 29 (quoting *Risen Energy Co. v. United States*, 47 CIT __, No. 20–3912, 2023 Ct. Int'l Trade LEXIS 52, at *11 (Apr. 11, 2023)). Therefore, Alcha reasons, Commerce's practice improperly requires certifications by ignoring other information a respondent could provide. *Id.*

Alcha also argues that Commerce's selection of a seventeen percent value added tax rate to calculate the benchmark for its purchases of primary aluminum was an improper use of selecting facts available with an adverse inference. *Id.* at 27–30. Alcha cites case law that directs Commerce to use information "available on the record" that "d[oes] not adversely affect a cooperative party" when possible. *Id.* at 29 (quoting *Fine Furniture (Shanghai) Ltd. v. United States*, 36 CIT 1206, 1212 (2012) *aff'd*, 748 F.3d 1365, 1372 (Fed. Cir. 2014)). It claims that Commerce erred by ignoring the thirteen percent rate Alcha put on the record and selecting a higher, non-neutral rate from the underlying investigation instead. *Id.* at 28–29; Pls.' Reply at 6–7, ECF No. 33. Even if Commerce's rate selection was neutral, Alcha argues that Commerce should have given it the opportunity to supplement the record so that Commerce could make the most accurate finding. Pls.' Br. at 29–30, ECF No. 29 (explaining that the applicable value added tax rate would have been "easily verifiable" because China's schedule for these rates is public).

B.

The Government responds that substantial evidence supports Commerce's determination. First, regarding the Export Buyer's Credit Program, the Government acknowledges that Commerce is "expected

to consider" evidence a cooperating party has submitted that would fill the gap created by a non-cooperating party. Def.'s Resp. to Mot. for J. on Agency R. (Def.'s Resp.) at 21, ECF No. 31 (quoting *GPX Int'l Tire Corp. v. United States*, 37 CIT 19, 58–59 (2013)). Nonetheless, it says Commerce is not obligated to verify information "so incomplete as to be unreliable." *Id.* (quoting *Hyundai Elec. & Energy Sys. Co. v. United States*, 15 F.4th 1078, 1089 (Fed. Cir. 2021)). The Government claims Alcha submitted exactly the kind of information the Federal Circuit described as unverifiable because "[a]bsent the information withheld by ...China, Commerce 'would be unable to confirm usage or claimed non-use by examining books and records which can be reconciled to audited financial statements or other documents ....'" *Id.* at 22 (quoting IDM at 25, J.A. at 14,210, ECF No. 36). The Government cites for support Commerce's finding that it does not know for what banks to look in the customer's records or what documentation to request without more guidance from China. *Id.* at 21–22 (citing to IDM at 25, J.A. at 14,210, ECF No. 36). Because only China could provide the necessary information and China chose not to participate, the Government argues that Commerce had no obligation to attempt verification of Alcha's incomplete information. *Id.* at 19–22, ECF No. 31.

The Government also rejects Alcha's argument that Commerce improperly conflated operation of the Export Buyer's Credit Program with use of the program. Instead, the Government says Commerce "explained why an understanding of the program['s] operation is necessary to *verify* Alcha's blanket and unsupported claims of non-use." *Id.* at 29. The agency described how not knowing the relevant bank names, the expected paper trail, and a general roadmap for the loan disbursements would impede its verification process. *Id.* at 27–30. Therefore, Commerce's purpose for seeking that information was "to confirm non-use," not merely to understand the program's operations. *Id.* at 29.

Turning to this Court's caselaw, the Government argues that Commerce complied with past CIT opinions concerning the Export Buyer's Credit Program. The Government cites this Court's opinion in *Cooper (Kunshan) Tire Co. v. United States* (*Cooper Tire II*) establishing a three-part test as a framework. *Id.* at 23–38 (citing 46 CIT __, 610 F. Supp. 3d 1287 (2022)). It claims that Commerce properly (1) identified the gap in the record by explaining what information is missing, (2) explained why the missing information was necessary to verify claims of non-use, and (3) showed that only the missing information could fill the gap. *Id.* at 23–25 (citing *Cooper Tire II*, 46 CIT __, 610 F. Supp. 3d at 1304). The Government says Commerce identified

