U.S. Court of International Trade

Slip Op. 20–95

UNITED STATES, Plaintiff, v. CRUZIN COOLER, LLC, BAD LAMA LLC, and KEVIN BEAL, Defendants.

Before: Timothy M. Reif, Judge
Court No. 15–00333

[Granting plaintiff's motion for default judgment.]

Dated: July 9, 2020

Nathanial B. Yale, Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice of Washington, D.C., for plaintiff United States. With him on the motion were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of Counsel was *Thomas A. Behe*, Senior Attorney, U.S. Customs and Border Protection.

OPINION

Reif, Judge:

The United States of America ("Government" or "plaintiff") brings a motion for a default judgment against Cruzin Cooler, LLC and Bad Lama LLC ("Bad Lama") (together, "defaulted defendants") to recover civil penalties pursuant to 19 U.S.C. § 1592 ("Section 1592"). The Government requests that the United States Court of International Trade ("USCIT" or "CIT"), in accordance with USCIT Rule 55, order Cruzin Cooler, LLC and Bad Lama to pay civil penalties in the amounts of $14,332.64 and $852,088.45, respectively, in addition to post-judgment interest. *See* Pl.'s Mot. for Default J., ECF No. 56 ("Pl. Mot.").

On July 24, 2019, the Court entered an order of default against Cruzin Cooler, LLC and Bad Lama when they failed to "otherwise defend" this action as required by USCIT Rule 55(a). *See* Entry of Default, ECF No. 55 ("Entry of Default"). This court has jurisdiction pursuant to 28 U.S.C. § 1582(1) for the recovery of civil penalties and duties under Section 1592.

For the reasons set forth below, the court grants plaintiff's motion for a default judgment and awards the Government the amount of $14,332.64 against Cruzin Cooler, LLC for the violation of Section 1592 based on gross negligence in respect of three entries,[1] and awards the Government $852,088.45, against Bad Lama for the vio-

[1] Entries 53102681284, 53102682886, and 53102683371.

lation of Section 1592 based on fraud in respect of 12 entries.[2] The Government is also entitled to post-judgment interest computed in accordance with 28 U.S.C. § 1961, and costs in accordance with USCIT Rule 55(b).

BACKGROUND

In December 2008, Cruzin Cooler, LLC started importing Cruzin Coolers and certain parts. Compl., ECF No. 3 ("Compl.") ¶ 4. A finished Cruzin Cooler, LLC product "resembles a large cooler on wheels . . . ." Compl. ¶ 4. Defendant Kevin Beal at all relevant times was the owner of both Cruzin Cooler, LLC and Bad Lama. Compl. ¶ 3. Mr. Beal also owned a third company, CSUSA, that imported merchandise similar to Cruzin Coolers, but which is not a party to this action. Compl. ¶ 10.

In September 2010, Mr. Beal sought internal advice from U.S. Customs and Border Protection ("Customs") regarding the classification of fully assembled Cruzin Coolers[3] after Customs reclassified certain entries of fully assembled Cruzin Coolers from subheading 8711.90.0000 with a duty-free rate to subheading 8704.90.0000 with a 25 percent duty rate.[4] Pl. Mot. at 2. In the same month that Mr. Beal sought internal advice on the fully assembled Cruzin Coolers, Customs issued an Informed Compliance Notice to Cruzin Cooler, LLC, in which Customs notified Cruzin Cooler, LLC that it had been improperly importing certain parts for Cruzin Coolers duty-free. Compl. ¶ 5. The Informed Compliance Notice stated that some parts in the shipments required either a 3 percent or a 10 percent duty rate. *Id*. The Informed Compliance Notice explained that Cruzin Cooler, LLC was importing these parts under the wrong subheading because under Additional Rule of Interpretation 1(c), parts for Cruzin Coolers can be classified under the heading for fully assembled Cruzin Coolers only if there is no specific heading in the U.S. Harmonized Tariff Schedule that covers the parts. *Id*. Despite receiving the Informed Compliance Notice, Cruzin Cooler, LLC continued to import the same parts under the duty-free heading for entries 53102681284, 53102682886, and 53102683371 ("Cruzin Cooler, LLC entries"). Compl. ¶ 6.

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[2] Entries AJV00157141, UPS54096394, UPS54136000, UPS54136646, UPS54173839, UPS54173946, UPS54180479, UPS80804301, UPS82984036, UPS84687215, UPS91103677, EWM00008050.

[3] Entries of fully assembled Cruzin Coolers are not at issue in this action. Pl. Mot. at 2.

[4] Years later, in May 2013, Customs determined in Ruling HQ H136456 that fully assembled Cruzin Coolers are imported duty-free under subheading 8711.90.0000 as an "other cycle." Pl. Mot. at 2. Based on the ruling, Customs cancelled its requests for duties on entries of fully assembled Cruzin Coolers. *Id*.

In January 2011, Customs sent Cruzin Cooler, LLC a second Informed Compliance Notice "which contained information on marking and classification issues with [importations from Cruzin Cooler, LLC]."[5] Compl. ¶ 10. In February 2011, Customs met with Mr. Beal and his attorney in person and told them that the classification by Cruzin Cooler, LLC of certain imported parts under the duty-free heading was improper. Compl. ¶ 10. That same month, Mr. Beal created Bad Lama, which took over the importation of the Cruzin Coolers and parts for Cruzin Coolers. Compl. ¶ 11. Mr. Beal "provided classification information to [Customs] and handled all customs-related business on behalf of Bad Lama." *Id*.

In March 2011, Customs issued Binding Ruling N151635 to Mr. Beal through his other company, CSUSA. Compl. ¶ 10. The Binding Ruling classified the unpowered, insulated, rectangular, four-wheeled ice chest made of plastic and polystyrene with a removable top as requiring a 3.2 percent duty rate. *Id*; Pl. Mot. at Appx154–155. From July 2011 through April 2013, Bad Lama continued to import parts under improper classifications for the following 12 entries: AJV00157141, UPS54096394, UPS54136000, UPS54136646, UPS54173839, UPS54173946, UPS54180479, UPS80804301, UPS82984036, UPS84687215, UPS91103677, EWM00008050 ("Bad Lama entries"). Compl. ¶ 13.

Two of the Bad Lama entries, UPS54173946 and UPS84687215, were in direct violation of Binding Ruling N151635.[6] Compl. ¶ 15. The remaining Bad Lama entries failed to follow Binding Ruling N151635 by misclassifying the four-wheeled ice chest as "trailers" or "semi-trailers" that needed to be coupled to another vehicle rather than having the option of pushing or pulling the chest manually, and these Bad Lama entries also "contained false statements and/or omissions that violated Additional U.S. Rule of Interpretation 1(c)."[7] Compl. ¶ 16; *See also* Pl. Mot. at Appx154.

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[5] Defendants deny receiving the first or second Informed Compliance Notice. Answer ¶ 5. However, because defendants are in default, the court accepts as true all well-pled facts in the complaint. *United States v. Puentes*, 41 CIT__, __, 219 F. Supp. 3d 1352, 1357 (2017) (citations omitted).

[6] In detail, UPS54173946 was merchandise improperly invoiced as other parts of motor cycles with a duty-free rate using subheading 8714.10.0050, instead of scooter wagons with a 3.2 percent duty rate as required by Binding Ruling N151635. Compl. ¶ 15. Additionally, UPS84687215 was improperly invoiced as non-propelled trailers using 8716.40.0000 with a duty-free rate, instead of scooter wagons with a 3.2 percent duty rate as required by Binding Ruling N151635. *Id*.

[7] Entries AJV00157141, UPS54136000, UPS54180479 and UPS82984036 were for merchandise invoiced as electric scooter motors. The four entries were incorrectly designated with a duty-free rate using subheadings 8711.90.0000, 8714.10.0050, and 8716.40.0000. Compl. ¶ 16. Customs determined that the parts should have been classified as electric motors under subheading 8501.20.4000 with a 4 percent duty rate or subheading

Additionally, the Bad Lama entries contained false statements on the Customs 7501 forms. Compl. ¶ 19. Bad Lama erroneously stated that it was "not related" to the company that manufactured the goods, when, in fact, Mr. Beal had an ownership interest in the manufacturing company and an employee of Bad Lama was on the payroll of the manufacturing company. *Id*.

Further, during Customs' investigation into Cruzin Cooler, LLC and Bad Lama, Mr. Beal revealed to Customs that he created Bad Lama to avoid scrutiny by Customs. Compl. ¶ 12. Mr. Beal relayed the same message to employees of Cruzin Cooler, LLC and one of his customs brokers. *Id*.

On November 25, 2013, Customs issued a pre-penalty notice to Cruzin Cooler, LLC regarding the Cruzin Cooler, LLC entries. Compl. ¶ 22. The pre-penalty notice identified a culpability level of gross negligence, and, in the alternative, negligence, and the actual loss of revenue identified was $3,583.16. *Id.* Cruzin Cooler, LLC did not respond, and on January 7, 2014, Customs issued the penalty notice in the amount of $14,332.64, assessing a penalty for gross negligence, and in the alternative, negligence. *Id*. The amount of $14,332.64, is four times the Government's loss of revenue, the lesser of the two maximum statutory penalties for gross negligence. *Id. See also* 19 U.S.C. § 1592(c)(2) (culpability level of gross negligence is punishable by a civil penalty in an amount not to exceed the lesser of the domestic value of the merchandise or four times the lawful duties, taxes, and fees deprived by the United States). Cruzin Cooler, LLC did not respond to the penalty notice and has not paid the $14,332.64 penalty. Compl. ¶ 24.

On December 4, 2013, Customs issued pre-penalty notices to Bad Lama and Mr. Beal identifying the Government's actual loss of rev-

8501.20.6000 with a 2.4 percent duty rate. *Id*. Entry UPS54096394 for merchandise invoiced as "foot pegs, stabilizer brackets left and right, engine control modules, fuel tanks,rim pins, rim hubs, and five hundred-watt motors" was incorrectly entered using subheading 8716.80.5090 with a 3.2 percent duty. Compl. ¶ 17. The parts should have been classified for foot pegs, stabilizer brackets left and right, engine control modules, fuel tanks, rim pins, and rim hubs using subheading 8714.99.8000 with a 10 percent duty rate and using subheading 8501.20.4000 with a 4 percent duty rate for 500-watt motors. *Id*. Entries UPS54136000, UPS54136646, UPS54173839, UPS54173946, UPS80804301, UPS91103677, and EWM00008050 for merchandise invoiced as spare parts, side bars, controllers, foot tubes, charger ports, handle bars, battery plugs, power cords, electric scooter parts, pull starts, charging ports, brake assemblies, and bearings were incorrectly designated with a duty-free rate using subheading 8714.10.0050 for motorcycle parts and a 2 percent duty rate using subheading 8481.80.9020 for controllers. Compl. ¶ 18. The parts should have been classified as the following: the parts or other vehicles using subheading 8716.80.5090 with a 3.2 percent duty rate, for the other parts and accessories of vehicles using subheading 8714.99.8000 with a 10 percent duty rate, for the bearings using subheading 8482.10.5064 with a 9 percent duty rate, for the battery plugs using subheading 8507.90.4000 with a 3.5 percent duty rate, for the power cords using subheading 8544.42.9000 with a 2.6 percent duty rate, and for the controllers using subheading 8537.10.9070 with a 2.7 percent duty rate. *Id*.

enue as $16,030.11.[8] Compl. ¶ 25. In the pre-penalty notices, Customs identified the culpability level of fraud, with gross negligence and negligence in the alternative, and a proposed penalty amount of $852,365.28.[9] *Id*. This penalty amount is equal to the domestic value of the Bad Lama merchandise, the maximum statutory penalty for fraud. *Id*. *See also* 19 U.S.C. § 1592(c)(2) (culpability level of fraud is punishable by a civil penalty in an amount not to exceed the domestic value of the merchandise).

Bad Lama and Mr. Beal failed to respond to the pre-penalty notices and, therefore, on January 10, 2014, Customs issued the penalty notices with the same culpability and penalty amount. *Id.* Bad Lama and Mr. Beal did not respond to the penalty notices, nor have they made payment on the $852,365.28 penalty. Compl. ¶ 27.

STANDARD OF REVIEW

Section 1592 governs the assessment of a civil penalty for the fraudulent, grossly negligent or negligent entry of merchandise into the United States. 19 U.S.C. § 1592. "[A]ll issues, including the amount of the penalty, shall be tried *de novo*." 19 U.S.C. § 1592(e)(1). "To bring a penalty claim before the court, Customs must perfect its penalty claim in the administrative process according to the procedures that Congress established in subsection (b) of 19 U.S.C. § 1592." *United States v. CTS Holding,* LLC, Slip Op. 2015–70, 2015 Ct. Int'l Trade LEXIS 26 at *19 (CIT June 30, 2015) (internal citations and quotations omitted). The administrative process consists of a pre-penalty notice and a penalty notice. 19 U.S.C. § 1592(b)(1)–(2). If Customs has reasonable cause to believe that there has been fraudulent, grossly negligent or negligent entry of merchandise into the United States, and determines that further proceedings are needed, Customs will issue a pre-penalty notice regarding the alleged violation. 19 U.S.C. § 1592(b)(1)(A). In the pre-penalty notice, Customs states the alleged violation, discloses the material facts, identifies the culpability level, estimates the Government's loss of revenue and proposes a monetary penalty. *Id*. The purpose of the pre-penalty notice is to inform and provide the importer with a reasonable opportunity to respond before the issuance of a penalty notice. *See id*. If an importer does not pay a perfected penalty notice, Customs' recourse is to file an action with this Court.

[8] The duties (loss of revenue to Customs) attributable to Cruzin Cooler, LLC and Bad Lama identified in the penalty notices are not outstanding because the sureties for Cruzin Cooler, LLC and Bad Lama paid. Pl. Mot. at 6.

[9] The penalty amount has been adjusted downward from the amount requested in the penalty notice and complaint to reflect certain clerical errors. Pl. Mot. at 15, n.4.

LEGAL FRAMEWORK

I. Default Judgment Under USCIT Rule 55

USCIT Rule 55 governs the circumstances under which the court must enter a default judgment against a party. Under Rule 55(a), the clerk must enter a party's default "when the party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is demonstrated by affidavit or otherwise." USCIT R. 55(a). After an entry of default, Rule 55(b) requires that the moving party file a motion with the court to secure a default judgement. USCIT R. 55(b). Further, under Rule 55(b), "[w]hen the plaintiff's claim is for a sum certain or for a sum that can be made certain by computation, the court – on the plaintiff's request with an affidavit showing the amount due – must enter judgment for that amount . . . ." *Id.* Rule 55(b) also requires that the court grant costs against a defaulted defendant if the defendant is "neither a minor nor incompetent person." *Id.*

This Court has established that once a default judgment is entered against a defendant, "all well-pled facts in the complaint are taken as true for purposes of establishing the defendant's liability." *United States v. Puentes*, 41 CIT__, __, 219 F. Supp. 3d 1352, 1357 (2017) (citations omitted). The defaulting party's admission of liability for all well-pled facts does not constitute an admission for the amount of damages claimed in the complaint. *United States v. Rupari Food Servs. Inc*., 42 CIT __, __, 298 F. Supp. 3d 1347, 1359 (2018). Accordingly, an entry of default is not sufficient to entitle a plaintiff to relief. *Puentes*, 219 F. Supp. 3d at 1358. The court must determine whether the unchallenged facts establish a violation of Section 1592 and, in turn, warrant a default judgment. *Id.*

II. Remedies and Penalties for Fraud, Gross Negligence and Negligence Under 19 U.S.C. § 1592

Section 1592 states that "no person, by fraud, gross negligence, or negligence . . . may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of . . . any document or electronically transmitted data or information, written or oral statement, or act which is material and false . . . ." 19 U.S.C. § 1592(a)(1). This Court has found that a misclassification of merchandise on Customs' entry documentation establishes a false statement. *United States v. Int'l Trading Servs., LLC* 41 CIT __, __, 222 F. Supp. 3d 1325, 1332 (2017).

A statement or an act is material under Section 1592 when "it has the natural tendency to influence or is capable of influencing agency

action including, but not limited to a Customs action regarding: (1) [d]etermination of the classification, appraisement, or admissibility of merchandise . . . (2) determination of an importer's liability for duty . . . ." 19 C.F.R. Pt. 171, App. B(B) (2009). There are three levels of culpability — fraud, gross negligence, and negligence — any of which constitutes a prerequisite for the assessment of a civil penalty under Section 1592. Section 1592(e) delineates the burden of proof for establishing each level of culpability and Section 1592(c) states the maximum penalties at each level of culpability for a violation of Section 1592(a).

A. Fraud

Section 1592(e)(2) provides that if the proceeding for the recovery of a monetary penalty is based on fraud, the Government bears the burden of proof to establish the alleged violation by "clear and convincing evidence." 19 U.S.C. § 1592(e)(2). For the Government to prove a defendant's violation under Section 1592 with a culpability level of fraud, the Government must establish that the defendant "knowingly" committed a customs violation or act in connection therewith. *United States v. Pan Pac. Textile Group, Inc.*, 29 CIT 1013, 1028, 395 F. Supp. 2d 1244, 1257–58, (2005) (internal citations omitted). To satisfy this standard, the Government "need not present direct evidence of defendants' knowing participation in the customs violations." *Id.* Instead, this Court has consistently found that a plaintiff may meet its burden of proof by circumstantial evidence because "it is seldom that a fraud or conspiracy to cheat can be proved in any other way than by circumstantial evidence." *Id.* (internal citations omitted in original). Lastly, a violation of Section 1592(a) under the culpability level of fraud is "punishable by a civil penalty in an amount not to exceed the domestic value of the merchandise." 19 U.S.C. § 1592(c)(1).

B. Gross Negligence

Section 1592(e)(3) provides that where the proceeding for the recovery of a monetary penalty is based on gross negligence, the Government bears the burden of proof to establish all elements of the alleged violation. 19 U.S.C. § 1592(e)(3). An importer's culpability level of gross negligence is established if it is found that the importer "behaved willfully, wantonly, or with reckless disregard in its failure to ascertain both the relevant facts and the statutory obligation, or acted with an utter lack of care." *United States v. Ford Motor Co.*, 463 F.3d 1267, 1292 (Fed. Cir. 2006). *See also Mach. Corp. of Am. v. Gullfiber AB*, 774 F.2d 467, 473 (Fed. Cir. 1985) ("The gross negligence standard has been defined as requiring willful, wanton, or reckless misconduct, or evidence of utter lack of all care" (internal

citation omitted)). Therefore, the Government must prove that an act or acts were conducted by a defendant "with actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute." *United States v. Univar USA Inc.*, 42 CIT __, __, 355 F. Supp. 3d 1225, 1254 (2018) (internal citations omitted). Ultimately, a violation of Section 1592(a) under the culpability level of gross negligence is "punishable by a civil penalty in an amount not to exceed — (A) the lesser of — (i) the domestic value of the merchandise, or (ii) four times the lawful duties, taxes, and fees of which the United States is or may be deprived, or (B) if the violation did not affect the assessment of duties, 40 percent of the dutiable value of the merchandise." 19 U.S.C. § 1592(c)(2).

