U.S. Customs and Border Protection

IMPLEMENTATION OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS (CNMI) ECONOMIC VITALITY & SECURITY TRAVEL AUTHORIZATION PROGRAM (EVS–TAP)

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: General notice.

SUMMARY: This document announces the implementation of the Commonwealth of the Northern Mariana Islands (CNMI) Economic Vitality & Security Travel Authorization Program (EVS–TAP). The CNMI EVS–TAP is a restricted sub-program of the Guam-CNMI Visa Waiver Program and allows prescreened nationals of the People's Republic of China to travel to the CNMI without a visa under specified conditions. In accordance with Department of Homeland Security regulations, DHS will begin implementation of the CNMI EVS–TAP requirements 45 days after publication of this notification of implementation in the **Federal Register**.

DATES: Implementation of the CNMI EVS–TAP requirements will begin as of February 20, 2024.

FOR FURTHER INFORMATION CONTACT: Neyda Yejo, Office of Field Operations, U.S. Customs and Border Protection, (202) 344–2373, or via email at *Neyda.I.Yejo@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

On January 18, 2024, the Department of Homeland Security (DHS), through U.S. Customs and Border Protection (CBP), published an interim final rule (IFR) in the **Federal Register** (89 FR 3299) with an effective date of September 30, 2024. The IFR, promulgated in consultation with the Secretary of the Interior and the Secretary of State, amended DHS regulations to establish an electronic travel authorization process for individuals traveling to Guam or the Commonwealth of the Northern Mariana Islands (CNMI) under the Guam-CNMI Visa Waiver Program (G–CNMI VWP). *See* § 212.1(q)(9) of title 8 of the Code of Federal Regulations (8 CFR 212.1(q)(9)). The IFR also amended DHS regulations to establish the

CNMI Economic Vitality & Security Travel Authorization Program (EVS–TAP) that also includes an electronic travel authorization process for certain nationals of the People's Republic of China (PRC) traveling to the CNMI only. *See* 8 CFR 212.1(r). As detailed in the IFR, to fully integrate the two automated systems in an efficient and cost-effective manner, DHS would implement the CNMI EVS–TAP after the system for G–CNMI VWP automation became fully operational. 89 FR at 3303, 3310. The IFR explained that when DHS was ready to fully implement CNMI EVS–TAP, DHS would provide notification in the **Federal Register** , and the CNMI EVS–TAP would be implemented 45 days after publication as set forth in 8 CFR 212.1(r)(11). *Id.*

Implementation of CNMI EVS–TAP

Although the IFR was effective on September 30, 2024, DHS incorporated a 60-day transition period to facilitate travelers adjusting to the new collection method. *See* 8 CFR 212.1(q)(9)(i). This 60-day transition period ended on November 29, 2024, and the system for G–CNMI VWP automation is fully operational. Accordingly, carriers must now deny boarding to travelers without a visa or without an approved electronic travel authorization. *See* 8 CFR 212.1(q)(5)(iv).

DHS is now ready to implement CNMI EVS–TAP. Pursuant to 8 CFR 212.1(r)(11), this document provides notification that CBP is implementing the requirements of CNMI EVS–TAP set forth in 8 CFR 212.1(r) for certain PRC nationals as of February 20, 2024. At that time, eligible nationals from the PRC seeking to travel to the CNMI only for a period not to exceed 14 days without a visa under the CNMI EVS–TAP will be required to obtain an electronic travel authorization from CBP prior to embarking on such travel. *See* 8 CFR 212.1(r). Concurrently, the current parole policy for PRC nationals seeking to enter the CNMI will be discontinued on February 20, 2024.

ALEJANDRO N. MAYORKAS,
Secretary of Homeland Security.

U.S. Court of Appeals for the Federal Circuit

OMAN FASTENERS, LLC, Plaintiff-Appellee v. UNITED STATES, Defendant
MID CONTINENT STEEL & WIRE, INC., Defendant-Appellant

Appeal No. 2023–1661

Appeal from the United States Court of International Trade in No. 1:22-cv-00348-MMB, Judge M. Miller Baker.