the information China failed to provide — details about the program's operation, a sample application and description of the expected paper trail, and the program's governing laws and regulations. *Id.* at 25 (citing IDM at 19–26, J.A. at 14,204–11, ECF No. 36); *see also* Def.-Int.'s Resp. to Mot. for J. on Agency R. (Def.-Int.'s Br.) at 9–13, ECF No. 32. Commerce then explained that it needed to know from which banks the funds would be coming and what documentation to request to verify nonuse. Def.'s Resp. at 27–30, ECF No. 31 (citing IDM at 20, 22–27, J.A. at 14,205, 14,207–12, ECF No. 36). It finally showed why only the Chinese government could explain the internal operations of the Export Buyer's Credit Program and provide the requested information. *Id.* at 33–34 (citing IDM at 25, J.A. at 14,210, ECF No. 36) (emphasizing that Alcha's customer — who is not a party to this case — receives the loan, not Alcha).

Next, the Government argues that Commerce's decision to use the seventeen percent value added tax rate for Alcha's primary aluminum purchases is supported by substantial evidence. The Government asserts that Commerce did not apply an adverse inference by selecting the seventeen percent rate. *Id.* at 40–41. Instead, Commerce chose the seventeen percent rate — the last official government rate placed on the record — from neutral facts otherwise available. *Id.* at 41. The applicable regulation requires Commerce to construct a benchmark price that reflects "the price that a firm actually paid or would pay if it *imported* the product." *Id.* (quoting 19 C.F.R. § 351.511(a)(2)(iv)). Commerce could not use Alcha's alternative rate, the Government explains, because that rate was based exclusively on Alcha's domestic purchases of primary aluminum. *Id.* at 41–42.

The Court held oral argument on March 22, 2024. ECF No. 40. There, Alcha's counsel conceded that the thirteen percent value added tax rate Alcha put on the record covered domestic purchases of primary aluminum, not imports. Oral Arg. Tr. at 40:7–14, ECF No. 42 (The Court: "[W]hat did your client actually provide [Commerce] with regard to its invoices, books, and records? Were there any imports in there or not?" Alcha's Counsel: "... I don't believe so." The Court: "You don't believe there were any imports in there?" Alcha's Counsel: "Yes."). Alcha also admitted that its customer's uncertified denial and the twenty-four-year-old regulations are the only record evidence supporting its claim not to have used the Export Buyer's Credit Program. *Id.* at 9:13–10:6 (in response to the Court's questioning, confirming this to be the case). Plaintiffs' Motion is now ripe for decision.

JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction pursuant to 28 U.S.C. § 1581(c), which grants the Court exclusive jurisdiction over final countervailing duty determinations. The Court must set aside any of Commerce's "determination[s], finding[s], or conclusion[s]" 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). "[T]he question is not whether the Court would have reached the same decision on the same record[;] rather, it is whether the administrative record as a whole permits Commerce's conclusion." *See New Am. Keg v. United States*, No. 20–00008, 45 CIT __, 2021 Ct. Intl. Trade LEXIS 34 at *15 (Mar. 23, 2021). Furthermore, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20 (1966)).

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); s*ee also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). The Federal Circuit has described "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA, LP v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

DISCUSSION

The parties ask this Court to answer two questions. First, the Court considers whether Commerce acted unlawfully when it found that Alcha benefitted from the Export Buyer's Credit Program despite Alcha's claim to the contrary. Second, the Court considers whether Commerce properly relied on data China provided in the underlying investigation to calculate the benefit conferred on Alcha from its purchases of primary aluminum. For the reasons explained below, the Court finds that Commerce supported its determinations on both issues with substantial evidence.