C. Negligence

Section 1592(e)(4) instructs that when a proceeding for the recovery of a monetary penalty is based on negligence, the Government bears the burden of proof to establish that the defendant's act or omission constitutes the violation. 19 U.S.C. § 1592(e)(4). The defendant, on the other hand, bears the burden of proof to show that the act or omission did not occur as a result of negligence. *Id.* Therefore, "[o]nce the government shows materiality and falsity," negligence is established if a defendant does not carry its burden by failing to argue that the acts or omissions did not occur as a result of negligence. *United States v. Chavez*, Slip Op. 2017–140, 2016 Ct. Int'l Trade LEXIS 26 at *9 (CIT October 10, 2017) (internal citations omitted) (finding that defendant's failure to appear in the case meant that there was no claim before the court that defendant exercised "'reasonable care and competence' to ensure the accuracy of the classifications for the entries at issue"). To meet the reasonable care standard, an importer or his agent must "review information regarding the nature and classification of the imported merchandise and information on the underlying transaction, including review of available documentation, to ensure that the merchandise is properly classified and assessed with appropriate duties . . . upon entry." *United States v. Six Star Wholesale, Inc.*, 43 CIT__, __, 359 F. Supp. 3d 1314, 1320 (2019) (citing 19 U.S.C. § 1484(a)(1)). Finally, a violation of Section 1592(a) under the culpability level of negligence is "punishable by a civil penalty in an amount not to exceed — (A) the lesser of — (i) the domestic value of the merchandise, or (ii) two times the lawful duties, taxes, and fees of which the United States is or may be deprived, or (B) if the violation did not affect the assessment of duties, 20 percent of the dutiable value of the merchandise." 19 U.S.C. § 1592(c)(3).

DISCUSSION

Obtaining a default judgment under USCIT Rule 55 is a two-step process when a party fails to plead or otherwise defend — an entry of default followed by an entry of a default judgment. *Six Star,* 359 F. Supp. 3d at 1318. The Court undertook the first step, an entry of default, on July 24, 2019, when Cruzin Cooler, LLC and Bad Lama failed to "otherwise defend" by not having counsel enter appearances on their behalves. Entry of Default, ECF No. 55. The court, therefore, turns to the second step. The court "will enter a default judgment against [a defendant] if (1) Plaintiff's allegations in its complaint establish liability [under Section 1592] as a matter of law, and (2) Plaintiff's claim [for damages] is for a sum certain or for a sum that can be made certain by computation." *Six Star*, 359 F. Supp. 3d at 1318 (internal citation omitted).

I. Liability

Section 1592 states that "no person, by fraud, gross negligence, or negligence . . . may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of . . . any document or electronically transmitted data or information, written or oral statement, or act which is material and false." 19 U.S.C. § 1592(a)(1). Cruzin Cooler, LLC and Bad Lama "entered merchandise into the commerce of the United States by means of . . . any document or electronically transmitted data or information, written or oral statement, or act . . . ." Accordingly, the court must determine (A) whether the information was material and false, and (B) whether the defaulted defendants acted by fraud, gross negligence, or negligence.

A. Cruzin Cooler, LLC and Bad Lama Supplied Material and False Information to Customs

In the context of Section 1592, a misclassification of merchandise on Customs' entry documentation establishes a false statement. *Int'l Trading Servs.*, 222 F. Supp. 3d at 1332. The Cruzin Cooler, LLC entries and Bad Lama entries are all misclassified merchandise listed under improper headings; therefore, the information and statements provided by Cruzin Cooler, LLC and Bad Lama to support those classifications were false. Compl. ¶¶ 7, 13.

Information is material under Section 1592 if it influences or is capable of influencing Customs' classification of merchandise or Customs' determination of an importer's liability for duty. 19 C.F.R. Pt.

171, App. B(B) (2011).[10] The false information provided by Cruzin Cooler, LLC and Bad Lama was material because it influenced Customs' determination of the defaulted defendants' liability for duties. Consequently, the entry by Cruzin Cooler, LLC, and Bad Lama of the merchandise under incorrect subheadings denied the Government of revenue that was properly due. Compl. ¶¶ 22, 25.

B. Misstatements from Cruzin Cooler, LLC Were Made with Gross Negligence and Bad Lama's Misstatements Were Made Fraudulently

1. Cruzin Cooler, LLC Acted with Gross Negligence

The Government alleges that Cruzin Cooler, LLC acted with gross negligence, and, in the alternative, negligence. Compl. ¶ 22. Gross negligence is established by proving that a defendant acted with "actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute." *Univar USA Inc.*, 355 F. Supp. 3d at 1254. The Government argues that Cruzin Cooler, LLC was grossly negligent when, despite having been issued the Informed Compliance Notice in September 2010, Cruzin Cooler, LLC submitted entries for parts under a duty-free classification when the correct classification was dutiable. Pl. Mot. at 15.

The court agrees. The Court previously has found, in an action under Section 1592, that a plaintiff met its burden for proving that defendant's level of culpability constituted gross negligence by showing that after being alerted to misclassifications by Customs, the defendant continued to make additional entries using the incorrect classification. *See United States v. Sterling Footwear, Inc.*, 41 CIT __, __, 279 F. Supp. 3d 1113, 1139 (2017) ("[Defendant] failed to correct its errors when pointed out by CBP and, instead, continued to make entries using the incorrect classification. Plaintiff has demonstrated [defendant]'s gross negligence by a preponderance of the evidence"). The Cruzin Cooler, LLC entries were imported after Cruzin Cooler, LLC received the initial Informed Compliance Notice notifying it that the parts should be imported under subheading 3923.10.0000 with a 3 percent duty-rate, and subheading 8714.99.8000 with a 10 percent duty-rate, instead of a duty-free rate. Compl. ¶ 5. In a similar fashion, in February 2011, Cruzin Cooler, LLC classified entry 53102683371 under a duty-free heading, notwithstanding that in January 2011, Customs had sent its second Informed Compliance Notice to Cruzin

[10] The relevant subsection of Appendix B to Part 171 has remained substantively unchanged since the 2011 code version. *Compare* 19 C.F.R. Pt. 171, App. B(B) (2011) *with* 19 C.F.R. Pt. 171, App. B(B) (2020).

Cooler, LLC making clear the marking and classification issues with Cruzin Cooler's importations. Compl. ¶ 10.

2. Bad Lama Acted Fraudulently

The Government alleges that Bad Lama acted fraudulently when importing the Bad Lama entries. The Government argues that Bad Lama's fraudulent acts are evidenced by "Bad Lama's failure to act in accordance with the September 2010 and January 2011 Informed Compliance Notices, Binding Ruling N151635, the additional guidance given by [Customs] to Mr. Beal, as well as the formation of Bad Lama for the purpose of avoiding [Customs'] scrutiny." Pl. Mot. at 14. The culpability level of fraud requires that the Government establish the alleged violation by clear and convincing evidence. 19 U.S.C. § 1592(e)(2). Therefore, the question that must be addressed, when all reasonable inferences are drawn in favor of Customs, is whether there is sufficient circumstantial evidence for a reasonable trier of fact to infer defendant's knowing participation in the customs violations at issue. *Pan Pac. Textile Group, Inc.*, 295 F. Supp. 2d at 1258.

The court finds that the answer to this inquiry is yes. There is sufficient evidence for a reasonable trier of fact to infer that Bad Lama knowingly participated in the customs violations. The majority of the Government's proffered evidence for a fraudulent culpability level relies in large part on connecting Bad Lama to Cruzin Cooler, LLC and CSUSA. A discussion of successor liability in a Section 1592 analysis is useful in identifying a knowing relationship between Bad Lama and both Cruzin Cooler, LLC and CSUSA, notwithstanding that the case at hand is not one of successor liability.[11] The Court in *United States v. CTS Holding, LLC* found that, in the customs context, a continuation could be evidenced by companies having the same registered agent, sharing at least one officer, having the same address and engaging in the same import activity. Slip Op. 2015–70, 2015 Ct. Int'l Trade LEXIS 71 at *34 (CIT June 30, 2015) (citing *Bud Antle, Inc. v. E. Foods, Inc.*, 758 F.2d 1451, 1458–59 (11th Cir. 1985)).

First, Bad Lama was related at all relevant times to Cruzin Cooler, LLC and CSUSA through Mr. Beal. Mr. Beal was the owner of all three companies and the registered agent for both Bad Lama and Cruzin Cooler, LLC. Compl. ¶¶ 3, 10. Bad Lama and Cruzin Cooler, LLC had the same address. Compl. ¶ 3. Bad Lama and Cruzin Cooler,

[11] This Court has held that corporate successors may be held liable for their predecessors' liabilities in Section 1592 actions. *United States v. CTS Holding, LLC*, Slip Op. 2015–70, 2015 Ct. Int'l Trade LEXIS 71 at *28 (CIT June 30, 2015). The Court in *CTS Holding*, stated that a corporate successor is responsible for its predecessor's debts if the successor is a "mere continuation of its predecessor." *Id.* at *33 (internal citations omitted).

LLC sold the same Cruzin Cooler parts and CSUSA sold similar Cruzin Cooler devices. Compl. ¶ 10.

The court deems that it is reasonable to find that Bad Lama knew of the two Informed Compliance Notices that Cruzin Cooler, LLC received and the Binding Ruling N151635 issued to CSUSA. Mr. Beal, representing Cruzin Cooler, LLC, met with Customs officials and was told in person that the classification of certain parts under the duty-free heading was improper. Compl. ¶¶ 5, 10. Mr. Beal was on notice that the classification of certain parts was improper, and yet, he knowingly continued to misclassify the parts after he formed his new company, Bad Lama. In fact, there is evidence in the well-pled complaint to indicate that Mr. Beal created Bad Lama precisely because of the attention Cruzin Cooler, LLC received from Customs. Compl. ¶ 12. As stated above, Mr. Beal revealed to Customs, employees of Cruzin Cooler, LLC, and one of his customs brokers that Mr. Beal created Bad Lama to avoid scrutiny by Customs. *Id.* Additionally, Bad Lama entries UPS54173946 and UPS84687215 were invoiced in direct violation of Binding Ruling N151635. Compl. ¶ 15. A reasonable trier of fact could find that Bad Lama knowingly violated the two Informed Compliance Notices and Binding Ruling N151635.

Additionally, the Bad Lama entries revealed false statements on the Customs 7501 forms. Compl. ¶ 19. Bad Lama stated that it was "not related" to the company that manufactured the goods. *Id.* However, there is evidence in the record that contradicts Bad Lama's assertion. The evidence shows that Mr. Beal had an ownership interest in the manufacturing company and that an employee of Bad Lama was also on the payroll of the manufacturing company. *Id.* Mr. Beal, as the owner and agent who "handled all customs related business on behalf of Bad Lama" would have known of his ownership interest in the manufacturing company. Compl. ¶ 11. Mr. Beal would also have had knowledge of the merchandise he was importing.

II. Damages

A. Assessing the Fourteen Factors to Determine Civil Penalty

Section 1592(e)(1) dictates that the court decide the amount of the civil penalty *de novo*. *Ford Motor Co.*, 463 F.3d at 1341. In a Section 1592 action, "[t]he court ordinarily considers fourteen non-exclusive factors to determine the appropriate penalty amount."[12] *United States v. Deladiep, Inc.*, 41 CIT __, __, 255 F. Supp. 3d 1326, 1341

[12] The fourteen factors referenced in *Deladiep* were identified in *United States v. Complex Machine Works Co*. and include the following: (1) the defendant's good faith effort to comply with the statute; (2) the defendant's degree of culpability; (3) the defendant's history of previous violations; (4) the nature of the public interest in ensuring compliance with the

(2017). However, Cruzin Cooler, LLC and Bad Lama have failed to appear, which leaves the court with an incomplete record to assess the fourteen factors. *See id.* Where there is an incomplete record, this Court has applied "differing approaches in determining the amount of the penalty" and has not always applied the *Complex Mach. Works Co.* factors. *United States v. Horizon Prods. Int'l. Inc.*, 41 CIT __, __, 229 F. Supp. 3d 1370, 1379 (2017). In *Horizon Prods. Int'l. Inc.*, the Court determined that it was appropriate to "weigh[ ] any applicable mitigating or aggravating considerations" because "[a] modest, but not a full, record exists, upon which the court may rely in determining the appropriate penalty." *Id*. *See also Deladiep*, 255 F. Supp. 3d at 1341 ("When a defendant fails to appear, the court will determine the appropriate penalty amount in light of the totality of the evidence, weighing mitigating circumstances that support a lower penalty and aggravating circumstances that support a higher penalty.") Additionally, when the court analyzes the amount of penalties for Cruzin Cooler, LLC and Bad Lama, "[t]he court will not presume that the statutory maximum is the starting point . . . ." *Six Star*, 359 F. Supp. 3d at 1320. The court now turns to the weighing of any mitigating or aggravating circumstances.

1. Defendant's Character: Good Faith Effort to Comply, Degree of Culpability, and History of Prior Violations

Cruzin Cooler, LLC did not show a good faith effort to comply with the statute when it disregarded Customs' September 2010 Informed Compliance Notice, leading this court to determine the culpability level to be gross negligence for Cruzin Cooler, LLC. Pl. Mot. at 17. Bad Lama did not show a good faith effort to comply with the statute as Bad Lama was formed by Cruzin Cooler, LLC to avoid its obligations under the statute. Compl. ¶ 12. The creation of Bad Lama in this context contributes further to a lack of good faith by Cruzin Cooler, LLC. *Id*. Thus, Bad Lama's culpability is at the highest level — fraud. Compl. ¶ 25. Further, Mr. Beal, Bad Lama's owner, had a history of previous violations, and when Customs sought to address these violations, he created Bad Lama in an attempt to continue the violations without having to face scrutiny. Compl. ¶ 12.

regulations involved; (5) the nature and circumstances of the violation at issue; (6) the gravity of the violation; (7) the defendant's ability to pay; (8) the appropriateness of the size of the penalty to the defendant's business and the effect of a penalty on the defendant's ability to continue doing business; (9) that the penalty not otherwise be shocking to the conscious of the court; (10) the economic benefit gained by the defendant through the violation; (11) the degree of harm to the public; (12) the value of vindicating the agency authority; (13) whether the party sought to be protected by the statute had been adequately compensated for the harm; and (14) such other matters as justice may require. *See United States v. Complex Machine Works Co.*, 23 CIT 942, 949–50, 83 F. Supp. 2d 1307, 1315 (1999).

2. Seriousness of Offense: Public Interest in Compliance, Nature and Circumstances of Violation, and Gravity of Violation

The public has a great interest in ensuring the "truthful and accurate submission of documentation to Customs and the full and timely payment of duties required on imported merchandise." *United States v. Complex Mach. Works Co.*, 23 CIT 942, 952, 83 F. Supp. 2d 1307, 1317 (1999). The nature and circumstances also imply that heavy penalties are warranted as there was a continuing failure to comply with Customs' Informed Compliance Notices. Compl. ¶ 12. The gravity of the violations in the instant case is high also because this was "not an isolated occurrence, but [rather] presents a pattern of gross disregard for and evasion of the Customs laws of the United States." *United States v. New-Form Mfg. Co.*, 27 CIT 905, 922, 277 F. Supp. 2d 1313, 1329 (citing *Complex Mach. Works Co.*, 83 F. Supp. 2d at 1317–18).

3. Practical Effect of Penalty: Defendant's Ability to Pay, Size of Penalty in Relation to Defendant's Business and Effect on Ability to Continue Doing Business, and Whether Penalty Shocks the Conscience

Due to a failure to defend by both Cruzin Cooler, LLC and Bad Lama, the court lacks information as to the defaulted defendants' ability to pay and as to the effect of the penalty on defaulted defendant's ability to continue to do business. Compl. ¶ 24. Nevertheless, the loss of revenue to the Government was $3,583.16 from Cruzin Cooler, LLC and $16,030.11 from Bad Lama. Compl. ¶ 22. In total, the civil penalty amount sought in the Government's well-pled complaint of $14,332.64 from Cruzin Cooler, LLC and $852,088.45 from Bad Lama is undoubtedly a large sum of money; however, application in this case of the statutory penalty range is not shocking to the conscience of the court given the blatant and intentional disregard for and violation of U.S. law. *Complex Mach. Works Co.*, 83 F. Supp. 2d at 1319.

4. Public Policy Concerns: Degree of Harm to Public, Value of Vindicating Agency Authority, and Whether Damaged Party Has Been Compensated for Harm

A review of the factors supports a substantial penalty and does not reveal mitigating factors for Cruzin Cooler, LLC and Bad Lama. Here, public policy was significantly harmed. Customs was "forced to conduct a multi-year investigation and litigation seeking to recoup

the penalties." Pl. Mot at 18 citing *New-Form Mfg. Co.,* 277 F. Supp.2d at 1331. Customs also spent much time and energy sending Informed Compliance Notices and even met with Mr. Beal and his attorney in person to ensure compliance with U.S. import laws. *See Six Star*, 359 F. Supp. 3d at 1322 (the court noted public policy considerations, which include "leaving Customs to expend resources to seek and obtain some payment from secondary parties"). As it stands, neither Cruzin Cooler, LLC nor Bad Lama has made any payment. Pl. Mot at 5–6.

B. Cruzin Cooler, LLC and Bad Lama Are Liable for the Maximum Civil Penalties

Section 1592 provides a maximum civil penalty amount for grossly negligent violations that affect the assessment of duties as the lesser of the domestic value of the merchandise or four times the lawful duties, taxes, and fees of which the United States is deprived. 19 U.S.C. § 1592(c)(2). Section 1592 also provides that the maximum civil penalty amount for fraudulent violations is the domestic value of the merchandise. 19 U.S.C. § 1592(c)(1). The Government alleges four primary reasons that Cruzin Cooler, LLC and Bad Lama are liable for the maximum civil penalties of $14,332.64 and $852,088.45, respectively: (1) a high degree of culpability; (2) public interest reasons such as inaccurate submission of documentation to Customs; (3) failure to pay required duties in a full and timely manner; and, (4) the importance of vindicating Customs' authority. Pl. Mot. at 17–18. As discussed above in II.A, a review of the mitigating and aggravating circumstances does not make a case for a lesser civil penalty for Cruzin Cooler, LLC or Bad Lama. *Complex Mach. Works Co.*, 83 F. Supp. 2d at 1316. As such, the court finds appropriate and grants the Government the maximum civil penalties for grossly negligent violations by Cruzin Cooler, LLC and for fraudulent violations by Bad Lama under Section 1592.

C. The Government Is Also Entitled to Post-Judgment Interest and Costs

The Government may be awarded post-judgment interest in a civil case on the penalty amounts established in 28 U.S.C. § 1961. Additionally, Rule 55(b) requires that the court, when awarding a judgment to a plaintiff in a default case, also "enter costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person." USCIT R. 55(b). *See Deladiep*, 255 F. Supp. 3d at 1336. Therefore, the court awards the Government post-judgment interest pursuant to 28 U.S.C. § 1961, and costs.

CONCLUSION

In 1980, Herb Brooks coached the United States Men's Olympic hockey team to one of the most stunning upset victories in sports history in a feat that became known as the "Miracle on Ice." On the evening of February 20, 1980, in Lake Placid, New York, in an arena that now bears his name, Coach Brooks spoke to his team, challenged and motivated the players as never before, as they prepared to take to the ice to take on — and beat — the odds-on favorite, four-time defending, Gold Medal champion Soviet team:

> Great moments are born from great opportunity, and that's what you have here tonight, boys. That's what you've earned here tonight. One game; if we played them ten times, they might win nine. But not this game, not tonight. Tonight, we skate with them. Tonight we stay with them, and we shut them down because we can. Tonight, we are the greatest hockey team in the world.[13]

Success in litigation, especially within the area of international trade and customs, is far from certain and rests always on the correct application of the pertinent law to the facts presented. Regardless of what the odds may be, all favorable outcomes begin with a defense.