Decided: January 7, 2025

MICHAEL R. HUSTON, Perkins Coie LLP, Phoenix, AZ, argued for plaintiff-appellee. Also represented by ANDREW CARIDAS, MICHAEL PAUL HOUSE, JONATHAN IRVIN TIETZ, Washington, DC; ANDREW DUFRESNE, SOPEN B. SHAH, Madison, WI.

ADAM H. GORDON, The Bristol Group PLLC, Washington, DC, argued for defendant-appellant. Also represented by BENJAMIN JACOB BAY, JENNIFER MICHELE SMITH-VELUZ.

Before MOORE, *Chief Judge*, SCHALL and TARANTO, *Circuit Judges*.

TARANTO, *Circuit Judge*.

Based on its 2015 antidumping-duty order covering certain steel nails from the Sultanate of Oman, the U.S. Department of Commerce conducted an administrative review under section 751 of the Tariff Act of 1930, 19 U.S.C. § 1675, of merchandise that was covered by the 2015 order and entered into the United States between July 1, 2020, and June 30, 2021 (the 2020–2021 administrative review). Oman Fasteners, LLC, a foreign producer and exporter of steel nails covered by the 2015 order, was the sole mandatory respondent in the 2020–2021 administrative review. Commerce issued a detailed questionnaire to Oman Fasteners, and on the day a response was due, counsel for Oman Fasteners submitted the response through Commerce's electronic filing system, but the system did not report acceptance of the submission (deemed necessary for completion) until 16-minutes after a deadline of 5:00 PM. The next day, as authorized by Commerce rules, counsel for Oman Fasteners made the final redactions for confidential information.

Oman Fasteners did not call its tardiness to the attention of Commerce officials. Five weeks later, after certain Commerce personnel noticed the 16-minute delay, Commerce rejected Oman Fasteners' response. Commerce proceeded to issue the final results of the review without considering any of the information in the response and in-

stead applied an inference adverse to Oman Fasteners, under 19 U.S.C. § 1677e(b), to arrive at an antidumping-duty rate for Oman Fasteners of 154.33%. The ruling had the immediate effect of requiring the importer of all new entries of Oman Fasteners' covered nails to make cash deposits with the government of that amount. Previously, under the 2019–2020 administrative review, the duty rate was 1.65% and therefore so was the cash-deposit rate.

Oman Fasteners filed an action in the Court of International Trade (Trade Court) to challenge the final results, and it promptly sought a preliminary injunction against imposition of the 154.33% duty rate. Domestic steel-nail producer Mid Continent Steel & Wire, Inc. (Mid Continent)—which had filed the petition that led to the 2015 antidumping-duty order and which had participated in the 2020–2021 administrative review—intervened as a defendant. After consolidating the preliminary-injunction proceeding with a trial on the merits, the Trade Court held that Commerce abused its discretion and remanded to Commerce for recalculation consistent with its opinion—a nonfinal decision not subject to appeal to this court. But it also issued an injunction that barred Commerce from enforcing the final results and from collecting cash deposits of 154.33% and limited the cash deposits to the pre-existing 1.65% rate. *Oman Fasteners, LLC v. United States*, No. 22–00348, Slip Op. 23–17, 2023 WL 2233642 (Ct. Int'l Trade Feb. 15, 2023) (*Trade Court Decision*).

Pursuant to 28 U.S.C. §§ 1292(c) and 1295(a)(5), Mid Continent filed an interlocutory appeal from the injunctive relief granted to Oman Fasteners. Oman Fasteners, in response, has defended the injunction, while also challenging Mid Continent's standing and urging dismissal for mootness in light of the intervening Commerce determination of a 0.00% rate for Oman Fasteners in the succeeding (2021–2022) administrative review (which set the going-forward cash-deposit rate). We now conclude that Mid Continent has standing and that this appeal is not moot, but we reject Mid Continent's challenges and therefore affirm the injunction on appeal.

I

A

Under the general legal framework relevant here, when Commerce finds that "foreign merchandise is . . . sold in the United States at less than its fair value" and the United States International Trade Commission determines that a domestic industry is, or is threatened to be, materially injured, Commerce must impose an antidumping duty "equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the [foreign] merchandise."