I. The Export Buyer's Credit Program

The parties dispute whether Commerce supported its finding that Alcha benefitted from the Export Buyer's Credit Program with sub-

stantial evidence. Alcha claims Commerce owed it a meaningful opportunity to verify its non-use claims. Pls.' Br. at 14–16, ECF No. 29. In drawing an adverse inference against China, it asserts that Commerce improperly harmed Alcha, a cooperating party, and ignored information Alcha submitted. *Id.* at 19. It also argues that this Court's caselaw supports its position because the Court has required Commerce to attempt verification where respondents did not provide non-use certifications from all their customers. *Id.* at 27. The Government responds that it had no duty to attempt verification because the information Alcha submitted was "unverifiable and incomplete." Def.'s Resp. at 21, ECF No. 31 (citing IDM at 15–29, J.A. at 14,200–14, ECF No. 36). It relies on caselaw from the Federal Circuit to reject Alcha's "collateral impact" claims. *Id.* at 18. Further, the Government claims that nearly all the caselaw Alcha cites from this Court is distinguishable because (1) the respondents in those cases provided certifications from their customers or (2) China participated. *Id.* at 22–23, 30–32.

Alcha also argues that Commerce repeats a blunder it has made in several previous CIT cases by conflating operation of the Export Buyer's Credit program with use of the program. Pls.' Br. at 16–25, ECF No. 29; Pls.' Reply at 2–3, ECF No. 33. Alcha points out that this Court has previously remanded cases where Commerce improperly focused on the innerworkings of the program instead of the actual evidence submitted. Pls.' Br. at 19–24, ECF No. 29. The Government replies that Commerce needed to understand the program's operation so that it could know what information was required for a complete verification. Def.'s Resp. at 27–30, ECF No. 31.

Finally, Alcha claims that Commerce cannot require respondents who deny use of the Export Buyer's Credit program to provide more proof than respondents denying use of other programs. Pls.' Br. at 14–15, ECF No. 29. The Government responds that Commerce's differential treatment is appropriate. Def.'s Resp. at 36–37, ECF No. 31. It explains that, unlike other programs, the Export Buyer's Credit Program provides loans to a respondent's customer, meaning the respondent would likely not possess the sort of information Commerce needs to complete verification. *Id.*

A.

China's Export Buyer's Credit program is by no means a new issue for this Court. Since 2012, many trees have given their lives debating whether Commerce properly supported its findings concerning the

program or should have attempted verification. *See Fine Furniture*, 36 CIT at 1206. For those cases where parties provided non-use certifications and China confirmed non-use, the Court has ordered Commerce to attempt verification. *See, e.g.*, *Guizhou Tyre Co. v. United States*, 43 CIT __, 415 F. Supp. 3d 1335, 1340–44 (2019) (ordering Commerce "to attempt verification using all reasonable tools at its disposal" where respondent submitted non-use certifications and China confirmed that respondent's customers had not used the program); *Clearon Corp. v. United States*, 43 CIT __, 359 F. Supp. 3d 1344, 1359–60 (2019) (ordering Commerce to attempt verification where respondent submitted non-use certifications from its customers and China confirmed the non-use claims); *Both-Well (Taizhou) Steel Fittings, Co. v. United States*, 46 CIT __, 557 F. Supp. 3d 1327, 1330–31, 1337 (2022) (ordering Commerce to "attempt to verify the non-use certifications" where customers submitted them and China confirmed that none of the customers used the program); *Risen Energy*, 47 CIT __, 2023 Ct. Intl. Trade LEXIS 52, at *12–14 (ordering Commerce to attempt verification where China participated and respondent provided non-use certifications and financial records from half of its U.S. customers — that half making up about 95% of respondent's sales).

The Court has also required Commerce to make a new determination where the respondent failed to submit certified declarations of non-use, but China participated. *See Yama I*, 43 CIT __, 419 F. Supp. 3d at 1349–50, 1356. In *Yama I*, the respondent provided an uncertified non-use declaration on behalf of its customers. *Id.* at 1349. China claimed the Export and Import Bank "searched in its own systems [for] each of [the] customers identified" and found "that none of the customers had balances for export buyer's credits during the [period of review]." *Id.* at 1349. The Court found that Commerce erred in finding the respondent had used the program because there was record evidence to the contrary and ordered Commerce to make a new determination without resorting to adverse inferences. *Id.* at 1356. However, when the respondent and China both fall short, the Court has not required Commerce to attempt verification. *See Cooper Tire II*, 46 CIT __, 610 F. Supp. 3d at 1316–18 (sustaining Commerce's determination where respondents did not provide certifications or "actually state[] that their customers did not use the [Export Buyer's Credit Program]" and China did not provide the requested information); *see also Cooper (Kunshan) Tire Co. v. United States* (*Cooper Tire I*), 45 CIT __, 539 F. Supp. 3d 1316, 1328–31 (2021) (describing the facts of the case in greater detail).