* * *

In the instant case, Cruzin Cooler, LLC and Bad Lama failed to "otherwise defend," and as such were found by this Court to be in default. Now, for the reasons set forth above, the court enters a default judgment against the defaulted defendants Cruzin Cooler, LLC and Bad Lama for the amounts of $14,332.64 and $852,088.45, respectively, plus post-judgment interests and costs.

Dated: July 9, 2020
New York, New York

/s/ Timothy M. Reif
TIMOTHY M. REIF, JUDGE

[13] Coach Herb Brooks, Pregame Speech to Team USA Men's Hockey, 1980 Winter Olympic Games, Lake Placid, New York (Feb. 20, 1980).

Slip Op. 20–96

MAGNUM MAGNETICS CORPORATION, Plaintiff, v. UNITED STATES, Defendant, and MAGNETIC BUILDING SOLUTIONS, Defendant-Intervenor.

Before: Jane A. Restani, Judge
Court No. 19–00126

[Commerce's Scope Ruling finding the subject merchandise outside of the scope of the relevant antidumping and countervailing duty orders is sustained]

Dated: July 13, 2020

Ritchie T. Thomas, *Jeremy W. Dutra*, and *Christopher D. Clark*, Squire Patton Boggs (US) LLP, of Washington, D.C., for Plaintiff Magnum Magnetics Corporation.

Jason M. Kenner, Trial Attorney, and Claudia Burke, Assistant Director, U.S. Department of Justice, Civil Litigation Division, Commercial Litigation Branch, of New York, N.Y., for Defendant United States of America. Of counsel on the brief was *Brandon J. Custard*, Attorney, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement & Compliance, of Washington, D.C.

Melissa M. Brewer and *Laurence J. Lasoff*, Kelley Drye & Warren, LLP, of Washington, D.C., for Defendant-Intervenor Magnetic Building Solutions.

OPINION

Restani, Judge:

This action challenges a final scope ruling of the United States Department of Commerce, International Trade Administration ("Commerce") regarding certain flexible magnets from the People's Republic of China ("PRC"), imported by Defendant-Intervenor Magnetic Building Solutions ("MBS"). Commerce determined that MBS's magnets are excluded from the scope of the antidumping and countervailing duty orders because they are "*printed* flexible magnets" of a kind that the orders' plain text expressly excludes. *See Scope Ruling on the Antidumping and Countervailing Duty Orders on Raw Flexible Magnets from the People's Republic of China: Request by Magnetic Building Solutions*, A-570–922, C-570–923 (Dep't Commerce June 19, 2019) ("*Scope Ruling*").

Plaintiff, Magnum Magnetics Corporation ("Magnum") moves for judgment on the agency record and asks the court to hold that Commerce's determination is contrary to the text of the antidumping and countervailing duty orders, and therefore, is unsupported by substantial evidence or otherwise not in accordance with law. *See* Mem. of P. & A. in Supp. of Pl. Magnum Magnetic Corp.'s Rule 56.2 Mot. For J. on the Agency R., ECF No. 22 at 12 (Dec. 2, 2019) ("Magnum Br."). Defendant, the United States of America (the "government"), responds that Commerce's scope ruling is supported by substantial evidence and otherwise in accordance with law, and asks the court to

sustain Commerce's determination. *See* Defendant's Response to Pl. Rule 56.2 Mot. For J. on the Agency R., ECF No. 25 at 7 (Mar. 3, 2020) ("Gov. Br."). For the following reasons, the court affirms Commerce's scope ruling.

BACKGROUND

In 2008, Commerce published antidumping and countervailing duty orders on certain flexible magnets from the PRC. *See Antidumping Duty Order: Raw Flexible Magnets from the People's Republic of China*, 73 Fed. Reg. 53,847 (Dep't Commerce Sept. 17, 2008) ("*ADD Order*"); *Raw Flexible Magnets from the People's Republic of China: Countervailing Duty Order*, 73 Fed. Reg. 53,849 (Dep't Commerce Sept. 17, 2008) ("*CVD Order*") (collectively, the "Orders"). The Orders cover merchandise under subheadings 8505.19.10 and 8505.19.20 of the Harmonized Tariff Schedule of the United States ("HTSUS"), under which the MBS magnets are classified.[1] Specifically, the Orders include the following merchandise:

> [C]ertain flexible magnets regardless of shape, color, or packaging. Subject flexible magnets are bonded magnets composed (not necessarily exclusively) of (i) any one or combination of various flexible binders (such as polymers or co-polymers, or rubber) and (ii) a magnetic element, which may consist of a ferrite permanent magnet material (commonly, strontium or barium ferrite, or a combination of the two), a metal alloy (such as NdFeB or Alnico), any combination of the foregoing with each other, or any other material capable of being permanently magnetized.
>
> Subject merchandise may be in either magnetized or unmagnetized (including demagnetized) condition, and may or may not be fully or partially laminated or fully or partially bonded with paper, plastic, or other material, of any composition and/or color. Subject flexible magnets may be uncoated or may be coated with an adhesive or any other coating or combination of coatings.

ADD Order, 73 Fed. Reg. at 53,847; *CVD Order*, 73 Fed. Reg. at 53,850. But, the Orders expressly exclude:

> [P]rinted flexible magnets, defined as flexible magnets (including individual magnets) that are laminated or bonded with paper, plastic, or other material if such paper, plastic, or other material bears printed text and/or images, including but not

[1] The Orders provide that the HTSUS subheadings are "provided only for convenience and customs purposes; the written description of the scope of the order is dispositive." *ADD Order*, 73 Fed. Reg. at 53,847; *CVD Order*, 73 Fed. Reg. at 53,850.

> limited to business cards, calendars, poetry, sports event schedules, business promotions, decorative motifs, and the like.

ADD Order, 73 Fed. Reg. at 53,487; *CVD Order*, 73 Fed. Reg. at 53,850. Nevertheless, the foregoing "exclusion does not apply" to those "printed flexible magnets" whose printing consists "only of the following:"

> [A] trade mark or trade name; country of origin; border, stripes, or lines; any printing that is removed in the course of cutting and/or printing magnets for retail sale or other disposition from the flexible magnet; manufacturing or use instructions (e.g., "print this side up," "this side up," "laminate here"); printing on adhesive backing (that is, material to be removed in order to expose adhesive for use such as application of laminate) or on any other covering that is removed from the flexible magnet prior or subsequent to final printing and before use; non-permanent printing (that is, printing in a medium that facilitates easy removal, permitting the flexible magnet to be re-printed); printing on the back (magnetic) side; or any combination of the above.

ADD Order, 73 Fed. Reg. at 53,487; CVD Order, 73 Fed. Reg. at 53,850. The parties do not dispute the meaning of the main language of the Orders, Magnum instead challenges Commerce's determination that the MBS magnets fall within the exclusion. *See* Magnum Br. at 3–19. The MBS magnets are raw flexible magnetic underlays sold in both rolls and panels. *Scope Ruling* at 3. The Orders address three types of underlays. *Id.* at 3, 10. The first underlay is sold in a roll and is "rolled onto the floor with the non-magnetized side facing down." *Id.* Users then purchase flooring material with a magnetic backing to attach to the magnetized side of the product. *Id.* The non-magnetized side of the product is "permanently bonded" with paper printed with a design, such as hardwood. *Id.* The second underlay is identical, except that the non-magnetized side with the hardwood design is covered in adhesive material and a strip of removable paper, so that the product can be stuck to the floor. *Id.* at 3, 10. The third underlay is sold in panels with an adhesive backing and is meant to be stuck to walls. *Id*. Customers similarly can attach wall coverings with magnetic backing to the product. *Id.* at 3. In sum, each of the three types of underlays have a permanent hardwood design on the non-magnetized side. *Id.* at 3–4.

After reviewing the "language of the scope, the description of the products contained in MBS's Scope Inquiry, prior scope determinations, including in the investigation, and the [International Trade

Commission ("ITC")] Final Injury Determination," Commerce determined that the MBS magnets are excluded from the scope of the Orders. *Scope Ruling* at 12. In particular, Commerce considered two prior scope rulings in arriving at its determination. *Id.* at 4–5, 12. Commerce found that although the list of exemplars in the exclusion language did not apply to MBS magnets, the list was a non-exhaustive guideline and that the permanent decorative motif on the underlays rendered them subject to the exclusion. *Id.* at 13–15.

Magnum contended that MBS's magnets are in-scope because: 1) they do not serve a decorative purpose, 2) they are not like the products listed in the exclusion, and 3) the design is printed on the back of the product, and thus falls within an exception to the exclusion. *See* Magnum Br. at 6–12. The government argues that Commerce did not err in finding the merchandise out of scope. Gov. Br. at 7–18.[2]

JURISDICTION AND STANDARD OF REVIEW

The court's jurisdiction to review a challenge to a final scope ruling is pursuant to 19 U.S.C. § 1516a(a)(2)(B)(vi) and 28 U.S.C. § 1581(c) (2012).[3] Unless "unsupported by substantial evidence on the record, or otherwise not in accordance with law," the court upholds Commerce's determination that the scope of an antidumping or countervailing duty order excludes the subject merchandise. 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1071 (Fed. Cir. 2001) (internal quotation and citations omitted).

DISCUSSION

I. Legal Framework

In making a scope ruling, Commerce must look first to the language of the antidumping or countervailing duty order. *See Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097–98 (Fed. Cir. 2002). Commerce must also consider the (k)(1) sources: "[1] The descriptions of the merchandise contained in the petition, [2] the initial investigation, and [3] the determinations of [Commerce] (including prior scope determinations) and the Commission." 19 C.F.R. § 351.225(k)(1). If the sources in (k)(1) are not dispositive, Commerce must then con-

[2] In lieu of a brief, MBS submitted a letter supporting Commerce's final scope ruling. *MBS Letter Re: Magnum Magnetics Corp. v. United States, Court No. 19–00126*, ECF No. 26 (March 4, 2020).

[3] Further citations to the United States Code are to the 2012 edition unless otherwise indicated.

sider the (k)(2) factors. 19 C.F.R. § 352.225(k)(2). "Commerce cannot 'interpret' an antidumping or countervailing duty order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms." *See Duferco Steel*, 296 F.3d at 1095 (quoting *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2011)).

II. Language of the Orders

Commerce found that the MBS magnets are excluded from the scope of the Orders because the plain language excludes printed flexible magnets, and because the MBS magnets do not conform to any of the exceptions to the exclusion. *Scope Ruling* at 18.

Magnum contends that the MBS magnets are not like the enumerated excluded items: "business cards, calendars, poetry, sports event schedules, business promotions, decorative motifs, and the like." Magnum Br. at 6–10. It argues that the list implies that any decorative motif must be visible during use for merchandise to merit exclusion. *Id.* The government responds that the phrase "including but not limited to" in the exclusion language renders the list informational, not exhaustive, and that the product need not be like the other products on the list to qualify for the exclusion. Gov. Br. at 9–11. In coming to this conclusion, the government stresses that although Commerce may clarify existing orders, it may not interpret them in a way to change the scope of the orders. *See* Gov. Br. at 11 (citing *Global Commodity Grp. LLC v. United States*, 709 F.3d 1134, 1138 (Fed. Cir. 2013)).

Magnum argues that the unifying characteristic of "business cards, calendars, poetry, sports event schedules, business promotions, decorative motifs, and the like" is to display a printed design to the user, either to relay information or decorate the surrounding space. *See* Magnum Br. at 7–8. Accordingly, it contends that any excluded article should serve a similar purpose to merit exclusion. *Id.* MBS's magnets do not ultimately display information or decorate the space they are installed in. *Scope Ruling* at 3–4, 7. Their design is either never visible, or briefly visible after they are removed from their packaging until they are placed design-side down on a floor or wall. *See id.* Therefore, in Magnum's view, the product is not "like" the products enumerated in the exclusion. Magnum Br. at 7–8.

The utilization of the phrase "including but not limited to," however, supports the government's position. The list: "business cards, calendars, poetry, sports event schedules, business promotions, decorative motifs, and the like," *see Scope Ruling* at 2, is exemplary but not exhaustive, and was justifiably read to include products without

a common purpose or unifying quality with the enumerated items. MBS's product meets the requirements of the exclusion; it is permanently bonded with paper bearing a conforming printed image. Further, Magnum does not argue, nor does the court find, that any of the exceptions to the exclusion apply to the MBS magnets. It was reasonable based on the language of the Orders for Commerce to determine that merchandise need not have a design visible after installation to merit exclusion.

III. Relevant (k)(1) Sources

Turning to the (k)(1) sources, none appear inconsistent with Commerce's ruling. The investigation report is of little probative value because MBS did not produce the magnets at issue at the time of the underlying petition and investigation. *See Raw Flexible Magnets from the People's Republic of China; Scope Request from Magnetic Building Solutions LLC – Final Scope Determination*, A-570–922, C-570–923 at 11–12 (Dep't Commerce Mar. 6, 2018) ("*MBS 2018 Ruling*"). With that said, there are indications in the investigation documents that printed products, as stated by the ITC, generally do not fall within the scope of the Orders, as "Raw flexible magnets" is a term "adopted for the purposes of these investigations to distinguish between the unprinted products of raw magnet producers such as Magnum, Flexmag, and Holm, and the printed magnets and other products of their non-distributor customers." *Raw Flexible Magnets from China and Taiwan*, USITC Pub. 4030, Inv. Nos. 701-TA-452 and 731-TA-1129-1130 at I-7, n. 15 (May 8, 2008) (final determination) ("Investigation Report"); *see also id.* at 5 (noting that "Commerce has excluded most types of printed flexible magnets from the scope of investigation."). In its scope ruling, Commerce mainly focuses on two prior determinations in concluding that the MBS magnets are properly excluded from the scope of the Orders. *See Scope Ruling* at 4–5. Each is addressed in turn.

First, the government argues that its determination is consistent with a prior scope ruling on a magnetic label holder with a zebra print design. *See* Gov Br. at 16–17. In 2017, Tatco Products, Inc. ("*Tatco*") requested a scope ruling for four magnetic label holders. *Scope Ruling on the Antidumping and Countervailing Duty Orders on Raw Flexible Magnets from the People's Republic of China: Request by Tatco Products, Inc.*, A-570–922, C-570–923 at 2 (Dep't Commerce Aug. 23, 2017) ("Tatco Ruling"). The label holders consisted of a raw flexible magnet and a clear plastic pocket heat-sealed to the front of the magnet. *See id.* at 4. Although one of the label holders had zebra stripes printed in black ink on the front of the white magnet, end users could insert a

piece of fiberboard into the plastic pocket, obscuring the design. *See id.* at 4, 7. The government concluded that the zebra-print label holder was exempt from the antidumping order because it contained a permanent printed design on the non-magnetic side of the magnet, rejecting Magnum's argument that the printing was functionally removed before use because it was concealed during use. Id. at 12.

In its brief, Magnum attempts to distinguish *MBS* from *Tatco* by claiming that Tatco's zebra design is not completely covered by the label when in use, and even if it is, the *Tatco* product is meant to be seen while empty, during which time the zebra print serves a decorative purpose. Magnum Br. at 11. In comments made in the *Tatco Ruling*, however, Magnum itself argued that the printing on Tatco's magnets had no function, decorative or otherwise, writing that "Tatco's printed magnets are precisely the type of non-functional printing that is addressed in the scope language." *Tatco Ruling* at 8. Commerce addressed Magnum's argument in *Tatco* by saying: "We disagree with Magnum that the exclusion language of the scope *Orders* contains an exception for printing that is concealed during the use of a flexible magnet." *Id.* at 12. Therefore, by the same logic, Commerce found that MBS's printed flooring magnets can qualify for the exclusion even if the printing is not visible during use and serves no functional purpose. *Scope Ruling* at 15–16.

Second, Commerce issued an earlier scope ruling to MBS for a similar product on March 6, 2018, and determined that the product was in scope "[1] because it is a bonded flexible magnet...[2] it consists of a flexible binder and a magnetic element...combined into a solid sheet by mechanical rolling...[and] [3] none of the exclusions in the scope of the *Orders* are applicable." *MBS 2018 Ruling* at 15–16. The magnetic flooring underlay in that determination was identical to the product at issue here, except that it had "no printing on it." *Scope Ruling* at 4. The government distinguished a previous ruling finding surgical drapes out of scope by noting that, unlike the underlays, the surgical drape magnets were "unprintable and unusable for other purposes" because they were permanently encased in other materials. *MBS 2018 Ruling* at 14.

Commerce's decision to exclude the MBS magnets at issue is consistent with its previous scope rulings. The *MBS 2018 Ruling* is clearly distinguishable because there the product at issue did not have any printing, thereby rendering it not subject to any exclusion. *See MBS 2018 Ruling* at 5, 16. The *Tatco Ruling*, similarly, is entirely consistent with Commerce's decision here. Although the zebra design was obscured when used in certain ways, Commerce determined that

the language of the Orders did not require visibility during use. *Tatco Ruling* at 12. In continuing that logic here, Commerce noted that nothing in the language of the exclusion or the exceptions to the exclusion requires the design to be seen while in use. *Scope Ruling* at 15. Although it may have been reasonable for Commerce to interpret the exclusion language to more closely track the listed exemplars, nothing in the language of the Orders or the (k)(1) sources undermines Commerce's contrary position. *King Supply v. United States*, 674 F.3d 1343, 1348 (Fed. Cir. 2012) (noting that "even if it is possible to draw two inconsistent conclusions from the evidence in the record, such a possibility does not prevent Commerce's determination from being supported by substantial evidence.") (citations omitted). Further, it is important that orders be interpreted consistently and not expanded so that importers and exporters have notice that their merchandise is subject to unfair trade remedies. *See ArcelorMittal Stainless Belgium N.V. v. United States*, 694 F.3d 82, 88 (Fed. Cir. 2012) (noting that "the primary purpose of an antidumping order is to place foreign exporters on notice of what merchandise is subject to duties."); *see also Eckstrom*, 254 F.3d at 1072 ("Commerce cannot 'interpret' an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms.") (citation omitted).

Magnum raises one final argument. It argues that because the MBS magnets are installed with the printed side down, the printed side is the "back" of the product. Magnum Br.at 11–12. In the Orders, Commerce stated that printing "on the back (magnetic) side" does not merit exclusion. ADD Order, 73 Fed. Reg. at 53,487; CVD Order, 73 Fed. Reg. at 53,850. Accordingly, Commerce determined that the "back" of an MBS magnet is the magnetic side, regardless of how the product is positioned. *Scope Ruling* at 16. MBS magnets are printed on the non-magnetic side, i.e. the "front," and therefore are not excluded by the scope language. *Id.* Commerce's finding is based on a reasonable, straightforward reading of the scope language and Magnum cites nothing to call into question this interpretation.

Commerce declined to read into the language of the Orders an exclusion requirement that did not clearly exist and nothing Magnum points to sufficiently undermines that decision. Accordingly, the court sustains Commerce's decision.[4]

[4] Throughout its brief, Magnum appears to argue that MBS is attempting to circumvent the previous scope ruling finding that certain MBS magnets were within the scope of the Orders. *See* Magnum Br. at 3, 6, 10. As the government notes, however, Magnum did not request an anticircumvention inquiry and Commerce did not exercise its discretion to self-initiate one. *See* Gov. Br. at 13; *see also* 19 U.S.C. § 1677j (circumvention of antidumping and countervailing duty orders); 19 C.F.R. §§ 351.225(g–j) (corresponding regulations).