19 U.S.C. § 1673; *see also id.* §§ 1677(7) (defining "material injury"), 1677(34) (defining "dumped"), 1677(35)(A) (defining "dumping margin"), 1677a (defining "export price" and "constructed export price"), 1677b (explaining the process for determining the normal value). Once such an order is in place, Commerce must determine what duties are owed for particular entries of goods subject to the order (subject merchandise). Under our laws' "'retrospective' assessment system," 19 C.F.R. § 351.212, Commerce does not finally determine the amount of antidumping duty owed for entries at the time of entry. Such final determinations occur later, and eventually are put into effect by U.S. Customs and Border Protection (Customs)—*i.e.*, the entries are "liquidated." 19 C.F.R. §§ 159.1, 351.212(a), 351.213(a).

The usual process for finally determining the duty for (already-made) entries of subject merchandise is an administrative review, which is conducted on an up-to-annual basis, at least if requested by an "interested party," such as a domestic producer like Mid Continent. 19 U.S.C. §§ 1675(a)(1), 1677(9) (defining "interested party"); 19 C.F.R. § 351.213(b); *see* 19 C.F.R. §§ 351.212(a), 351.213(a). Through such an administrative review (often called an "annual review"), Commerce is to calculate the proper antidumping duty for the entries made during the discrete review period (generally twelve months) in which the antidumping duty was in effect. 19 U.S.C. § 1675(a)(2)(B)(i), (iv); 19 C.F.R. § 351.213(e). Because facts that are key to the calculation of the dumping margin (*e.g.*, sales prices, production costs) may change over time, periodic assessments through administrative reviews help Commerce fulfill its broad obligation to calculate accurate dumping margins. *See*, *e.g.*, *Dongtai Peak Honey Industry Co., Ltd. v. United States*, 777 F.3d 1343, 1351 (Fed. Cir. 2015); *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

The temporal difference between entry and final determinations of duty for the entered merchandise gives rise to a requirement of cash deposits upon entry. When an antidumping-duty order is in effect, Commerce must instruct Customs to collect cash deposits from the importer of record on covered goods entered, the money to be held by the government until the final determination of the duty actually owed. 19 U.S.C. §§ 1673d(c)(1)(B)(ii), 1673e(a), 1673g; 19 C.F.R. § 351.211(a), (b)(1)–(2); *see Trade Court Decision*, at *1 n.2 ("This requirement is intended as security for the eventual payment of antidumping duties."). The cash-deposit rate for entries generally is the applicable antidumping-duty rate most recently determined—in the original antidumping-duty order or, later, in the most recently con-

cluded administrative review. *See* 19 U.S.C. §§ 1673d(c)(1)(B)(ii), 1675(a)(2)(C); 19 C.F.R. § 351.212(a). Once the duty for a particular entry is finally determined, the importer is to pay to the government any excess of that duty over the cash deposit made upon entry and the government is to pay a refund if the cash deposit exceeded that duty. 19 U.S.C. §§ 1505(b), 1673f, 1677g (providing for interest on overpayments or underpayments); *see* 19 C.F.R. § 351.212.

Commerce, lacking subpoena power, generally must rely on the parties for information crucial to its determination. The "burden of creating an adequate record lies with interested parties and not with Commerce." *BMW of N America LLC v. United States*, 926 F.3d 1291, 1295 (Fed. Cir. 2019) (citations omitted). During an administrative review like the one here, Commerce may request information through "questionnaires requesting factual information" to determine the antidumping duty. 19 U.S.C. § 1677b(b)(2)(A)(ii); 19 C.F.R. § 351.221(b)(2). Under 19 U.S.C. § 1677e(a), "[i]f a respondent fails to provide requested information by the deadlines for submission," Commerce must "fill in the gaps" using information other-wise available to it. *BMW*, 926 F.3d at 1295 (citations omitted). "Separately," under 19 U.S.C. § 1677e(b), "if Commerce determines that an interested party has 'failed to cooperate by not acting to the best of its ability to comply' with a request for information, it may use an adverse inference in selecting a rate from" the information otherwise available to it. *Id.* (quoting § 1677e(b)).