The Federal Circuit has clarified verification's purpose. Commerce may use the verification process to check the accuracy of information the parties put on the record. *Hyundai,* 15 F.4th at 1089 ("Commerce's objective" is "to verify the accuracy and completeness of submitted factual information under 19 C.F.R. § 351.307(d) ...."). It should *not* use verification as a fact-finding tool for discovering additional facts the parties failed to put on the record. *Id.* at 1089–90. In other words, Commerce is not required to spend its time attempting to check the accuracy of incomplete or unverifiable information. *Id.* at 1089 ("Where necessary information is absent, Commerce need not conduct a verification in an attempt to obtain the missing information."). Verification is not the equivalent of discovery in civil cases. The parties bear the burden to build an adequate record before the agency and suffer the consequences should they fail to do so. *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014).

B.

Alcha finds itself in a difficult position. China refused to participate in these proceedings. Alcha did not place any certified statements on the record regarding its sole customer's alleged non-use of the program. These facts distinguish Alcha's case from the Court's prior cases and leave Alcha with little record evidence on which to hang its hat. Considering that lack of verifiable evidence, the Court finds that Commerce's determination concerning the Export Buyer's Credit Program is supported by substantial evidence.

Because China refused to participate in the review, it is appropriate to draw an adverse inference against China. When Commerce is missing information about a subsidy like the Export Buyer's Credit Program, the countervailing duty statute provides a two-part process to fill the gap. 19 U.S.C. § 1677e(a). That statute enables Commerce to use "facts otherwise available" in place of the missing information if:

> (1) necessary information is not available on the record, or
>
> (2) an interested party or any other person —
>
> (A) withholds information that has been requested by [Commerce],
>
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested ...
>
> (C) significantly impedes a proceeding under this subtitle, or

> (D) provides such information but the information cannot be verified[.]

Id.

Commerce may draw an adverse inference from those facts otherwise available if "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce] ...." *Id.* § 1677e(b)(1). Although they are often lumped together, § 1677e(a) and § 1677e(b) are separate determinations that require distinct analyses. *Shanghai Tainai Bearing Co. v. United States*, 47 CIT __, 658 F. Supp. 3d 1269, 1282 (2023). "Commerce first must determine that it is missing necessary information; and, if it wishes to fill the resulting gap with facts that reflect an adverse inference against an interested party, Commerce must secondarily determine that the party has failed to cooperate by not acting to the best of its ability." *Id.* (citing *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1346 (Fed. Cir. 2011)). For the purposes of these determinations, a foreign government is considered an "interested party." *See* 19 U.S.C. § 1677(9)(B) (defining "interested party" to include "the government of a country in which such merchandise is produced or manufactured or from which such merchandise is exported").

Here, Commerce appropriately drew an adverse inference against China because China refused to answer any questions or otherwise participate in the investigation. Commerce satisfied the first part of the statute by identifying what necessary information is missing. *See* 19 U.S.C. § 1677e(a). It explained that it needed the names of the banks disbursing loans under the Export Buyer's Credit Program, the typical paper trail that a loan generates, and a general roadmap of loan disbursements to complete verification. IDM at 24–27, J.A. at 14,209–12, ECF No. 36. China did not provide this information, nor was it otherwise on the record. Whether because (i) necessary information was missing, § 1677e(a)(1); (ii) China withheld information Commerce requested, § 1677e(a)(2)(A); or (iii) China significantly impeded the review, § 1677e(a)(2)(C), the test was easily satisfied. The Court therefore finds that Commerce could legally use the facts otherwise available.

Commerce also satisfied the second part of the test because it has shown that China failed to act "to the best of its ability." *Shanghai Tainai*, 47 CIT __, 658 F. Supp. 3d at 1282 (citing *Zhejiang DunAn*, 652 F.3d at 1346). By failing to respond in any way to Commerce's inquiries, there can be no doubt China failed to put forth its "maxi-

mum effort" to comply. *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) ("Compliance with the 'best of its ability' standard is determined by assessing whether respondent has put forth its maximum effort to provide Commerce with full and complete answers ...."). Commerce was therefore free to draw an adverse inference against China.