CONCLUSION

For the foregoing reasons, Magnum's motion for judgment on the agency record is denied. The court sustains Commerce's determination that the MBS magnets are excluded from the scope of the Orders. Judgment will enter accordingly.

Dated: July 13, 2020
New York, New York

/s/ Jane A. Restani
JANE A. RESTANI, JUDGE

Given the differing analysis between standard scope rulings and anticircumvention inquiries, it is possible that Commerce would have arrived at a different decision had such a process been pursued. *See Target v. United States*, 578 F. Supp. 2d 1369, 1373 (CIT 2008) (discussing Commerce's practice and the differing statutory and regulatory procedures for anticircumvention inquires as compared to other scope rulings). Nonetheless, Magnum's anticircumvention arguments are beyond the purview of this action. *See Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003) ("If a party does not exhaust available administrative remedies, 'judicial review of Commerce's actions is inappropriate.'") (citation omitted).

Slip Op. 20–97

BOSUN TOOLS CO., LTD. and CHENGDU HUIFENG NEW MATERIAL TECHNOLOGY CO., LTD., Plaintiff and Consolidated Plaintiff, DANYANG NYCL TOOLS MANUFACTURING CO., LTD. et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and DIAMOND SAWBLADES MANUFACTURERS' COALITION, Defendant-Intervenor and Consolidated Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Consol. Court No. 18–00102

[Sustaining in part and remanding in part Commerce's remand redetermination in the seventh administrative review covering the antidumping duty order covering diamond sawblades and parts thereof from the People's Republic of China.]

Dated: July 14, 2020

Gregory S. Menegaz, *J. Kevin Horgan*, and *Alexandra H. Salzman*, deKieffer &Horgan, PLLC, of Washington, DC, for plaintiff, Bosun Tools Co., Ltd.

Lizbeth R. Levinson, *Ronald M. Wisla*, and *Brittney R. Powell*, Fox Rothschild LLP, of Washington, DC, for consolidated plaintiff Chengdu Huifeng New Material Technology Co., Ltd. and plaintiff-intervenors Danyang NYCL Tools Manufacturing Co., Ltd., Danyang Weiwang Tools Manufacturing Co., Ltd., Hangzhou Deer King Industrial and Trading Co., Ltd., Guilin Tebon Superhard Material Co., Ltd., Jiangsu Youhe Tool Manufacturer Co., Ltd., Quanzhou Zhongzhi Diamond Tool Co., Ltd., Rizhao Hein Saw Co., Ltd., and Zhejiang Wanli Tools Group Co., Ltd.

Joseph H. Hunt, Assistant Attorney General, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Franklin E. White, Jr.*, Assistant Director, *Jeanne E. Davidson*, Director. Of Counsel on the brief was *Paul K. Keith*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, of Washington, DC.

Daniel B. Pickard, *Maureen E. Thorson*, and *Stephanie M. Bell*, Wiley Rein, LLP, of Washington, DC, for defendant-intervenor and consolidated defendant-intervenor, Diamond Sawblades Manufacturers' Coalition.

OPINION AND ORDER

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Department" or "Commerce") remand redetermination filed pursuant to the court's order in *Bosun Tools Co. v. United States*, 43 CIT __, 405 F. Supp. 3d 1359 (2019) ("*Bosun I*"). *See also* Redetermination Pursuant to Court Remand Order in *Bosun I*, Mar. 10, 2020, ECF No. 79 ("*Remand Results*"). In *Bosun I*, the court sustained in part and remanded in part Commerce's final determination in the seventh administrative review for the antidumping duty ("ADD") order covering diamond sawblades and parts thereof ("DSBs") from the People's Republic of China ("PRC"). *[DSBs] From the [PRC]*, 83 Fed. Reg. 17,527 (Dep't Commerce Apr. 20, 2018) (final results of [ADD] admin.

review; 2015–2016) ("*Final Results*"), and accompanying Issues & Decision Memo. Admin. Review [ADD] Order on [DSBs] from the [PRC], A-570–900, (Apr. 16, 2018), ECF No. 24–5 ("Final Decision Memo"); *[DBSs] From the [PRC] and the Republic of Korea*, 74 Fed. Reg. 57,145 (Dep't Commerce Nov. 4, 2009) ([ADD] orders).

The court directed Commerce to place the business confidential and public versions of Chengdu Huifeng New Material Technology Co., Ltd.'s ("Chengdu") second supplemental response on the record and consider it for purposes of calculating Chengdu's dumping margin, as well as recalculate any margins affected by a change to Chengdu's margin. *See Bosun I*, 43 CIT at __, 405 F. Supp. 3d at 1366–67. On remand, Commerce, under respectful protest,[1] placed Chengdu's second supplemental response on the record and considered that response, along with Chengdu's responses to two additional supplemental questionnaires issued during the remand proceeding, and calculated an individual rate for Chengdu as well as recalculated the separate rate respondents' rates. *See Remand Results* at 1–2.

Plaintiff Bosun Tools Co., Ltd. ("Bosun") as well as Plaintiff-Intervenors Danyang NYCL Tools Manufacturing Co., Ltd., Danyang Weiwang Tools Manufacturing Co., Ltd., Guilin Tebon Superhard Material Co., Ltd., Hangzhou Deer King Industrial and Trading Co., Ltd., Jiangsu Youhe Tool Manufacturer Co., Ltd., Quanzhou Zhongzhi Diamond Tool Co., Ltd., Rizhao Hein Saw Co., Ltd. and Zhejiang Wanli Tools Group Co., Ltd. (collectively, "separate rate respondents") challenge as unsupported by substantial evidence and not in accordance with law Commerce's calculation of a separate rate respondents' rate. Pl. [Bosun's] Cmts. Opp'n Remand Results at 1, Apr. 10, 2020, ECF No. 82 ("Pl.'s Br."); Pl.-Intervenors' Cmts. [Remand Results] at 1–2, Apr. 10, 2020, ECF No. 84 ("Pl.-Intervenors' Br."). Defendant-Intervenor Diamond Sawblades Manufacturers' Coalition ("DSMC") challenges as unsupported by substantial evidence and contrary to law Commerce's reversal of its original determination to apply adverse facts available with an adverse inference to Chengdu. *See* [DSMC] Comments on [Remand Results] at 3–4, Apr. 10, 2020, ECF No. 81 ("Def-Intervenor's Br."). However, DSMC argues that Commerce did not err in calculating the separate rate respondents' rate. [DSMC] Reply Cmts. [Remand Results] at 3–11, May 21, 2020, ECF No. 88 ("Def.-Intervenor's Reply Br."). Consolidated Plaintiff Chengdu and Defendant request the court to uphold the *Remand Results* in their entirety. Consol. Pl.'s Cmts. [Remand Results], Apr.

[1] By adopting a position forced upon it by the Court "under protest," Commerce preserves its right to appeal. *See Viraj Grp., Ltd. v. United States*, 343 F. 3d 1371, 1376 (Fed. Cir. 2003).

10, 2020, ECF No. 83 ("Consol. Pl.'s Br."); Def.'s Resp. Cmts. Remand Results, May 21, 2020, ECF No. 87 ("Def.'s Br."). For the reasons that follow, the court sustains Commerce's determination of Chengdu's rate and remands for further explanation or consideration the calculation of the rate applicable to Bosun and the separate rate respondents.

BACKGROUND

The court presumes familiarity with the facts of this case as set out in its previous opinion ordering remand to Commerce, and now recounts those relevant to the court's review of the *Remand Results*. *See Bosun I*, 43 CIT at __, 405 F. Supp. 3d at 1363–64. Relevant here, in the seventh administrative review of the ADD order covering DSBs from the PRC,[2] Commerce selected Chengdu and Jiangsu Fengtai Single Entity ("Fengtai") as mandatory respondents.[3] *See* Selection of Respondents for Individual Examination at 8, PD 106, bar code 3566489–01 (Apr. 26, 2017).[4] Commerce found Chengdu qualified for a separate rate.[5] In addition, Commerce rejected as untimely the public and business proprietary versions of Chengdu's second supple-

[2] The seventh administrative review covered subject merchandise entered during the period November 1, 2015 through October 31, 2016. *Initiation of Antidumping & Countervailing Duty Admin. Reviews*, 82 Fed. Reg. 4,294, 4,296 (Dep't Commerce Jan. 13, 2017).

[3] No party challenged Commerce's calculation of Fengtai's rate, and Fengtai is not a party to this consolidated action.

[4] On June 13, 2018, Defendant submitted indices to the public and confidential administrative records underlying Commerce's final determination. Defendant later filed a corrected index to the confidential record. The relevant indices are located on the docket at ECF Nos. 24–1 and 29. Subsequently, on March 24, 2020, Commerce filed on the docket the indices for the remand administrative record at ECF Nos. 801–2. All references to administrative record documents in this opinion are to the numbers Commerce assigned to the documents in the relevant indices.

[5] In antidumping proceedings, Commerce presumes that the export activities of all companies operating in a non-market economy ("NME") country, like the PRC, are subject to government control. [DSBs] From the [PRC]: Decision Memo. for Prelim. Results of [ADD] Admin. Review; 2015–2016 at 4, A-570–900, PD 255, bar code 3646590–01 (Nov. 30, 2017). The presumption is rebuttable, and companies seeking to rebut it file a separate rate application through which they must demonstrate that their export activities are de facto and de jure free of the NME-country's control. *Id.* If a company successfully rebuts the presumption, it is assigned its own separate rate. *Id.*

Congress does not prescribe a method for calculating a separate rate. Congress does, however, in 19 U.S.C. § 1673d(c)(5) prescribe a method for calculating an all-others rate, a rate assigned to non-mandatory respondent companies from a market economy country. Commerce has, by practice, adopted the methodology in 19 U.S.C. § 1673d(c)(5) to calculate a separate rate. *See Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1351–53 (Fed. Cir. 2016); *see also* 19 U.S.C. § 1673d(c)(5). Section 1673d(c)(5) states that the all-others rate shall be the weighted average of the individually investigated exporter's and producer's dumping margins, excluding any margins that are de minimis, zero, or determined entirely by adverse facts available. As a result, the rate assigned to the successful separate rate respondents depends on the rate(s) calculated for the mandatory respondent(s).

mental response. *See* Commerce's Rejection of Chengdu's Second Suppl. Resp. at 1–2, PD 235, bar code 3625400–01 (Oct. 3, 2017). Commerce also denied Chengdu's request for reconsideration. *See generally* Chengdu's Resp. & Req. for Reconsideration of Commerce's Rejection Memo., PD 236, bar code 3627194–01 (Oct. 6, 2017); Commerce's Denial of Chengdu's Reconsideration Req., PD 246, bar code 3635994–01 (Nov. 1, 2017). Given that Commerce found that Chengdu missed the filing deadline[6] and did not act to the best of its ability to supply necessary information, Commerce determined its rate on the basis of total AFA,[7] selecting the PRC-wide entity rate of 82.05 percent as Chengdu's total AFA rate. *See Final Results*, 83 Fed. Reg. at 17,528; *see also [DSBs] From the [PRC]*, 82 Fed. Reg. 57,585, 57,586 (Dep't Commerce Dec. 6, 2017) (prelim. results of [ADD] admin. review; 2015– 2016) ("*Prelim. Results*"), and accompanying Decision Memo. for [Prelim. Results] at 10–13, A-570–900, PD 255, bar code 3646590–01 (Nov. 30, 2017) ("Prelim. Decision Memo."). Likewise, Commerce applied total AFA to determine Fengtai's rate, because Commerce found Fengtai missed filing deadlines and failed to cooperate to the best of its ability. *See* Final Decision Memo. at 7–12, 16–19, 21; *see also* Prelim. Decision Memo. at 13. Commerce assigned the separate rate respondents the same AFA rate.[8] *See Final Results*, 83 Fed. Reg. at 17,528. Bosun and Chengdu initiated separate actions, which were later consolidated, challenging Commerce's rejection of Chengdu's second supplemental response and the application of total AFA to select the rate assigned to Chengdu and the separate rate respondents in the *Final Results*. *See* [Bosun's] Summons, May 4, 2018, ECF No. 1; [Bosun's] Compl., May 4, 2018, ECF No. 6; Order at 2, July 27, 2018, ECF No. 28.[9]

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[6] Chengdu successfully uploaded the unredacted version of its second supplemental submission onto the Enforcement and Countervailing Duty Centralized Electronic Service System ("ACCESS") but was unable to upload the complete redacted version prior to the filing deadline. *See Bosun I*, 43 CIT at __, 405 F. Supp. 3d at 1365.

[7] Parties and Commerce sometimes use the shorthand "adverse facts available" or "AFA" to refer to Commerce's reliance on facts otherwise available with an adverse inference to reach a final determination. However, AFA encompasses a two-partinquiry pursuant to which Commerce must first identify why it needs to rely on facts otherwise available, and second, explain how a party failed to cooperate to the best of its ability as to warrant the use of an adverse inference when "selecting among the facts otherwise available." *See* 19 U.S.C. § 1677e(a)–(b). The phrase "total adverse inferences" or "total AFA" encompasses a series of steps that Commerce takes to reach the conclusion that all of a party's reported information is unreliable or unusable and that as a result of a party's failure to cooperate to the best of its ability, it must use an adverse inference in selecting among the facts otherwise available.

[8] Commerce found that Bosun and Plaintiff-Intervenors were eligible for a separate rate. *See* Final Decision Memo at 21 & n.89; Prelim. Decision Memo at 6–8.

[9] On May 24, 2018, the court granted Plaintiff-Intervenors' motion to intervene as a matter of right. Order, May 24, 2018, ECF No. 20.

In *Bosun I*, the court held Commerce's rejection of Chengdu's second supplemental response was an abuse of discretion and directed Commerce, on remand, to place the submission on the record and consider it for purposes of calculating Chengdu's rate and to recalculate any rates affected by a change to Chengdu's rate. *See Bosun I*, 43 CIT at __, 405 F. Supp. 3d at 1366–67.[10] The court did not reach whether Commerce's use of total AFA to select the margin assigned to Chengdu and the separate rate respondents was contrary to law. *Id.*, 43 CIT at __, 405 F. Supp. 3d at 1367.

On remand, Commerce placed Chengdu's second supplemental response on the record under respectful protest, because Commerce disagrees with the court's direction in *Bosun I*. *See Remand Results* at 1, 6. Commerce considered Chengdu's second supplemental response, as well as its responses to two additional supplemental questionnaires that Commerce issued during the remand proceeding, in determining Chengdu's rate. *Id.* at 1–2, 4. Using that information, Commerce calculated an individual antidumping rate of 0.00 percent for Chengdu. *Id.* at 4. Commerce also assigned the separate rate respondents the average of Chengdu's 0.00 percent rate and Fengtai's AFA 82.05 percent rate, i.e., an all others rate of 41.025 percent. *Id.* at 7–8, 14–18.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2012), which grant the Court authority to review actions contesting the final determination in an administrative review of an antidumping duty order. This Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance

[10] Specifically, the court held that Commerce abused its discretion in rejecting and removing from the record Chengdu's second supplemental response, when Chengdu successfully uploaded the unredacted version, but not the redacted version, of that response onto ACCESS before the filing deadline expired and timely served interested parties a copy of the unredacted submission. *See Bosun I*, 43 CIT at __, 405 F. Supp. 3d at 1364–67. Chengdu had attempted to upload the redacted version prior to the expiry of the filing deadline but was only successful in uploading part and Commerce soon after notified Chengdu to re-file the redacted version, which Chengdu successfully did. *Id.*, 43 CIT at __, 405 F. Supp. 3d at 1365. Given that Commerce and all interested parties had timely received copies of the full, unredacted version of the submission, the court could not conclude that Chengdu's actions infringed or delayed Commerce's review of the information in the submission. *Id.*, 43 CIT at __, 405 F. Supp. 3d at 1366. Further, the court noted that Commerce's rejection of the submission would likely undermine the accurate calculation of dumping margins. *Id.*, 43 CIT at __, 405 F. Supp. 3d at 1366. Therefore, the court ordered Commerce to place Chengdu's submission on the record. *Id.*, 43 CIT at __, 405 F. Supp. 3d at 1366–67.

with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

DISCUSSION

I. Commerce's Calculation of Chengdu's Rate

DSMC argues that Commerce's decision on remand not to apply adverse facts available with an adverse inference to Chengdu is unsupported by substantial evidence and contrary to law, because Commerce had appropriately determined Chengdu's margin on the basis of total AFA in the *Final Results*. *See* Def.-Intervenor's Br. at 3–4. Although DSMC disagrees with the remand order in *Bosun I*, it does not argue that Commerce failed to comply with the court's order or otherwise take issue with the *Remand Results*. *See generally id.* Defendant requests the court to sustain Commerce's calculation of Chengdu's rate because the *Remand Results* comply with the court's remand order. *See* Def.'s Br. at 5–6. Chengdu also requests the court to affirm the remand results. *See* Consol. Pl.'s Br. at 1. Because Commerce placed Chengdu's second supplemental response on the record and considered that response in its determination of Chengdu's rate as directed in *Bosun I*, the court sustains Commerce's determination of Chengdu's rate. *See Remand Results* at 1–4, 6.

II. Commerce's Adjustment of Separate Rate Respondents' Rate

Bosun and separate rate respondents contend that Commerce erred in assigning the separate rate companies an all others rate of the average of Chengdu's >0.00 percent rate and Fengtai's 82.05 percent rate. *See* Pl.'s Br. at 1–2; Pl.-Intervenors' Br. at 1–2. Further, they argue that Commerce's application of the "expected method" under the statute, 19 U.S.C. § 1673d(c)(5), is unsupported by substantial evidence and not in accordance with law. *See* Pl.'s Br. at 1–2; Pl.Intervenors' Br. at 1–2. Defendant and DSMC counter that Commerce reasonably relied upon an "expected method" and that its chosen methodology, as applied, is reasonable and in accordance with law. *See* Def.'s Br. at 6–11; Def.-Intervenor's Reply Br. at 3–10. Likewise, Chengdu requests the court to affirm Commerce's calculation of the separate rate companies' margin. *See* Consol. Pl.'s Br. at 1. For the reasons that follow, Commerce's calculation of the 41.025 percent rate applicable to the separate rate respondents is not supported by substantial evidence.

Commerce normally calculates the all-others rate—or the rate applicable to non-investigated exporters and producers—as the "weighted average of the estimated weighted average dumping margins established for exporters and producers individually examined, excluding any zero and de minimis margins" and margins determined entirely on the basis of facts otherwise available.[11] 19 U.S.C. § 1673d(c)(5)(A).[12] However, where all margins for individually examined exporters and producers are zero, de minimis, or based entirely on facts otherwise available, Commerce "may use any reasonable method to establish the estimated all others rate . . . , including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated." *Id.* at § 1673d(c)(5)(B). The Statement of Administrative Action elaborates that the "expected method[,]" in this scenario, is "to weight-average the zero and de minimis margins and margins determined pursuant to the facts available, provided that volume data is available." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 873 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4201.[13] If the "expected method" is "not feasible" or the method "results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers," Commerce may, instead, "use other reasonable methods." *Id.* Commerce's determination must be supported by substantial evidence. *See Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1353 (Fed. Cir. 2016) (explaining that "Commerce must find based on substantial evidence that there is a reasonable basis for concluding that the separate respondents' dumping is different" to depart from the "expected method").