The collateral harm to Alcha — a cooperating party — does not prevent Commerce from drawing an adverse inference. The Federal Circuit has held that the "collateral impact on a cooperating party does not render the application of adverse inferences in a [countervailing duty] investigation improper." *See Fine Furniture*, 748 F.3d at 1372 (citing *KYD, Inc. v. United States*, 607 F.3d 760, 768 (Fed. Cir. 2010)). *Fine Furniture* involved a similar situation also involving the government of China. There, Fine Furniture complained that it was being impermissibly harmed by the collateral impact of drawing an adverse inference against the uncooperative Chinese government. *Id.* at 1371. The Federal Circuit rejected this argument, holding that "a remedy that collaterally reaches [the cooperating respondent] has the potential to encourage ... China to cooperate so as not to hurt its overall industry." *Id.* at 1373. The possibility of encouraging Chinese cooperation in future proceedings was enough to justify the collateral impact on the cooperating party. "Although it is unfortunate that cooperating respondents may be subject to collateral effects due to the adverse inferences applied when a government fails to respond to Commerce's questions, this result is not contrary to the statute or its purposes, nor is it inconsistent with this court's precedent." *Id.* at 1373; *see also KYD*, 607 F.3d at 768 (explaining that Commerce's application of an adverse inference was "likely to have the effect of ... inducing cooperation from" the non-cooperating party). This holding is not without limits. The Federal Circuit took notice that Commerce "did not apply adverse inferences to substitute for any information that was actually submitted by the cooperating respondents" in that case. *Fine Furniture*, 748 F.3d at 1372.

Fine Furniture governs here, and Commerce's actions fall within the bounds of its limitations. Commerce did not "substitute for any information" Alcha "actually submitted" because the information Alcha submitted was not verifiable. *Id.*; *see* 19 U.S.C. § 1677e(a)(2)(D) (providing for use of facts available when "information cannot be verified"); IDM at 28–29, J.A. at 14,213–14, ECF No. 36 ("Commerce is unable to verify in a meaningful manner the little information on the record indicating non-use ...."). Furthermore, the negative impact on China's aluminum sheet industry could encourage China to coop-

erate in the future. *Fine Furniture*, 748 F.3d at 1372–73. The Federal Circuit's holdings bind this Court and dispense with Alcha's claim that the collateral harm to it prevents Commerce from drawing an adverse inference against China.

Common sense and civil trial practice also support this conclusion. As our Court noted in another countervailing duty case where China refused to provide information, "[A] party with a motive to provide information favorable to it may be presumed to possess information adverse to it when it fails to produce the information ...." *GPX Int'l Tire*, 37 CIT at 58. The use of an adverse inference to punish noncooperation is not unique to countervailing duty cases. It is a general rule of evidence that a jury may draw an adverse inference against a party that fails to produce evidence. *See* 2 McCormick on Evidence § 264 (8th ed. 2022) ("When it would be natural under the circumstances for a party to ... produce documents or other objects in his or her possession as evidence and the party fails to do so, tradition has allowed the adversary to use this failure as the basis for invoking an adverse inference."); *Jandreau v. Nicholson*, 492 F.3d 1372, 1375 (Fed. Cir. 2007) ("The general rules of evidence law create an adverse inference when evidence has been destroyed ...."). The normal operation of the Federal Rules of Civil Procedure refutes the notion that Alcha is a victim of any unfairness. *Cf.* Fed. R. Civ. P. 37(e)(2)(B) (permitting a judge to "instruct the jury that it may or must presume the information was unfavorable to the party" failing to produce it).

Alcha further doomed its argument by failing to place on the record a certified statement of non-use from its sole U.S. customer. It therefore may not take advantage of rulings from this Court involving cases where such certified statements were filed. It must instead accept the record that it had the burden to develop. *See Nan Ya Plastics Corp. v. United State* s, 810 F.3d 1333, 1337–38 (Fed. Cir. 2016) (quoting *QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011)) ("[T]he burden of creating an adequate record lies with interested parties and not with Commerce."). Alcha submitted its sole U.S. customer's uncertified declaration of non-use and no evidence of its customer's books and records to support that bare assertion. Initial Questionnaire Resp. at 28–29, J.A. at 80,066–67, ECF No. 37. Paired with China's failure to participate, that record left Commerce with nothing to verify. *See Hyundai*, 15 F.4th at 1089 (holding that Commerce is not required to verify information "so incomplete as to be unreliable").

Finally, it makes no difference that Commerce requires less proof from respondents claiming non-use of other subsidy programs. As the Government explains, a loan under the Export Buyer's Credit Pro-

gram is not issued to the respondent but to the respondent's customer. IDM at 21–22, J.A. at 14,206–07, ECF No. 36. It follows that Commerce would either need the customer's data to verify non-use or an indication of the customer's willingness to participate in the administrative review via a certified declaration. Where the customer refuses to take the minimal step to certify its non-use, the customer signals that it is unlikely to participate in the formal verification process. *Cf. Both-Well (Taizhou)*, 46 CIT __, 557 F. Supp. 3d at 1335 (noting that "non-use certifications themselves suggest that the customers must have information that could be used to verify the non-use certifications."). Commerce cannot be faulted for taking this signal at face value.

Whatever may be required of Commerce when a respondent provides customers' non-use certifications or the Chinese government responds to questionnaires, those cases offer Alcha no help. Faced with a record containing only a bare assertion of non-use and no information from China, Commerce correctly resorted to using the facts otherwise available and to drawing an adverse inference when doing so. Its determination on that basis is supported by substantial evidence, in compliance with the law, and **SUSTAINED**.

II. Less Than Adequate Remuneration for Primary Aluminum

The Court also sustains Commerce's use of a seventeen percent value added tax rate to calculate the benefit conferred on Alcha through its purchases of primary aluminum from China. The regulation, 19 C.F.R. § 351.511(a)(2)(iv), requires Commerce to establish the value added tax rate based on what the respondent would have paid if it imported the aluminum. Here, Alcha submitted a rate based on its purchases of domestically produced aluminum, not imported aluminum. Alcha's suggested rate therefore does not meet the regulation's requirements, and Commerce properly used the seventeen percent rate for imported aluminum that China provided in the underlying investigation.

A.

When a foreign government provides goods to a domestic company for less than adequate remuneration, Commerce may find that the provision of those goods is countervailable. 19 C.F.R. § 351.511(a)(1). Commerce will examine whether the foreign government provides the goods to the company at a price that falls below the market price in the relevant country. Sometimes, Commerce is unable to determine the relevant market price because "actual transactions" in that coun-

try are unavailable. *Id.* § 351.511(a)(2)(i). In such circumstances, Commerce will instead set a comparison price or benchmark based on a world market price that reasonably would be available to purchasers in the country at issue. *Id.* § 351.511(a)(2)(ii).

Commerce must adjust its benchmark to reflect what the foreign company "actually paid or would pay if it imported the product." *Id.* § 351.511(a)(2)(iv). Those adjustments should account for the "delivery charges and import duties" an importer would have paid such as a value added tax. *Id.* A value added tax is "a consumption tax placed on a product whenever value is added at each stage of the supply chain, from production to the point of sale." *Jiangsu Zhongji*, 44 CIT __, 435 F. Supp. 3d at 1274 n.1. As with any other necessary information, Commerce may draw from the facts otherwise available to fill gaps left by the parties. *See* 19 U.S.C. § 1677e(a)(1) (allowing use of facts available if "necessary information is not available on the record").

B.

In the original investigation, China submitted evidence that the value added tax rate for primary aluminum was seventeen percent. IDM at 33, J.A. at 14,218, ECF No. 36. No party disputes that the seventeen percent tax rate is on the record of this review. Pls.' Br. at 27–30, ECF. No. 29; Def.'s Resp. at 10–11, ECF No. 31; Def.-Int.'s Br. at 15–17, ECF No. 32. In response to Commerce's initial questionnaire, Alcha provided spreadsheets documenting its primary aluminum purchases during the period of review. Initial Questionnaire Resp., Exs. 39–40, J.A. at 81,881–904, ECF No. 37. The spreadsheets showed Alcha paid a thirteen percent value added tax rate on those purchases. *Id.* Commerce did not attempt to verify the thirteen percent rate. Instead, Commerce used the higher seventeen percent rate that China previously provided to adjust its benchmark under 19 C.F.R. § 351.511(a)(2)(iv). IDM at 34, J.A. at 14,219, ECF No. 36. Commerce then calculated the benefit Alcha received by comparing the price Alcha paid to the benchmark. *Id.*