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[11] Commerce is authorized to impose antidumping duties when merchandise is sold at less than fair value in the United States. 19 U.S.C. § 1673. Antidumping duties are equal to the dumping margin, or the amount by which "normal value"—or, the price of merchandise in the exporting country—exceeds the export price—or the price of merchandise in the United States. *Id.* at §§ 1673e(a)(1), 1677b(a)(1), 1677a(a). If the exporting country is designated a nonmarket economy ("NME"), like the PRC, "sales of merchandise in [that NME] country do not reflect the fair value of merchandise." 19 U.S.C. § 1677(18)(A). Therefore, Commerce determines normal value based on an NME producer's factors of production, used to produce the subject merchandise, in a market economy country or countries. *See id.* at § 1677b(c); *see also* 19 C.F.R. § 351.408. Commerce assumes that all producers are part of the government-entity and, in its preliminary and final determinations, calculates one country-wide margin, unless an investigated respondent demonstrates it qualifies for a separate rate. *See* 19 C.F.R. § 351.408.

[12] The Court of Appeals for the Federal Circuit has clarified that the methods under 19 U.S.C. § 1673d apply to administrative reviews as well as investigations. *See Albemarle Corp. v. United States*, 821 F.3d 1345, 1352–53 (Fed. Cir. 2016).

[13] The Statement of Administrative Action is "recognized by Congress as an authoritative expression concerning the interpretation and application of the Tariff Act under 19 U.S.C. § 3512(d)[.]" *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1373 (Fed. Cir. 2013).

For example, in *Albemarle*, the Court of Appeals evaluated Commerce's decision to set, as the rate applicable to three qualifying separate rate companies, the margins previously assigned to those same three separate rate companies from a prior administrative review (i.e., use non-contemporaneous data), rather than follow the "expected method" of averaging the de minimis margins assigned to the individually examined respondents. *See id.* at 1349. In evaluating Commerce's determination, the Court of Appeals noted that the statute's "expected method" accords with the statutory framework, namely that the statute contemplates that, by individually investigating a limited number of exporters that account for a majority of the market, Commerce may approximate the margins of all known exporters. *Id.* at 1353.[14] Thus, the Court of Appeals explained that Commerce must find, based on substantial evidence, that there is a reasonable basis to conclude that the non-individually examined respondents' dumping is different in order to depart from the "expected method." *Id.* For two of the separate rate companies, the Court of Appeals held that Commerce's decision to deviate from the expected method and carry forward their previously assigned rates was not reasonable, when neither company had been individually examined in previous reviews and when Commerce lacked data specific to the two companies. *Id.* at 1355.[15] As a result, the Court of Appeals held that Commerce had no basis to conclude that the separate rate companies' potential dumping was different from the individually examined respondents' dumping and apply "any other reasonable method." *Id.* However, for the third separate rate company, the Court of Appeals found that Commerce had information specific to that company, because it had been individually examined in the preceding administrative review. *Id.* Specifically, the court noted, the margin assigned to that company in the preceding review was far higher than what would be the average of the individually examined respondents in the instant review, indicating that following the "expected method" might not reflect that separate rate company's potential dumping margin.

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[14] The Court of Appeals elaborated that "[t]he representativeness of the investigated exporters is the essential characteristic that justifies an 'all others' rate based on a weighted average for such respondents." *Albemarle*, 821 F.3d at 1353 (citing *Nat'l Knitwear & Sportswear Ass'n v. United States*, 15 CIT 548, 559, 779 F. Supp. 1364, 1373–74 (1991)) (internal quotes omitted).

[15] The Court of Appeals noted that in the immediately preceding administrative review, Commerce assumed that the individually examined respondents were reasonably representative of the two separate rate companies and, as a result, calculated the separate rate by averaging the margins of the individually examined respondents (i.e., applied the "expected method"). *Albemarle*, 821 F.3d at 1355.

Id. Therefore, the court held that Commerce was entitled to resort to "other reasonable methods" under the statute. *Id.* at 1355–56.[16]

Further, "accuracy and fairness must be Commerce's primary objectives in calculating a separate rate for cooperating exporters," *Albemarle*, 821 F.3d at 1354 (citing *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1379 (Fed. Cir. 2013)), contrary to Commerce's suggestion, here, that such concerns are no longer valid. *See Remand Results* at 16. Specifically, Commerce contends that accuracy and fairness concerns stem from a statutorily superseded requirement laid out in *Gallant Ocean* that Commerce consider "commercial reality." *See Remand Results* at 16 (citing *Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319, 1325 (Fed. Cir. 2010)). The statutory provision at issue provides that, when Commerce makes an adverse inference in selecting among facts otherwise available, Commerce "is not required, for purposes of subsection (c) or for any other purpose . . . to demonstrate that the countervailable subsidy rate or dumping margin . . . reflects an alleged commercial reality of the interested party." *See* 19 U.S.C. § 1677e(d)(3). It does not stand to reason that the statutory directive not to consider "commercial reality" in the AFA context obviated the fairness and accuracy concerns identified by *Bestpak* when applying a separate statutory provision to cooperative respondents. *See Bestpak*, 716 F.3d at 1379–80; *see also Albemarle*, 821 F.3d at 1354 (citing to *Gallant Ocean* for the proposition that "accuracy and fairness must be Commerce's primary objectives in calculating a separate rate for cooperating exporters").

Here, Commerce's application of the "expected method" of weight-averaging the zero and AFA margins is not reasonable, because Commerce failed to consider evidence indicating that the 41.025 rate is not reasonably reflective of the separate rate respondents' dumping.

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[16] However, the Court of Appeals ultimately held that Commerce's decision to apply a previous, non-contemporaneous margin did not constitute an "other reasonable method[]" given the facts at hand and remanded Commerce's determination. *Albemarle*, 821 F.3d at 1356–59. Specifically, the Court of Appeals faulted Commerce for assuming that the underlying facts or the margins remained the same from the prior period of review. *Id.* at 1356–57. Even though, as the court acknowledged, there may be "at least two circumstances" in which it may be appropriate to apply a non-contemporaneous rate—where the overall market and dumping margins have not changed or where, based on a lack of cooperation that warrants the application of AFA, Commerce may assume a respondent's dumping behavior has not changed—neither circumstance applied to the cooperating separate rate company. *Id.* at 1357–58. In addition, the court disagreed with the defendant that a history of dumping in itself demonstrates that the dumping continued at the same rate, even if that history of dumping from prior administrative reviews "is relevant and may inform Commerce's methodology[.]" *Id,* at 1358. The court also found it unreasonable that Commerce carried over the separate rate company's' prior rate, when it could have collected additional data but declined to do so, and when it had partial data already on the record specific to that company. *Id.* at 1358–59.

Albemarle, 821 F.3d at 1355–57. Specifically, Commerce fails to address evidence which detracts from its determination to use the expected method. *Albemarle* establishes that Commerce will use the expected method unless it determines that the expected method will result in dumping margins not reasonably reflective of a separate rate respondent's potential dumping margin and supports that determination with substantial evidence. *See Albemarle*, 821 F.3d at 1353 ("Commerce must find based on substantial evidence that there is a reasonable basis for concluding that the separate rate respondents' dumping is different."); *see also id.* at 1355–57. Bosun put forth evidence that the expected method would result in an unreasonable rate. *See* Pl.'s Br. at 6–7 (explaining that "there is a history of low calculated dumping margins," including margins assigned to Bosun following individual examination). The separate rate companies and Bosun did not, as Commerce finds, "fail to identify any record evidence suggesting that the separate rate does not reasonably reflect their potential dumping margins." *Remand Results* at 15. Rather, Commerce simply declines to address that evidence because it was non-contemporaneous. *Id.* at 8 n.20, 14–15. Commerce errs by summarily rejecting that evidence.[17] *Id.* at 15; *see also Solianus Inc. v. United States*, 43 CIT __, __, 391 F. Supp. 3d 1331, 1339 (sustaining Commerce's adherence to the "expected method" when there was no evidence why the resultant margin failed, as the plaintiffs alleged, to reflect their economic reality). On remand, and consistent with *Albemarle*, Commerce must either reconsider its determination or explain why following the "expected method" is reasonable in light of evidence of any margins assigned to the separate respondents and Bosun, when individually investigated in prior reviews.[18]

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[17] Commerce misreads *Albemarle*. Commerce invokes *Albemarle* to reject non-contemporaneous data as a basis to deviate from the expected method. *See Second Remand* Results at 14–15; *see also* Def.'s Br. at 9–10 (defending Commerce's analysis based on *Albemarle*). However, in *Albemarle* the Court of Appeals endorsed Commerce's reliance upon non-contemporaneous data for it to depart from the expected method in determining the "all others" rate. *Id.*, 821 F.3d at 1356. Contrary to Commerce's approach here, the *Albemarle* court instructs Commerce to consider any evidence on the record—in that case, the presence or absence of historical data—to determine whether to apply the expected method. *Compare Remand Results* at 14 *with Albemarle*, 821 F.3d at 1355–56. The contemporaneity of the data is then considered when establishing the reasonableness of a rate established by an alternative method. *See Albemarle*, 821 F.3d at 1356–59.

[18] On remand, Commerce, in determining whether to apply the "expected method," should consider any margins determined by individual examination of Bosun and any of the separate rate respondents in prior administrative reviews. *Cf. Albemarle*, 821 F.3d at 1355–57. Should Commerce, on remand, determine that following the "expected method" does not reflect Bosun's or one or more of the separate rate respondents' potential dumping margins, Commerce must provide a reasoned explanation for its selection of an "other reasonable methodology[]" in light of *Albemarle*. *See id.*, 821 F.3d at 1356–59; *see also Yangzhou Bestpak & Crafts Co. v. United States*, 716 F.3d 1370, 1378–81 (Fed. Cir. 2013).

CONCLUSION

In accordance with the foregoing, it is

ORDERED that Commerce's calculation of Chengdu's rate is sustained; and it is further

ORDERED that Commerce's determination of the rate applicable to Bosun and the separate rate respondents is remanded for further explanation or consideration consistent with this opinion; and it is further

ORDERED that Commerce shall file its remand redetermination with the court within 90 days of this date; and it is further

ORDERED that the parties shall have 30 days thereafter to file comments on the remand redetermination; and it is further

ORDERED that the parties shall have 30 days to file their replies to comments on the remand redetermination; and it is further

ORDERED that the parties shall have 14 days thereafter to file the Joint Appendix; and it is further

ORDERED that Commerce shall file the administrative record within 14 days of the date of filing of its remand redetermination.

Dated: July 14, 2020
New York, New York

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

Commerce may consider the extent to which it has information on the record regarding a separate rate respondent and whether it would be appropriate to reopen the record to collect additional information. *Albemarle*, 821 F.3d at 1358–59 (citing *Amanda Foods (Vietnam) Ltd. v. United States*, 35 CIT at 415–17, 774 F. Supp. 2d 1286, 1289–90 (2011) ("*Amanda Foods*") (noting, in *Amanda Foods*, that Commerce reopened the administrative record to collect additional information from separate rate respondents when all individually assigned respondents were assigned de minimis margins). Further, to the extent that Bosun and the separate rate respondents suggest that a zero rate would be reasonably reflective of their potential dumping margins, that is a determination for Commerce to make after considering record evidence, should it decide to depart from the "expected method." *See* Pl.'s Br. at 12; Pl.-Intervenors' Br. at 1–2. Nonetheless, Commerce should heed the *Albemarle* court's words of caution regarding carrying forward non-contemporaneous margins and AFA margins, when, as is the case here, the non-individually examined respondents cooperated. *See id.*, 821 F.3d at 1357–58.

Slip Op. 20–98

TRANSPACIFIC STEEL LLC, Plaintiff, BORUSAN MANNESMANN BORU SANAYI VE TICARET A.S., et. al Intervenor Plaintiffs, v. UNITED STATES et al., Defendants.

Before: Claire R. Kelly, Gary S. Katzmann, and Jane A. Restani, Judges
Court No. 19–00009

[Proclamation 9772 imposing additional § 232 duties on Turkish steel violates statutorily mandated procedures and the Constitution's guarantee of equal protection under law]

Dated: July 14, 2020

Matthew M. Nolan and *Russell A. Semmel*, Arent Fox LLP, of Washington, DC, argued for plaintiff Transpacific Steel LLC. With them on the brief were *Aman Kakar*, *Andrew A. Jaxa-Debicki*, *Diana Dimitriuc-Quaia*, and *Jason R. U. Rotstein*.

Julie C. Mendoza, *Brady W. Mills*, *Donald B. Cameron*, *Eugene Degnan*, *Mary S. Hodgins*, and *Rudi W. Planert* Morris, Manning, & Martin, LLP, of Washington, DC, for intervenor plaintiff Borusan Mannesmann Boru Sanayi ve Ticaret A.S., et. al.

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Tara K. Hogan, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, *Stephen C. Tosini*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, and *Meen Geu Oh*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, argued for defendants. With them on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Joshua E. Kurland*, Trial Attorney.

OPINION

Restani, Judge:

The question before us is whether President Trump issued *Proclamation No. 9772 of August 10, 2018*, 158 Fed. Reg. 40,429 (Aug. 15, 2018) ("Proclamation 9772") in violation of the animating statute and constitutional guarantees. We hold that he did. Proclamation 9722 is unlawful and void.

Plaintiff Transpacific Steel LLC ("Transpacific"), a U.S. importer of steel, requests a refund[1] of the additional tariffs it paid pursuant to Proclamation 9772 on certain steel products from the Republic of Turkey ("Turkey").[2] *See Proclamation No. 9705 of March 8, 2018*, 83 Fed. Reg. 11,625 (Mar. 15, 2018) ("Proclamation 9705") (imposing a 25

[1] Transpacific asserts that it paid over $2.8 million as a result of the additional tariffs. *See* Am. Compl. at Ex. 3.

[2] After we issued our decision denying the government's motion to dismiss, Borusan Mannesmann Boru Sanayi ve Ticaret A.S. ("BMB"), a steel pipe producer in Turkey and non-resident U.S. importer and Borusan Mannesmann Pipe U.S. Inc. ("BMP") (collectively "Borusan") and the Jordan International Company ("Jordan") were granted leave to intervene as Plaintiff-Intervenors. Order Granting Borusan's Mot. to Intervene, ECF No. 39 (Dec. 10, 2019); Order Granting Jordan's Mot. to Intervene, ECF No. 46 (Dec. 13, 2019).

percent tariff duty on steel products from several countries); Proclamation 9772 (imposing a 50 percent tariff duty on steel products from Turkey alone); Am. Compl., ECF No. 19, ¶¶ 2, 4 (Apr. 2, 2019) ("Am. Compl."). Plaintiffs argue that Proclamation 9772 is unlawful because it lacks a nexus to national security, was issued without following mandated statutory procedures, and singles out importers of Turkish steel products in violation of Fifth Amendment Equal Protection and Due Process guarantees.

BACKGROUND

During the Cold War, Congress enacted Section 232 of the Trade Expansion Act of 1962, which authorized the President to adjust imports that pose a threat to the national security of the United States. *See* Trade Expansion Act of 1962, Pub. L. No. 87–794, Title II, § 232, 76 Stat. 872, 877 (1962) (codified as amended 19 U.S.C. § 1862) ("Section 232"). Since its original passage, there have been several amendments of the statute of varying magnitude including: altering the agency responsible for advising the president, shortening the time limit for investigation, and adding a congressional override for presidential actions taken to adjust petroleum imports. *See generally*, Trade Act of 1974, Pub. L. No. 93–618, Title I, § 127, 88 Stat. 1978, 1993–94 (1974); Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96–223, Title IV, § 402, 94 Stat. 229, 301–02 (1980). The most recent substantive change to Section 232 occurred in 1988, when the statute was altered to add time limits on the President's ability to act pursuant to the Secretary of Commerce's affirmative finding that investigated imports are a threat to national security. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, Title I, § 1501, 102 Stat. 1107, 1257–60 (1988). As it currently stands, the process to adjust imports under Section 232 is as follows.

First, the Secretary of Commerce ("Secretary"), in consultation with the Secretary of Defense, initiates an investigation "to determine the effects on the national security of imports of the article[s]." 19 U.S.C. § 1862(b)(1)(A). No later than "270 days after the date on which an investigation is initiated, the Secretary shall submit to the President a report on the findings" that will advise the President if articles being imported into the United States threaten to impair national security and recommend appropriate action. *Id.* § 1862(b)(3)(A). Second, after receiving the Secretary's report, the President "[w]ithin 90 days," must determine whether he or she concurs with the Secretary

Borusan, Jordan, and Transpacific jointly submitted a motion and brief for judgment on the agency record. Pl. Transpacific & Pl.-Intervenors. Borusan, et al.'s 56.1 Mot. for J. on the Agency R., ECF No. 51 (Jan. 21, 2020) ("Pl. Br."). For ease of reference, we refer to Transpacific, Borusan, and Jordan collectively as "Plaintiffs."

and, if so, "determine the nature and duration of the action" to "adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security."[3] *Id.* § 1862(c)(1)(A). In making this assessment, the President "shall" consider various non-exhaustive factors listed in § 1862(d). *Id.* §1862(d). The President "shall implement that action" no later than 15 days from his or her decision to take such action.[4] *Id.* § 1862(c)(1)(B). Finally, within 30 days after making any determination, the President must submit to Congress a written statement of reasons for taking that action. *Id.* § 1862(c)(2). Notably, the time limits described were added as part of the 1988 amendments. *See* Omnibus Trade and Competitiveness Act of 1988 § 1501. President Trump's recent proclamations are the first issued pursuant to Section 232 since the passage of these amendments. *See* CONG. RESEARCH SERV., R45249, SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS, APP'X B (Apr. 7, 2020) ("CRS 232 Overview").

On April 19, 2017, the Secretary initiated an investigation into the effect of imported steel on national security. *See Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel*, 82 Fed. Reg. 19,205 (Dep't Commerce Apr. 26, 2017). On January 11, 2018, the Secretary issued his report and recommendation to the President. *See The Effect of Imports of Steel on the National Security*, (Dep't Commerce Jan. 11, 2018) ("Steel Report").[5] In response, on March 8, 2018, President Trump issued Proclamation 9705, which imposed a 25 percent *ad valorem* tariff on imports of steel products[6] effective March 23, 2018. *See* Proclamation 9705. On August 10, 2018, the President issued Proclamation 9772, which imposed a 50 percent *ad valorem* tariff on steel products imported from Turkey, effective August 13, 2018. *See* Proclamation 9772. The additional tariffs on Turkish steel products

[3] This timeline is altered if the chosen action is to negotiate an agreement limiting importation into or exportation to the United States. 19 U.S.C. §1862(c)(3)(A); *see also Transpacific Steel LLC v. United States*, 415 F. Supp. 3d 1267, 1276 n.15 (CIT 2019) ("*Transpacific I*").

[4] While termination of proclamations is provided for in 19 U.S.C. § 1885(b), piecemeal increases to existing 232 duties would interfere with the carefully designed statutory scheme, including the right of Congress to know the reasons for and to react to the duties imposed. *See* 19 U.S.C. § 1862(c)(2).

[5] A summary of the Steel Report was not published in the Federal Register until July 6, 2020, even though 19 U.S.C. § 1862(b)(3)(B) requires that "any portion of the report submitted by the Secretary . . . which does not contain classified information or proprietary information shall be published in the Federal Register." 19 U.S.C. § 1862(b)(3)(B); *see also Publication of a Report on the Effect of Imports of Steel on the National Security*, 85 Fed. Reg. 40,202 (Dep't Commerce July 6, 2020). Plaintiffs do not raise this issue and we do not rely on it.

[6] Proclamation 9705 applied to all countries except Canada and Mexico. *See* Proclamation 9705, ¶ 8.

remained in place until the President issued Proclamation 9886, which removed the additional tariffs on Turkish steel products, effective May 21, 2019. *See* Proclamation No. 9886 of May 16, 2018, 84 Fed. Reg. 23,421 (May 21, 2019) ("Proclamation 9886").

JURISDICTION AND STANDARDS OF REVIEW

The court has jurisdiction under 28 U.S.C. §§ 1581(i)(2) and (4). A President's action under Section 232 may be reviewed for a "clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." *See Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985). In evaluating an equal protection claim involving neither fundamental rights nor a suspect classification, the court will apply the rational basis test, which asks "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Armour v. City of Indianapolis*, 566 U.S. 673, 680 (2012) (quotations and citations omitted). In evaluating a Due Process challenge, the court considers whether there was a deprivation of a constitutionally protected life, liberty, or property interest and, if so, whether the necessary procedures were followed. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570–74, 76–77 (1972).

DISCUSSION

I. Whether the President Violated Section 232's Procedural Requirements

Plaintiffs argue that the President violated statutorily mandated temporal conditions, and investigation and report procedures in issuing Proclamation 9772. Pl. Br. at 22–28. In their view, to avoid delegation of powers concerns, the President is bound by these statutory restrictions. *Id.* at 22–24. Plaintiffs note that the statute requires the President to make a decision based on the Secretary's report and recommendation within 90 days and then implement any chosen action another 15 days after that decision. *Id.* at 25 (citing 19 U.S.C. § 1862(c)(1)(A)-(B)). Insofar as the government argues that Proclamation 9772 is a modification of the earlier, timely Proclamation 9705, Plaintiffs assert that there is no statutory basis for a purported modification of a previous proclamation and that allowing this interpretation would render the timelines meaningless. *Id.* at 26. Further, Plaintiffs argue that Proclamation 9772 was issued not following a formal report as required by the statute, but following informal information the President had later received from the Secretary. *Id.* at 26–28.

The government responds that Congress "inten[ded] to confer continuing authority and flexibility on the President to counter the threat identified" as confirmed by the "language, long-standing congressional understanding, and the purpose of the statute . . ." Defs.' Resp. in Opp'n to Pls.' Mot. for J., ECF No. 55 at 16 (Mar. 9, 2020) ("Gov. Br."). In its view, to require the President to strictly abide by the time restraints in the statute would frustrate its statutory purpose. *Id.* at 17. The government takes an expansive reading of the statutory terms "nature," "duration," and "implement" and finds that these terms indicate that the President has authority to revisit and modify previous actions taken under Section 232. *Id.* at 17–19 (citing congressional statements from 1955). Although the government acknowledges that the 1988 amendments intended to accelerate the 232 process, it contends that nothing in those amendments intended to prevent the President from making modifications to earlier Proclamations. *Id.* at 19–22. The government further contends that requiring the President to act within the temporal windows in the statute would undermine the purpose of Section 232 and would "convert the time-deadlines into impermissible sanctions," when those deadlines are in fact "directory, not mandatory." *Id.* at 22–27.

The language of the statute is clear, however. After receiving a report from the Secretary, "[w]ithin 90 days," and if the President concurs, he or she shall "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports." 19 U.S.C. § 1862(c)(1)(A). Then the President "shall implement that action by no later than the date that is 15 days after" the determination to take action is made. *Id.* § 1862(c)(1)(B). As noted in our previous decision, Proclamation 9772 was issued far beyond this temporal window. *Transpacific I*, 415 F. Supp. 3d at 1273–74. The government continues to argue that the President is permitted to modify his previous proclamation, but as we have already said, "[t]he President's expansive view of his power under section 232 is mistaken, and at odds with the language of the statute, its legislative history, and its purpose." *Id.* at 1274–75 (citing legislative history undermining the contention that the President can take under Section 232 outside the prescribed time limits).

National security is dependent on sensitive and ever-changing dynamics; the temporal restrictions on the President's power to take action pursuant to a report and recommendation by the Secretary is not a mere directory guideline, but a restriction that requires strict adherence. To require adherence to the statutory scheme does not amount to a sanction, but simply ensures that the deadlines are given meaning and that the President is acting on up-to-date national

security guidance. The President is, of course, free to return to the Secretary and obtain an updated report pursuant to the statute. As the government acknowledges, the 1988 Amendments were passed against the backdrop of President Reagan's failing to take timely action in response to the Secretary's report finding that certain machine tools threatened to impair national security and Congress's resulting frustration. Gov. Br. at 20–21 (citing Hearings Before the Committee on Ways and Means on H.R. 3 Trade and International Economic Policy Other Proposals Reform Act, 100th Congr. (1987); Hearings Before the Subcommittee on Trade of H. Comm. On Ways & Means, 99th Cong., 2d Sess. 1282 (1986)). The purpose and legislative history support that the time limits here were very much intended to require presidential action in a timely fashion, not just encourage it.[7] *See Transpacific I*, 415 F. Supp. 3d at 1275 (citing legislative history from the 1988 Amendments). Finally, as we noted previously, when Congress means to allow action outside of a set temporal window, it provides for it. *See id.* at 1276 n.15 (citing 19 U.S.C. § 1862(c)(3)).

Contrary to the government's contention, there is nothing in the statute to support the continuing authority to modify Proclamations outside of the stated timelines. The government offers no citation to the statute nor to the recent legislative history to support this theory. Instead, the government relies on legislative history prior to the 1988 amendments. *See* Gov. Br. at 18–19. As originally enacted, Section 232 may have allowed for the President to modify previous Proclamations as a form of continuing authority. *See* H.R. Rep. No. 84–745, at 8158 (1955). The court is also aware that prior to the recent amendments, several Presidents modified President Eisenhower's *Proclamation No. 3279 of March 10, 1959*, 24 Fed. Reg. 1781 (Mar. 12, 1959) ("Proclamation 3279") on Petroleum and Petroleum Products with the latest "modification" occurring under President Reagan in

[7] The government cites several cases for the proposition that when a statute does not specify a consequence for failing to meet a deadline, the deadline is merely directory. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003); *Hitachi Home Electronics (America), Inc. v. United States*, 661 F.3d 1343, 1345–46 (Fed. Cir. 2011); *Gilda Industries, Inc. v. United States*, 622 F.3d 1358, 1365 (Fed. Cir. 2010); *Canadian Fur Trappers Corp. v. United States,* 884 F.2d 563, 566 (Fed. Cir. 1989). Such cases do not address delegation to the President in an area normally belonging to Congress, i.e. import duties. As discussed *infra*, without meaningful limits such delegation is improper. Further, the resulting consequences of finding that the deadlines in these cases were mandatory would have had greater permanence than simply requiring the President to return to the Secretary for a current report. *Barnhart*, 537 U.S. at 160 (deadline was directory as otherwise the consequence would be to "shift financial burdens from otherwise responsible private purses to the public fisc."); *Hitachi*, 661 F.3d at 1348 (deadline was directory and failing to meet that deadline did not strip Customs of its power to allow or deny a protest); *Canadian Fur*, 884 F.2d at 566 (deadline was directory and failure for Customs to meet a deadline did not result in liquidation); *Gilda*, 662 F.3d at 1365 (failure of the United States Trade Representative to timely comply with notice obligations did not mean a retaliatory action would not terminate.).

Proclamation No. 4907 of March 10, 1982, 47 Fed. Reg. 10,507 (Mar. 10, 1982). But the statutory scheme has since been altered, and the court must give meaning to those alterations. The 1988 amendments prescribed time limits, as described above, but also deleted language that could be read to give the President the power to continually modify Proclamations. *See* Omnibus Trade and Competitiveness Act of 1988 § 1501. Prior to the 1988 amendments, the relevant provision read "and the President shall take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security." 19 U.S.C. § 1862(b) (1982). The current relevant provisions omit the clause "and for such time." *See* 19 U.S.C. § 1862(b),(c) (2018). These changes appear to further restrict the time under which the president can act to adjust imports under 19 U.S.C. § 1862. Until the current administration, no President had issued a Proclamation after the 1988 changes, so there was no occasion to consider whether modifying an existing Proclamation remained an allowable exercise. *See* CRS 232 Overview, App'x B. Given the changes in the statute, the court holds that regardless of whether modifications were permissible before, "modifications" of existing Proclamations under the current statutory scheme, without following the procedures in the statute, are not permitted.

In *Federal Energy Administration v. Algonquin SNG, Inc.*, the Court stressed the importance of the procedural safeguards in holding that Section 232 was not an impermissible delegation of congressional authority over imports. 426 U.S. 548, 559 (1976). As we stated previously, "[i]f the President could act beyond the prescribed time limits, the investigative and consultative provisions would become mere formalities detached from Presidential action." *Transpacific I*, 415 F. Supp. 3d at 1276. Section 232 grants the President great, but not unfettered, discretion. The President exceeded his authority in issuing Proclamation 9772 outside of the temporal limits required by Section 232.

II. Whether the President Exceeded His Authority by Issuing a Proclamation Purported to Lack a Nexus to National Security

Plaintiffs contend that the President exceeded his authority in issuing Proclamation 9772 because the Proclamation lacked a nexus to Section 232's national security objective, which would render the Proclamation *ultra vires*. Pl. Br. at 14–22. Accordingly, they contend that the court may review whether the issuance of the Proclamation 9772 falls within the authority granted to the President under the

statute. *Id.* at 14–16. Citing various D.C. Circuit Court opinions, Plaintiffs argue that this court should engage in such review to determine whether the President acted in conformity with Section 232. *See id.* at 14–16 (citing *Independent Gasoline Marketers Council, Inc. v. Duncan*, 492 F. Supp. 614 (D.D.C.1980); *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979) (en banc); *United States Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996)). Turning to the facts at hand, Plaintiffs argue that Proclamation 9772 was not motivated by proper national security considerations, such as those listed in 19 U.S.C. § 1862(d), but was issued to employ "diplomatic leverage against a foreign government."[8] *See id.* at 18–22. They further contend that because imports of Turkish steel products comprise only a comparatively small percentage of steel products imported into the United States, doubling tariffs on those products would have too remote an effect to address national security concerns detailed in the Steel Report. *Id.* at 21.

The government responds that any analysis of whether Proclamation 9772 has a nexus to Section 232's national security purpose requires the court to engage in an improper inquiry into the President's fact-finding. Gov. Br. at 12–16. It contends that the court cannot analyze the President's action beyond inquiring whether the action taken was "of a type permitted by the statute." *Id.* at 13. In the government's view, any evaluation of the President's motivations is foreclosed. *Id.* at 13–15.

The court declines to consider proffered evidence of the President's "true motive" or question his fact-finding. Even if warranted, such an inquiry is unnecessary to the disposition of this matter. What is evident is that the President acted beyond the procedural limitations set forth in the statute in issuing Proclamation 9772, rendering his action *ultra vires*. In addition to acting outside of the time limitations as noted above, he acted without a proper report and recommendation by the Secretary on the national security threat posed by imports of

[8] Plaintiffs ask the court to consider President Trump's tweet regarding the detainment of Pastor Andrew Brunson in Turkey and his tweet roughly two weeks later declaring: "I have just authorized a doubling of Tariffs on Steel and Aluminum with respect to Turkey as their currency, the Turkish Lira, slides rapidly downward against our very strong Dollar! Aluminum will now be 20% and Steel 50%. Our relations with Turkey are not good at this time!." *See* Pl. Br. at 19 (citing Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 10, 2018, 8:47 AM), twitter.com/realdonaldtrump/status/1027899286586109955; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2018, 11:22 AM), twitter.com/realdonaldtrump/status/1022502465147682817). Plaintiffs further cite tweets and statements issued after Proclamation 9772 went into effect in which the President appears to threaten to destroy the Turkish economy. *See id.* at 19–20. Because we do not review the President's fact-finding, we decline to consider this evidence in relation to Plaintiffs' statutory challenge. *See Florsheim Shoe Co., Div. of Interco, Inc. v. United States*, 744 F.2d 787, 796 (Fed. Cir. 1984).

steel products from Turkey. *See* Proclamation 9772. The Steel Report assesses the impact of steel imports in the aggregate on national security and makes no finding regarding Turkey specifically. *See generally*, Steel Report. Other than the Steel Report, Proclamation 9772 mentions informal discussions between the President and the Secretary regarding the changes to capacity utilization in the domestic steel industry after Proclamation 9705 and how additional tariffs on steel products from Turkey would be "a significant step toward ensuring the viability of the domestic steel industry." *See* Proclamation 9772 ¶¶ 4, 6. The President is not authorized to act under Section 232 based on any off-handed suggestion by the Secretary; the statute requires a formal investigation and report.[9] *See* 19 U.S.C.A. § 1862(b), (c). To clarify, the court does not decide that there was not a national security threat meriting new duties, but instead simply holds that there was no procedurally proper finding of that threat.[10] Thus, the President was not empowered under Section 232 to issue Proclamation 9772.[11]

III. Equal Protection

In addition to their statutory claims, Plaintiffs raise a Fifth Amendment Equal Protection challenge to Proclamation 9772. Pl. Br. at 28–38. Their basic contention is that the Proclamation discriminates between similarly situated importers based on the origin of their imports without rational justification. *Id.* at 28–34. Plaintiffs argue that the government has offered no sensible reason for targeting

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[9] President Ford's modification of Proclamation 3279, with *Proclamation No. 4341 of January 23, 1975*, 40 Fed. Reg. 3965 (January 27, 1975) ("Proclamation 4341"), the Proclamation at issue in *Algonquin*, was issued only after the Secretary issued a report pursuant to 19 U.S.C. § 1862(b). *See Algonquin*, 426 U.S. 548, 554 (1976). The Court's decision that Section 232 was not an improper delegation was based, in part, on the required precondition that the Secretary make a finding and issue a report. *Id.* at 559. Allowing the President to skirt this precondition would potentially pose delegation concerns. Further, it is not an insurmountable burden to require that the President return to the Secretary and obtain a new report prior to taking action under Section 232. As noted in a memorandum opinion by the then Assistant Attorney General in the Office of Legal Counsel, the report issued prior to Proclamation 4341 was "completed in only ten days." *See* Mem. Op. for the Deputy Att'y Gen. "The Presidents Power to Impose a Fee on Imported Oil Pursuant to the Trade Expansion Act of 1962," 6 Op. O.L.C. 74, at 80 (Jan. 14, 1982).

[10] The court is respectful of separation of powers and does not opine on the wisdom of the President's foreign policy. Our role here is to decide whether the statute at issue has been followed.

[11] The court does not foreclose the possibility that a future action could arise that, although procedurally sound, nonetheless is devoid of any discernable national security objective and thus subject to court review. *See Am. Inst. for Int'l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335, 1344 (CIT 2019) ("To be sure, section 232 regulation plainly unrelated to national security would be, in theory, reviewable as action in excess of the President's section 232 authority.").

imports from Turkey and that no reasonable rationale is apparent. *Id.* at 30–34. Although Plaintiffs acknowledge that Turkey is named in the Steel Report, they argue that the Secretary's determination was based on the import of steel products in the aggregate and that nothing in the Steel Report supports additional duties on Turkish steel products alone.[12] *Id.* at 31–34. At base, Plaintiffs argue that that Proclamation 9772 drew an arbitrary and irrational distinction by doubling the tariff rate on Turkish steel products and was based on an impermissible purpose.[13] *Id.* at 34–38.

The government responds that to succeed on their equal protection claim, Plaintiffs must first show that the government "intended to discriminate against the claimant or group," and then show that the classification lacks a connection to an "identifiable state interest." Gov. Br. at 28. Because the Plaintiffs cannot show that the President intended to discriminate against any importers of Turkish steel products, the government argues that the Plaintiffs' equal protection claim fails. *Id.* at 28–34. The government further argues that levying additional tariffs on Turkish steel products alone was a reasonable step towards the legitimate purpose of national security, even if it was just an incremental step towards that purpose. *Id.* at 34–39. Finally, it contends that Plaintiffs unjustifiably attempt to make a statutory interpretation case into a constitutional one. *Id.* at 38–40. In reply, Plaintiffs argue that the government has overstated their "burden to prove their equal protection claim." Pl. Reply to Def's Resp. to Pl.s' Mot. for J. on the Agency R., ECF No. 60 at 14 (Apr. 9, 2020) ("Pl. Reply"). They further point out that discrimination in this case "is clear on the face of the proclamation," and that the cases cited by the government involved facially neutral policies. Pl. Reply at 15–16.

At the outset, the government mistakes a factor sufficient to result in an Equal Protection violation for one necessary to succeed on such a claim. An intent to discriminate or "bare desire to harm a politically unpopular group" will result in a violation of the Constitution's Equal Protection clause as it "cannot constitute a *legitimate* government

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[12] Plaintiffs also cite a report from Commerce indicating that there has recently been a greater reduction of steel product imports from Turkey when compared to several other countries listed in the Steel Report. Pl. Br. at 32 (citing DEP'T OF COMMERCE, INT'L TRADE ADMIN., *Global Steel Trade Monitor, Steel Imports Report: United States* at 3 (June 2018) (noting that between 2017 and 2018, steel imports from Turkey decline by 59 percent by volume and 49 percent by value, whereas most top import source countries increased their exports of steel to the United States).

[13] As described in *supra* note 8, Plaintiffs highlight statements made by the President that supposedly indicate that Proclamation 9772 was motivated by Turkey's detention of Pastor Andrew Brunson. Pl. Br. at 36–38. In their view, the President's action was guided by impermissible animus against Turkey. *Id.*

interest," *Romer v. Evans*, 517 U.S. 620, 634 (1996) (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)) (quotation marks omitted), but this does not mean discriminatory motive is required to find a violation. The disparate impact cases cited by the government are inapposite as they do not focus on the central issue here–whether the challenged action was rationally related to a legitimate government purpose. *See McCleskey v. Kemp*, 481 U.S. 279, 293, 298–99 (1987) (Georgia death penalty statute disproportionately used against Black defendants); *Personnel Adm'r of Mass. v. Feeney,* 442 U.S. 256, 273 (1979) (gender-neutral statute that had disproportionately adverse effects on women); *Washington v. Davis*, 426 U.S. 229, 237–39 (1976) (police officer examination that had disproportionately adverse effects on Black applicants).

The Constitution's Equal Protection guarantees apply to actions taken by the federal government through the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). The fundamental question is whether the government's action is justified by sufficient purpose. *See Romer*, 517 U.S. at 635 ("[A] law must bear a rational relationship to a legitimate governmental purpose."). The Proclamation at issue here distinguishes between imports on the basis of country of origin. *See* Proclamation 9772. Disparate treatment alone, however, does not violate the Equal Protection Clause, if "(1) a rational purpose underlies the disparate treatment, and (2) [the governmental decisionmaker] has not achieved that purpose in a patently arbitrary or irrational way." *Belarmino v. Derwinski*, 931 F.2d 1543, 1544 (Fed. Cir. 1991) (citing *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 177 (1980). Because the purpose need not be articulated at the time, any legitimate purpose is sufficient.[14] *See Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) ("[T]his Court's review does require that a purpose may conceivably or may reasonably have been the purpose and policy of the relevant governmental decisionmaker.") (citation and quotation marks omitted); *see also Trump v. Hawaii*, 138 S.Ct. 2392, 2420 (2018) (considering plaintiffs' extrinsic evidence, but upholding a challenged presidential proclamation "so long as it can reasonably be understood to result from a justification independent of

[14] In prior cases, the Court has not required that the "purpose" of the law be the actual purpose because the legislature is not required to offer a rationale when enacting a statute. *See F.C.C. v. Beach Comm, Inc.*, 508 U.S. 307, 315 (1993) ("Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."). It is unclear whether this reasoning applies with equal force to the situation before us today, as the challenge is to a presidential proclamation, rather than a legislative act, and the President is required to state his reasons for acting pursuant to Section 232. *See* 19 U.S.C. §§ 1862(c)(2), (c)(3)(A), (c)(3)(B). Accordingly, whether any conceivable reasonable purpose would suffice here is an open question.

unconstitutional grounds."). Thus, to survive rational basis review, Proclamation 9772 must be a rational way of achieving a legitimate government purpose.