Alcha argues that Commerce was obligated to attempt verification of the thirteen percent rate rather than rely on the seventeen percent rate China earlier provided. Pls.' Br. at 29, ECF No 29. Commerce responds that it was under no such obligation because the thirteen percent rate Alcha submitted was based on domestic purchases, not imports as the regulation requires. *Compare* Pls.' Br. at 29–30, ECF No. 29 (arguing that Commerce should have attempted verification of the thirteen percent rate), *with* 19 C.F.R. § 351.511(a)(2)(iv) (mandating Commerce use the price Alcha "would pay if it imported the

product"). The parties also disagree over whether Commerce applied an adverse inference under 19 U.S.C. § 1677e(a)(2). Alcha claims that Commerce drew an adverse inference by selecting the "substantially higher" seventeen percent rate when more accurate data was on the record. Pls.' Br. at 29, ECF No 29. Commerce disagrees, saying it only neutrally selected from the facts otherwise available, which was permissible because Commerce could not use the other data on the record. Def.'s Resp. at 41, ECF No. 31. Alcha responds that Commerce should have given it an opportunity to supplement the record with information proving the thirteen percent rate was accurate. Pls.' Br. at 29–30, ECF No. 29 (explaining that the applicable value added tax rate would have been "easily verifiable" because China's schedule for these rates is public).

C.

Alcha's counsel conceded at oral argument that the thirteen percent rate it provided was for goods it purchased domestically. Oral Arg. Tr. at 40:7–14, ECF No. 42 (The Court: "[W]hat did your client actually provide [Commerce] with regard to its invoices, books, and records? Were there any imports in there or not?" Alcha's Counsel: "... I don't believe so." The Court: "You don't believe there were any imports in there?" Alcha's Counsel: "Yes."). This ends the matter. The regulation requires Commerce to "adjust the comparison price to reflect the price that a firm actually paid or would pay if it *imported* the product." 19 C.F.R. § 351.511(a)(2)(iv) (emphasis added). Thus, Commerce correctly declined to use Alcha's proffered rate because it did not reflect Alcha's purchase of imported goods. The only information on the record reflecting China's value added tax rate for imported aluminum was that provided by the Chinese government in an earlier investigation. Commerce cannot be faulted for failing to consider information that does not meet the regulation's requirements. It was Alcha's responsibility to build the record. *See Nan Ya Plastics*, 810 F.3d at 1337–38 (quoting *QVD Food*, 658 F.3d at 1324) ("'[T]he burden of creating an adequate record lies with interested parties and not with Commerce.'"). Because Alcha failed to place information on the record reflecting the tax rates for imported materials, it bears the cost of its failure.

Alcha's adverse inference argument fails for the same reason. Commerce may select from the facts otherwise available on the record when the parties fail to provide information necessary to calculate the benchmark. *See* 19 U.S.C. § 1677e(a)(1). Commerce needed the value added tax rate for imports of primary aluminum during the period of

review. *See* 19 C.F.R. § 351.511(a)(2)(iv) (requiring Commerce to adjust the benchmark for "delivery charges and import duties"). With no responsive information from Alcha, Commerce looked at the record and neutrally selected the only rate that met the regulation's import requirement. It drew no adverse inference. Commerce's decision to use the only tax rate on the record that met the regulation's requirement to be based on the cost to import primary aluminum is supported by substantial evidence and therefore **SUSTAINED**.

CONCLUSION

In every trade matter before Commerce, the record created by the parties determines the outcome. Alcha's complaints all stem from information missing from the record. As the party charged with building that record, it must reap what it failed to sow. Commerce's Final Results are therefore **SUSTAINED**.

Dated: July 11, 2024
New York, New York

Stephen Alexander Vaden
STEPHEN ALEXANDER VADEN, JUDGE

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