National security is a legitimate purpose, *see Trump v. Hawaii*, 138 S.Ct. at 2421, so the court must assess whether additional tariffs on imported steel products from Turkey is a "rational means to serve" this "legitimate end." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442 (1985). Unlike the determination made by the Court in *Trump v. Hawaii*, there is no "persuasive evidence" here to support that the President's proclamation "has a legitimate grounding in national security concerns." 138 S.Ct. at 2421.[15] In that case, the "Proclamation explain[ed], in each case the determinations were justified by the distinct conditions in each country." *Id.* In contrast, here, Proclamation 9772 is purportedly based on the Steel Report, which evaluated the collective impact of global steel imports on national security, and not the impact of imports from Turkey individually. *See* Proclamation 9772 ¶ 1; *see also* Steel Report at 55–57 (concluding that the global excess capacity of steel and imports into the United States "threaten[s] to impair" national security). The national security concerns were characterized as "[t]he displacement of domestic steel by imports," and the resulting effect on the United States economy, and the ability to "meet national security requirements." *See* Steel Report at 57. Singling out steel products from Turkey is not a rational means of addressing that concern. Section 232 does not ban the President from addressing concerns by focusing on particular exporters, but the decision to increase the tariffs on imported steel products from Turkey, and Turkey alone, without any justification, is arbitrary and irrational.[16]

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[15] The government relies heavily on *Trump v. Hawaii* for the proposition that an Equal Protection challenge cannot succeed without evidence of animus. *See* Oral Argument at 57:40–58:25; *see also* Gov Br. at 32. *Trump v. Hawaii* was a case dealing with the First Amendment's Establishment Clause in the context of border security in which a Proclamation was issued with a "legitimate grounding in national security concerns." *Id.* at 2421. That case does not stand for the proposition asserted by the government. *See Trump v. Hawaii*, 138 S.Ct. at 2420 (stating that rational basis review "considers whether the entry policy is plausibly related to the Government's stated objective"). A successful Equal Protection claim, at least in the context of taxes and duties, does not require a showing of animus. *See Allegheny Pittsburgh Coal Co. v. County Com'n of Webster County*, 488 U.S. 336, 345 (1989).

[16] The choice is underinclusive. The Steel Report ranks Turkey as the sixth largest exporter of steel products to the United States. *See* Steel Report at 28, Fig. 2. Given the presence of larger steel exporters in the market, targeting Turkish steel products alone would not appear to be an effective means of remedying the national security concerns outlined in the Report. The decision may be overinclusive as well. Transpacific contends that some of the steel slated to be imported from Turkey was destined for Puerto Rico to aid in the "rebuilding in the aftermath of Hurricanes Irma and Maria," and that Transpacific is "one of the largest importers of steel into Puerto Rico." *See* Am. Compl. ¶ 10, Ex. 3 (Declaration of Jules Levin, CEO of Transpacific). Given the broad view of national security articulated in the

This case is materially indistinguishable from *Allegheny Pittsburgh Coal Co. v. Cnty Com'n of Webster Cnty*, 488 U.S. 336 (1989). In that case, the Court declared irrational a county tax assessor's use of differing methods to assess property value that had been recently sold from property that had not. *Id.* at 338. The result was that generally "comparable properties" were assessed at vastly different rates depending on the last date of sale. *Id.* at 341. The Court found that the tax assessor's practice was arbitrary and that the "relative undervaluation of comparable property" denied the petitioners in that case equal protection. *Id.* at 346. The Court noted that the West Virginia Constitution establishes a general principle of uniform taxation, and held that the tax assessor's practice did not accord with the West Virginia Constitution and violated the United States Constitution's Equal Protection Clause. *Id.* at 345 ("The equal protection clause. . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.") (quoting *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946)). The situation before the court here is no different. There is no apparent reason to treat importers of Turkish steel products differently from importers of steel products from any other country listed in the Steel Report. The status quo under normal trade relations is equal tariff treatment of similar products irrespective of country of origin. *See* 19 U.S.C. § 1881. Although deviation from this general principle is allowable, such deviation cannot be arbitrarily and irrationally enforced in a way that treats similarly situated classes differently without permissible justification. Proclamation 9772 denies Plaintiffs the equal protection of the law.

IV. Constitutional Due Process

The Constitution's Due Process Clause provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. For Plaintiffs to succeed on their procedural due process claim, the court must first determine that a protected property interest exists. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire")

Steel Report, the failure to consider the potential impact on the Puerto Rican recovery in issuing Proclamation 9772, and to exempt those shipments, may make the action overinclusive. Mot. to Dismiss. Hearing Tr., at 14, ECF No. 41 (Dec. 12, 2019). Under rational basis review, even significant over or underinclusiveness can be tolerable in some instances, *see Vance v. Bradley*, 440 U.S. 93, 108 (1979), but here this mismatch, particularly based on underinclusion, between Proclamation 9772's purported national security purpose and the chosen action to address that purpose is simply too great.

(citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). The court looks to "existing rules or understandings that stem from an independent source such as state law," in ascertaining whether a protected property interest exists. *Id.* (citing *Paul v. Davis*, 424 U.S. 693, 709) (1976)). If an interest exists, the court must then ascertain what process is required under the circumstances. *See Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

Plaintiffs contend that Proclamation 9772 violates the Constitution's guarantee of Due Process. Pl. Br. at 38–43. They identify the property interest as "simply that the plaintiff-imports paid large amounts of duties to the U.S. Government and incurred numerous other expenses associated with the dislocation attendant to the imposition of 50% tariffs on Turkey."[17] *Id.* at 38. They further identify the process owed as "at least a basic level of protection under these circumstances." *Id.* at 39. The government responds that Plaintiffs have failed to identify a constitutionally protected property interest. Gov. Br. at 40–43. Because Plaintiffs do not point to an independent source that gives rise to a property interest, the government contends that the only process owed to Plaintiffs is "whatever the statute or regulation provides." *Id.* at 43. Because, in the government's view, that process was afforded here, there is no violation. *Id.* at 43–44.

Plaintiffs have failed to fully articulate a property interest beyond various nebulous notions and do so without reference to any independent source establishing that a concrete, protected property interest exists. Further, the process Plaintiffs request is simply that the government be made to comply with the procedures laid out in the statute. Because we hold that Plaintiffs are entitled to that process under the statute, we need not also answer whether any constitutional guarantees of Due Process were violated. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936) (Brandeis, J., concurring) (noting that a court "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of"). The court does not foreclose the possibility that a constitutionally-protected property interest may exist,[18] but declines to identify one

[17] Later in their brief, Plaintiffs instead characterize the property interest as "a freedom from the interference with existing contracts and business relationships, an expectation of a benefit, a level playing field, and the freedom from malignant stigma." Pl. Br. at 41.

[18] At oral argument, the court questioned whether "the statutory provision for Normal Trade Relations at 19 U.S.C. § 1881 and the Harmonized Tariff Schedule of the United States, which is a statute, *see* 19 U.S.C. §§ 1202, 3004(c), combine together to create a legitimate expectation to a certain rate that would be sufficient to trigger procedural due process protections[.]" Issues for Oral Argument, ECF No. 63 (May 26, 2020).

here. Whatever constitutional minimum process might be owed, it is satisfied by requiring that the President abide by the statute's procedures.

CONCLUSION

For the foregoing reasons, the court grants Plaintiffs' motion for judgment upon the agency record. Proclamation 9772 is in violation of mandated statutory procedures and in violation of the Fifth Amendment's Equal Protection guarantees. Judgment will enter accordingly.

Dated: July 14, 2020
New York, New York

/s/ Jane A. Restani
JANE A. RESTANI, JUDGE

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

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

Slip Op. 20–99

JINDAL POLY FILMS LIMITED OF INDIA, Plaintiff, v. UNITED STATES, Defendant, and DUPONT TEIJIN FILMS, MITSUBISHI POLYESTER FILM, INC., and SKC, INC., Defendant-Intervenors.

Before: Leo M. Gordon, Judge
Court No. 19–00043

[*Final Results* sustained.]

Dated: July 14, 2020

Lizbeth R. Levinson, *Ronald M. Wisla*, and *Brittney R. Powell*, Fox Rothschild, LLP of Washington, DC, for Plaintiff Jindal Poly Films Limited of India.

Sonia M. Orfield, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel was *Elio Gonzalez*, Attorney, U.S. Department of Commerce, Office of the Chief Counsel for Trade Enforcement and Compliance of Washington, DC.

Patrick J. McLain, *Sarah S. Sprinkle*, and *Stephanie E. Hartmann*, Wilmer, Cutler, Pickering, Hale, and Dorr, LLP of Washington, DC for Defendant-Intervenors Dupont Teijin Films, Mitsubishi Polyester Film, Inc., and SKC, Inc.

OPINION

Gordon, Judge:

This action involves the final results of an administrative review conducted by the U.S. Department of Commerce ("Commerce") of the antidumping duty order covering polyethylene terephalate film, sheet, and strip ("PET Film") from India. *See Polyethylene Terephthalate Film, Sheet and Strip from India*, 84 Fed. Reg. 9,092 (Dep't of Commerce Mar. 13, 2019) (final results admin. review) ("*Final Results*"), and accompanying Issues and Decision Memorandum, A-533–824, (Dep't of Commerce Mar. 5, 2019), available at https://enforcement.trade.gov/frn/summary/india/2019–04624–1.pdf (last visited this date) ("*Decision Memorandum*").

Before the court is the USCIT Rule 56.2 motion for judgment on the agency record filed by Plaintiff Jindal Poly Films Limited of India ("Jindal"). *See* Mem. in Supp. of Jindal's Rule 56.2 Mot. for J. on the Agency R., ECF No. 36[1] ("Pl.'s Br."); *see also* Def.'s Resp. to Pl.'s Rule 56.2 Mot. for J. on the Agency R., ECF No. 38 ("Def.'s Resp."); Def.-Intervenors Dupont Teijin Films, Mitsubishi Polyester Film, Inc., and SKC, Inc.'s Mot. in Resp. to Pl.'s Rule 56.2 Mot. for J. on the Agency R., ECF No. 39 ("Def.-Intervenors' Resp."); Pl.'s Reply Br., ECF No. 40 ("Pl.'s Reply"). The court has jurisdiction pursuant to Section

[1] All citations to parties' briefs and the agency record are to their public versions unless otherwise noted.

516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[2] and 28 U.S.C. § 1581(c) (2012). For the reasons set forth below, the court sustains Commerce's *Final Results*.

I. Standard of Review

The court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). The two-step framework provided in *Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984) governs judicial review of Commerce's interpretation of the international trade laws of the United States. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (Commerce's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous."). The court first considers whether Congressional intent on the issue is clear, and if not, whether Commerce's interpretation is reasonable. *Chevron*, 467 U.S. at 842–45. If the agency's interpretation is reasonable, albeit not the only or even preferred reasonable interpretation, it must withstand judicial scrutiny. *See NSK Ltd. v. United States*, 115 F.3d 965, 973 (Fed. Cir. 1997); *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994).

II. Discussion

19 U.S.C. § 1673 directs Commerce to impose an antidumping duty ("AD") "in an amount equal to the amount by which the normal value exceeds the export price (or constructed export price)." 19 U.S.C. § 1673. The statutory regime defines "export price" as the price at which subject merchandise is first sold, before it is imported, by a producer or exporter outside the United States and purchased by an unaffiliated purchaser in the United States. 19 U.S.C. § 1677a(a). In calculating the export price, Commerce is directed to adjust that price by "the amount of any countervailing duty [("CVD")] imposed on the subject merchandise ... to offset an export subsidy." 19 U.S.C. § 1677a(c)(1)(C). The purpose for the adjustment ("export subsidy offset") is to prevent a "double application" of duties. *See Decision Memorandum* at 6 (explaining that "the basic theory underlying [§ 1677a(c)(1)(C)] is that, in parallel AD and CVD proceedings, if Commerce finds that a respondent received the benefits of an export subsidy program, it is presumed the subsidy contributed to lower-

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

priced sales of subject merchandise in the United States market. Thus, the subsidy and dumping are presumed to be related ....").

Here, Commerce used the export subsidy rate from the final results of the 2015 administrative review of the CVD order ("*2015 CVD Final Results*")[3] covering the subject merchandise to adjust the export price of Jindal's PET film in the underlying AD administrative review. *Id.* at 5. Commerce explained that its practice is to use export subsidy rates only from the "most recently completed" CVD administrative review in calculating the export subsidy offset under § 1677a(c)(1)(C), which in this case was the *2015 CVD Final Results. Id*.

Jindal challenges Commerce's decision to use the *2015 CVD Final Results*, arguing that § 1677a(c)(1)(C) requires Commerce to use the export subsidy rate from the preliminary results of the CVD administrative review contemporaneous to the underlying AD administrative review. Pl.'s Br at 7–11 (citing *Polyethylene Terephalate Film, Sheet & Strip from India*, 83 Fed. Reg. 39,677 (Dep't of Commerce Aug. 10, 2018) ("*2016 CVD Preliminary Results*")). In addition to its legal challenge, Jindal also contends that it was unreasonable for Commerce to refuse to "await" the final results of the 2016 CVD administrative review. Pl.'s Br. at 13.

In the underlying AD administrative review, Commerce determined that the term "imposed" on the subject merchandise as used in § 1677a(c)(1)(C) permits it to use the "most recently completed" final results of a segment of a CVD proceeding, regardless of the contemporaneity of those results with the period of review ("POR"). *Decision Memorandum* at 6. Jindal disagrees maintaining that the statute requires Commerce to calculate an export subsidy offset using the export subsidy rate from the preliminary results of the 2016 CVD administrative review because they are contemporaneous with the POR covered by the final results from the underlying AD administrative review. Pl.'s Br. at 11–12. More specifically, Jindal argues that the duties calculated in the 2015 CVD administrative review cannot constitute a CVD "imposed" on merchandise imported in 2016–17 and covered by the subject administrative review. Pl.'s Br. at 5–6; Pl.'s Reply at 2.

The parties agree that § 1677a(c)(1)(C) is "silent or at least ambiguous with respect to the meaning of the term "imposed", arguing that the resolution of the issue hinges on whether Commerce's interpretation of the term is reasonable under the two-step framework set forth in *Chevron*, 467 U.S. at 842–43 *See* Pl.'s Br. at 7 (noting that court should determine whether Commerce's interpretation of "im-

[3] *Polyethylene Terephthalate Film, Sheet and Strip from India*, 83 Fed. Reg. 5,612 (Dep't of Commerce Feb. 8, 2018)

posed" is permissible under *Chevron* step two, citing *Serampore Indus. v. United States*, 11 CIT 866, 870, 675 F. Supp. 1354, 1358 (1987)); Def.'s Resp. at 6 (arguing that "Commerce's interpretation of the statute is reasonable and entitled to *Chevron* deference").

Jindal maintains that the court previously addressed the meaning of the term "imposed" in *Dupont Teijin Films, USA v. United States*, 27 CIT 1817, 297 F. Supp. 2d 1367 (2003), *aff'd*, 407 F.3d 1211 (Fed. Cir. 2005) ("*Dupont Teijin*"). *See* Pl.'s Br. at 8–9; *see also* Def.'s Resp. at 5–6 (citing *Dupont Teijin*). Jindal argues that *Dupont Teijin* stands for the importance of connecting the actual "imposition" of countervailing duties with the calculation of the export subsidy offset. *See* Pl.'s Br. at 8–11. Specifically, Jindal contends that *Dupont Teijin* "upheld Commerce's interpretation that [§ 1677a(c)(1)(C)] requires [the agency] to increase export price by the countervailing duties attributable to export subsidies imposed under a countervailing duty order *that has been issued*." *Id.* at 8. Accordingly, in Plaintiff's view, Commerce's use of the non-contemporaneous *2015 CVD Final Results* to adjust Jindal's export price in the *Final Results* was not in accordance with law. *Id.* at 8–11.

In *Dupont*, the U.S. Court of Appeals for the Federal Circuit addressed Commerce's interpretation of the term "imposed" in § 1677a(c)(1)(C) in an AD investigation where Commerce was attempting "to account for expected countervailable export subsidies calculated in a concurrent [CVD] investigation" prior to the issuance of a CVD order. *See Dupont*, 407 F.3d at 1212–15. Critically, no CVD order had been issued, and thus no export subsidy rates, contemporaneous or otherwise, were available for Commerce to use in calculating an export subsidy offset. Ultimately, the Court affirmed Commerce's interpretation of the term "imposed" to require "the issuance of a CV duty order before CV duties can be used to offset the export price in the calculation of the dumping margin." *Id.* at 1219.

Given that the factual circumstances and the nature of Commerce's determination in *Dupont* are significantly different from those in this matter, Plaintiff's reliance on *Dupont* is misplaced. Here, Commerce used the export subsidy rates from its "most recently completed administrative review of the parallel CVD order" to calculate the export subsidy offset in an administrative review of a previously issued AD order. *See Decision Memorandum* at 6. Commerce explained that it does not use preliminary rates in an on-going contemporaneous review to calculate the export subsidy offset "because those rates are not final, have not been commented on by parties, and are subject to change, and thus cannot be considered "imposed." *Id.* The court does not see any tension between Commerce's use of the export

subsidy rate from the "most recently completed" CVD administrative review in this matter and Commerce's decision, sustained as reasonable in *Dupont*, to calculate the export subsidy offset in an AD proceeding only after a corresponding CVD order had been issued. *See Dupont*, 407 F.3d at 1219.

Jindal next argues that here Commerce unreasonably departed from prior agency practice in interpreting the term imposed in § 1677a(c)(1)(C). Pl.'s Br. at 9–10. None of the cited agency determinations support Jindal's preferred interpretation—that the term "imposed" in the statute mandates Commerce to use export subsidy rates from a contemporaneous (parallel) CVD administrative review rather than those from a segment of a CVD proceeding covering a different POR, in this case the *2015 CVD Final Results*. To the contrary, these determinations support Commerce's determination. *See Certain Hot-Rolled Carbon Steel Flat Products from India*, 71 Fed. Reg. 40,694 (Dep't of Commerce July 18, 2006) (Commerce used export subsidy rates from most recently completed CVD administrative review, which merely happened to be contemporaneous with AD review, to calculate export subsidy offset); *Carbazole Violet Pigment 23 from India*, 83 Fed. Reg. 15,788 (Dep't of Commerce Apr. 12, 2018) (where Commerce had not completed administrative review of CVD order, agency used export subsidy rates from original CVD investigation to calculate export subsidy offset); *PET Film, Sheet, and Strip from India*, 73 Fed. Reg. 7,252 (Dep't of Commerce Feb. 7, 2008) (after failing to adjust AD rate in preliminary results by any export subsidy offset, Commerce used final CVD export subsidy rate to adjust export price in final results of review).

Problematically for Plaintiff, there are other determinations that also support Commerce's practice.[4] *See, e.g.*, *Citric Acid and Certain Citrate Salts from the People's Republic of China*, 80 Fed. Reg. 77,323 (Dep't of Commerce Dec. 14, 2015), and accompanying Issues & Decision Memorandum at cmt. 12, A-570–937, (Dep't of Commerce Dec. 7, 2015), available at https://enforcement.trade.gov/frn/summary/prc/2015–31427–1.pdf (last visited this date) (calculating respondent's export subsidy offset based off of "most recently completed CVD review," and explaining, "[i]n this instance, although the timing of the AD and CVD proceedings are technically not parallel, as noted by Petitioner, the Department finds that the 2012 CVD proceeding is the most appropriate proceeding upon which to base the export subsidy adjustment because it is the most recent data."); *see also Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules,*

[4] The court notes that Plaintiff failed to cite these determinations that run adverse to its position in its USCIT Rule 56.2 opening brief.

from the People's Republic of China, 84 Fed. Reg. 36,886 (Dep't of Commerce July 30, 2019) (adjusting U.S. price in 2016–2017 AD administrative review using export subsidy rates in most recently completed CVD administrative review covering calendar year 2015); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China*, 80 Fed. Reg. 40,998 (Dep't of Commerce July 14, 2015) (offsetting AD margins in administrative review using export subsidy rates found in final determination of CVD investigation that was most recently completed segment of CVD proceeding). Accordingly, Commerce's interpretation of § 1677a(c)(1)(C) is reasonable.

Jindal also contends that Commerce should have calculated the export subsidy offset by using the export subsidies calculated in the 2016 CVD administrative review for the partially overlapping period of review dates. Jindal Br. at 9–14. Commerce explained, however, that the preliminary results of the ongoing CVD administrative review were not final, had not been commented on by parties, and were subject to change. *Decision Memorandum* at 6. Commerce reasoned that the preliminary results of the 2016 CVD administrative review were of no legal effect under the statute and imposed no countervailing duties on Jindal. *Id.* Commerce further explained that those preliminary results did not reflect the ultimate, final determination of Commerce as to the amount of countervailing duties imposed on Jindal to offset export subsidies. *Id.* Commerce therefore determined that it could not use the preliminary results from the ongoing 2016 CVD administrative review when calculating the offset. *Id.* This is no different from what Commerce has done in similar circumstances.

As a final tack-on, alternative argument, Jindal contends that even if Commerce's interpretation of § 1677a(c)(1)(C) was reasonable, Commerce nevertheless unreasonably failed to await the publication of the final results of the 2016 CVD administrative review before concluding the *Final Results*. Pl.'s Br. at 13. According to Jindal, "had Commerce waited only a matter of weeks, it would have had a definitive measure of the countervailing duties **imposed on the subject merchandise** ...to offset the export subsidies." *Id.* Jindal therefore seeks an affirmative injunction directing Commerce to temporally align its AD and CVD reviews. *Id.*; *see also* Pl.'s Reply at 4 ("align the two [proceedings] ... where the [CVD] final results were due very shortly after the final [AD] results"). All Jindal offers in support of this relief is a naked assertion, unadorned by citation, that given the "ease with which Commerce could have extended its proceeding, the agency should have aligned the final results of both the [AD] and [CVD] reviews." Pl.'s Reply Br. at 4. Defendant-Intervenors correctly point out that Jindal fails to provide any analysis of the

respective statutory and regulatory provisions governing deadlines and extensions of final determinations in antidumping and countervailing duty proceedings. Def.-Intervenors' Resp. at 4–5. The court obviously needs more than a bare assertion to support an affirmative injunction ordering Commerce to align the proceedings. Jindal cannot leave the burden to the other parties and the court to frame Jindal's argument within the applicable web of statutory and regulatory provisions.[5] The court will therefore deem this argument waived. *Cf. United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones."); *see also JBF RAK LLC v. United States*, 991 F. Supp. 2d 1343 1356 (2014) (citing *Zannino*). The court does simply note that where the statute expressly addresses a temporal alignment of AD and CVD proceedings, albeit *investigations*, it only confers an express right on *petitioners* to require alignment; it does not confer a corresponding right on respondents like Jindal. *See* 19 U.S.C. § 1671d(a)(1).

III. Conclusion

For the foregoing reasons, the court sustains the *Final Results*. Judgment will enter accordingly.

Dated: July 14, 2020
New York, New York

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

[5] The court notes that Plaintiff's reply brief does not address Defendant-Intervenors' waiver argument.

Slip Op. 20–100

UNITED STATES, Plaintiff, v. GREENLIGHT ORGANIC, INC., and PARAMBIR SINGH "SONNY" AULAKH, Defendants.

Before: Jennifer Choe-Groves, Judge
Court No. 17–00031

[Denying Defendant Aulakh's motion to dismiss.]

Dated: July 14, 2020

William Kanellis and *Kelly Krystyniak*, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Plaintiff United States. With them on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director.

Angela M. Santos, *Robert B. Silverman*, and *Joseph M. Spraragen*, Grunfeld Desiderio Lebowitz Silverman & Klestadt LLP, of New York, N.Y., for Defendant Parambir Singh Aulakh.[1]

OPINION

Choe-Groves, Judge:

Plaintiff United States ("Plaintiff" or "Government") brings this 19 U.S.C. § 1592 civil enforcement action seeking to recover unpaid duties and to affix penalties, alleging that Greenlight Organic, Inc. ("Greenlight") and Parambir Singh "Sonny" Aulakh ("Aulakh" or "Defendant Aulakh") (together, "Defendants") imported wearing apparel into the United States fraudulently. Second Am. Compl. ¶ 1, ECF No. 124. Pending before the court is Defendant Aulakh's Motion to Dismiss Plaintiff's Second Amended Complaint under USCIT Rule 12(b)(6). Def.'s Mot. to Dismiss & Mem. of Law in Supp. of Mot. to Dismiss ("Def. Br."), ECF No. 128. Plaintiff opposed Aulakh's motion. Pl.'s Opp'n to Def.'s Mot. to Dismiss ("Pl. Opp'n"), ECF No. 129. Aulakh replied. Reply Mem. in Supp. of Def.'s Mot. to Dismiss Second Am. Compl. ("Def. Reply"), ECF No. 130.[2] For the reasons set forth below, Aulakh's motion is denied.

I. BACKGROUND

The court presumes familiarity with the facts set forth in its prior opinion dismissing the First Amended Complaint with leave to amend and now recounts those facts relevant to the court's review of

[1] Greenlight Organic, Inc. is not currently represented by counsel.

[2] Greenlight does not join in Aulakh's Motion to Dismiss the Second Amended Complaint and is not currently represented by counsel in this civil enforcement action. Notwithstanding Greenlight's failure to retain counsel to answer or otherwise respond to the Second Amended Complaint, Aulakh urges the court to "dismiss or limit the case against Greenlight to the same degree that relief is afforded to Mr. Aulakh." Def. Br. at i n.1.

the Motion to Dismiss the Second Amended Complaint. *See United States v. Greenlight Organic, Inc.*, 43 CIT ___, 419 F. Supp. 3d 1298, 1301–02 (2019) ("*Greenlight II*").

In *Greenlight II*, Aulakh moved to dismiss the First Amended Complaint for failure to exhaust administrative remedies and for failure to state a claim. *Id.* at 1303. This court held that Plaintiff's fraudulent importation claim was administratively exhausted and that Plaintiff failed to plead the fraud allegations with sufficient particularity under USCIT Rule 9(b). *Id.* at 1304–05. The court dismissed the First Amended Complaint and granted Plaintiff leave to cure the pleading deficiencies discussed in the opinion. *Id.* at 1306. Plaintiff then filed the Second Amended Complaint.

In the Second Amended Complaint, Plaintiff includes new facts to support its allegations, including that "Greenlight, under the direction of Aulakh . . . knowingly made material false statements" as to the classification, valuation, and source fabrics of wearing apparel made "under cover of approximately 148 entries" of athletic wearing apparel into the United States. Second Am. Compl. ¶ 6. As to the misclassification scheme, Plaintiff provides new facts identifying Monika Gill ("Gill") and Apramjeet "A.J." Singh ("Singh") as employees and agents of Greenlight who knew that 122 entries of athletic wearing apparel were comprised of knitted materials that are subject to higher duties, based on their role in selecting and sourcing the fabrics used to produce the subject entries of wearing apparel. *Id.* ¶ 8. Plaintiff avers further that Defendants, as well as Gill and Singh, conspired with Van Le, the owner of manufacturer One Step Ahead, to make material and false statements about the composition of the athletic wearing apparel. *Id.* ¶ 9. As to the undervaluation allegations, Plaintiff provides new facts to support its allegation of a double-invoicing scheme. *Id.* ¶¶ 12–15. Plaintiff avers that "Aulakh directed Greenlight to create and submit to [U.S. Customs and Border Protection] alternate invoices for the same purchases of wearing apparel from One Step Ahead." *Id.* ¶ 14. Plaintiff alleges that Aulakh created a double-invoicing scheme, in which payments for the entered merchandise were deposited into two separate bank accounts: monetary amounts matching amounts claimed in documents submitted to U.S. Customs and Border Protection ("Customs") were deposited into the account of manufacturer One Step Ahead, and separate additional payments were deposited into the personal account of Van Le, the owner of One Step Ahead. *Id.* ¶ 15, Ex. 2 (listing the date and amount of payments relating to entries for which Aulakh and Greenlight created two invoices).

II. LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

When pleading fraud, "the circumstances constituting fraud" must be stated "with particularity," but intent or knowledge may be alleged generally. USCIT R. 9(b); *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1326 (Fed. Cir. 2009). The plaintiff must inject factual precision or some measure of substantiation, i.e., pleading in detail "the who, what, when, where, and how of the alleged fraud." *Exergen Corp.*, 575 F.3d at 1327 (citation omitted). Although intent and knowledge may be pled with generality, the pleading must contain "sufficient underlying facts from which a court may reasonably infer that a party acted with the requisite state of mind." *Id.*; *see United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112, 123–24 (D.C. Cir. 2015).

III. DISCUSSION

Aulakh moves to dismiss the Second Amended Complaint under USCIT Rule 12(b)(6) based on three theories. First, Aulakh argues that Plaintiff's claims have not been exhausted because Customs failed to provide proper notice to Defendants of the entries at issue when conducting the underlying administrative penalty proceeding and thus failed to perfect the penalty claim. Def. Br. at 17–24. Second, Aulakh asserts that the five-year statute of limitations bars Plaintiff's claims as to all entries identified in the Second Amended Complaint. *Id.* at 25–31. Third, Aulakh argues that the Second Amended Complaint fails to plead the allegations of fraud with sufficient particularity per USCIT Rule 9(b). *Id.* at 7–16.

A. Exhaustion of Administrative Remedies

Aulakh argues that Customs did not exhaust its administrative remedies because Customs never provided Defendants with an appraisement schedule and failed to provide Defendants with an opportunity to challenge the fraud allegations during the administrative proceedings. *Id.* at 17–24. Plaintiff counters that Aulakh's exhaustion argument "fails for the same reason it failed earlier: because it is

predicated upon the false characterization that Aulakh was not supplied with the basis for [Customs'] penalty and loss-of-revenue calculation and was not provided an adequate administrative hearing." Pl. Opp'n at 19.

This court previously considered and rejected Defendant Aulakh's exhaustion argument, holding that Aulakh received notice that Customs intended to assert liability against him for penalties owed by Greenlight, and that Aulakh was given notice and a right to be heard throughout the underlying administrative proceedings. *Greenlight II*, 419 F. Supp. 3d at 1304. Defendant Aulakh presses the argument again here, based on his repeated claim that Defendants never received an adequate appraisement schedule of the subject merchandise from Customs. *See* Def. Br. at 23–24.

The court remains unconvinced. To perfect a penalty claim at the administrative level, Customs must issue pre-penalty and penalty notices containing certain information regarding the particulars of the fraud allegations. *Greenlight II*, 419 F. Supp. 3d at 1303. The court observes that the Second Amended Complaint contains sufficient facts to defeat the motion to dismiss based on a challenge to administrative exhaustion, because Plaintiff avers that Customs issued a pre-penalty notice of $3,232,032 pursuant to 19 U.S.C. § 1592 on or about April 15, 2014, alleging that Greenlight's violations were the result of fraud, and a subsequent penalty notice for $3,232,032 and duty demand for $217,968.22 pursuant to 19 U.S.C. § 1592 on or about May 16, 2014. Second Am. Compl. ¶¶ 23–28. These allegations are sufficient to state a claim for relief that is plausible on its face showing that Defendants received sufficient notice that Customs intended to assert liability and had the opportunity to be heard during the administrative proceedings, thus satisfying the administrative exhaustion requirement. The court denies, therefore, the motion to dismiss the Second Amended Complaint on the basis of administrative exhaustion.

B. Statute of Limitations

Aulakh argues that the five-year statute of limitations has expired, based on Aulakh's contention that Plaintiff appended new exhibits documenting the entries at issue for the first time in the Second Amended Complaint and thus Plaintiff failed to identify the entries and claim details when Plaintiff filed the original Complaint in February 2017. Def. Br. at 25–27; Compl., ECF No. 2. Plaintiff responds that the Government discovered Defendants' fraudulent scheme in February 2012, when Aulakh first produced to Customs records from Greenlight showing evidence of a double-invoicing scheme. Pl. Opp'n

at 22. Plaintiff also notes that Defendants received the same list of entries at issue during the pre-penalty and penalty stage of the underlying administrative proceeding. *Id.* at 21–22.

Civil penalty enforcement actions under Section 1592 must be initiated "within 5 years after the date of the alleged violation or, if such violation arises out of fraud, within 5 years after the date of discovery of fraud[.]" 19 U.S.C. § 1621(1). Courts refer to the "date of discovery of fraud" language as the "discovery rule" and have applied that rule to toll the statute of limitations until the date the Government first learns of the fraud. *Greenlight Organic, Inc. v. United States*, 42 CIT ___, 352 F. Supp. 3d 1312, 1315 (2018) (citing, among other cases, *United States v. Spanish Foods, Inc.*, 24 CIT 1052, 1056, 118 F. Supp. 2d 1293, 1297 (2000)) ("*Greenlight I*"). The relevant inquiry for a fraud statute of limitations analysis focuses on when the Government first discovered the fraudulent activity.

In *Greenlight I*, the court addressed at summary judgment Greenlight's contention that the five-year statute of limitations barred the Government from continuing this civil enforcement action. 352 F. Supp. 3d at 1314–16. The court denied Greenlight summary judgment, concluding that there were genuine issues of material fact as to when and how the Government first learned of Defendants' alleged fraudulent conduct. *Id.* at 1315–16. The court noted the lack of undisputed material facts showing when the Government had knowledge of Greenlight's intent to commit fraud and when the Government discovered Greenlight's misclassification and undervaluation of its entries. *Id.* The court also found genuine disputes of material fact as to when the Government first learned of Defendants' alleged fraud and double-invoicing scheme. *Id.*

In contrast to the summary judgment context, the court reviews a motion to dismiss a complaint based on whether the complaint contains sufficient facts accepted as true to state a claim for relief that is plausible on its face. *Iqbal*, 556 U.S. at 678. Plaintiff alleges that Aulakh and Greenlight provided documents in February 2012 to the Government evidencing the double-invoicing scheme, which supports Plaintiff's contention that the Government first became aware of Defendants' fraudulent activities in February 2012 when Defendants provided these documents showing discrepancies in payments and invoicing. Second Am. Compl. ¶¶ 30–31.

The question before the court is whether the Second Amended Complaint should be dismissed based on an expiration of the five-year statute of limitations. Because the court observes that the Second Amended Complaint contains sufficient facts accepted as true to establish on its face that the Government discovered the fraudulent

activity in February 2012, and the Complaint was filed within five years in February 2017, the court rejects Aulakh's statute of limitations argument. The court denies the motion to dismiss the Second Amended Complaint on the basis of the statute of limitations.

C. Whether the Second Amended Complaint Pleads Fraud with Particularity

Aulakh argues that the Second Amended Complaint should be dismissed for failure to plead fraud with sufficient particularity. *See* Def. Br. at 4–17. Aulakh maintains that the allegations lack the requisite particularity of a pleading under Rule 9(b) in that the Government still fails to indicate "how defendant directed the alleged fraudulent activity and continues to withhold entry information, and [loss-of-revenue] and domestic value calculations (i.e., appraisement schedules) for each entry for which a claim is being made." Def. Br. at 4; *see id.* at 5–16. The Government counters that the newly pled allegations in the Second Amended Complaint answer "the specific who, what, when, where, and how" of the fraudulent classification and valuation scheme. Pl. Opp'n at 15 (quoting *Exergen Corp.*, 575 F.3d at 1328).

A Section 1592(a) claim must contain sufficient factual matter showing that a person entered, introduced, or attempted to enter or introduce merchandise into the commerce of the United States through making either a material and false statement, document, or act, or a material omission. 19 U.S.C. § 1592(a)(1)(A)(i)–(ii); *United States v. Inn Foods, Inc.*, 560 F.3d 1338, 1343 (Fed. Cir. 2009). When pleading fraud, "the circumstances constituting fraud" must be stated "with particularity." USCIT R. 9(b); *Exergen Corp.*, 575 F.3d at 1326. The plaintiff must inject factual precision or some measure of substantiation, i.e., pleading in detail "the who, what, when, where, and how of the alleged fraud." *Exergen Corp.*, 575 F.3d at 1327 (citation omitted).

The Government's Second Amended Complaint satisfies USCIT Rule 9(b). The newly added facts in the Second Amended Complaint describe the particulars of the fraudulent importation scheme. For example, the Government (1) described how the double invoicing and payment scheme worked, as Defendants made separate payments to a vendor's business and personal accounts, Second Am. Compl. ¶ 15; (2) stated that Aulakh knew of the differential invoice values submitted to Customs, *id.*, Ex. 2.; and (3) identified with whom Aulakh worked to commit the alleged fraud, *id.* ¶ 15. The Government also alleges new facts detailing Defendants' fraudulent misclassification and undervaluation activities. For example, Plaintiff alleges that Aulakh and other Greenlight employees represented falsely that the

entered merchandise was made from woven material, when they knew that the material was actually made of knitted material subject to higher tariff levels, *id.* ¶ 8; Aulakh and other Greenlight employees had an agreement with Van Le of One Step Ahead to mislabel the first-run polyester merchandise as recycled polyester, *id.* ¶ 9; Aulakh directed Greenlight to create double invoices for each entry, *id.* ¶¶ 12–15; and Aulakh directed Greenlight to make payments into two separate bank accounts to conceal the double invoicing scheme, *id.* ¶ 15. The Government's Second Amended Complaint provides sufficient factual precision to satisfy "the who, what, when, where, and how" standard for particularity under Rule 9(b). *Exergen Corp.*, 575 F.3d at 1327. The court therefore denies the motion to dismiss the Second Amended Complaint for failure to plead fraud with sufficient particularity.

IV. CONCLUSION

For the foregoing reasons, the court denies Defendant Aulakh's Motion to Dismiss the Second Amended Complaint.

Dated: July 14, 2020
New York, New York

/*s*/ *Jennifer Choe-Groves*
JENNIFER CHOE-GROVES, JUDGE