B

Commerce initiated an antidumping investigation of certain steel-nail products imported from the Sultanate of Oman, and certain other places, based on a petition filed by Mid Continent, and Commerce subsequently determined that Oman Fasteners was dumping certain steel nails. *Certain Steel Nails From the Sultanate of Oman: Final Determination of Sales at Less Than Fair Value*, 80 Fed. Reg. 28972 (May 20, 2015). Commerce issued an antidumping-duty order on July 13, 2015, imposing a 9.10% duty on Oman Fasteners. *Certain Steel Nails From the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, and the Socialist Republic of Vietnam: Antidumping Duty Orders*, 80 Fed. Reg. 39994, 39996 (July 13, 2015).[1] Each year since, Commerce has conducted an administrative review, and the

[1] After years of litigation, Commerce's initial antidumping-duty rate has been reduced to 4.22%. *See Mid Continent Steel & Wire, Inc. v. United States*, 941 F.3d 530 (Fed. Cir. 2019); *Mid Continent Steel & Wire, Inc. v. United States*, 586 F. Supp. 3d 1349, 1353 (Ct. Int'l Trade 2022). Today, we reject Oman Fasteners' effort to reduce it even further, and we affirm the 4.22% rate. *Mid Continent Steel & Wire, Inc. v. Oman Fasteners, LLC*, No. 23–1039 (Fed. Cir. Jan. 7, 2025).

Commerce-determined rates for Oman Fasteners preceding the present review were (in chronological order) 0.63%, 0.00%, 0.00%, 0.00%, and 1.65%. *Trade Court Decision*, at *8 & n.12 (citing decisions for 2014–2016, 2016–2017, 2017–2018, 2018–2019, and 2019–2020).[2]

On September 7, 2021, Commerce initiated an administrative review for the period of review spanning July 1, 2020, to June 30, 2021. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 86 Fed. Reg. 50034, 50037 (Sept. 7, 2021). Oman Fasteners responded to Commerce's supplemental questionnaire on December 10, 2021. J.A. 3553–54. On January 24, 2022, in accordance with 19 U.S.C. § 1677m(d), Commerce informed Oman Fasteners that the submission was deficient and gave Oman Fasteners ten days to respond to "37 separately numbered questions, plus additional subquestions, for a total of 48 separate requests for information, clarifications and/or data covering a wide variety of subjects" pertaining to Oman Fasteners' U.S. sales. J.A. 101, 141, 2484–91, 2783–84. At Oman Fasteners' request, Commerce extended the deadline to February 14, 2022, which by regulation meant by 5:00 PM Eastern Time that day, 19 C.F.R. § 351.303(b)(1), but Commerce warned that it did not "anticipate providing any additional extension." J.A. 118–19, 2493–94, 2498–99, 2501–03, 2505–06.

On February 14, counsel for Oman Fasteners, in preparing to submit its response electronically, prescreened the files for submission-impairing errors by using the "check file" feature on Commerce's electronic filing system ACCESS. J.A. 2513. The "check file" identified no problem. *Id.* Although prior submissions by counsel had taken between 9 and 32 minutes, J.A. 144, counsel began uploading the files about 50 minutes before the 5:00 PM deadline. J.A. 2514. Despite the clean "check file" results, counsel received a notification that the first file was rejected 8 minutes after submitting it, and counsel received a similar notification 9 minutes after resubmitting the file. J.A. 2514, 2527–30. Counsel for Oman Fasteners reformatted and resubmitted the response narrative and a supporting PDF (Portable Document Format) document, receiving electronic confirmation of receipt by 4:46 PM. J.A. 2514–15, 2529–30. Counsel then began uploading additional files, which were in a different computer format and contained mostly (but not entirely) the same information already submitted successfully by 4:46 PM—but the last of those files were not accepted (or, therefore, successfully submitted) until 5:16 PM. J.A.

[2] In the administrative review for 2021–2022, which is the period following the review period at issue here (2020–2021), Commerce adopted a 0.00% rate for Oman Fasteners. *Certain Steel Nails From the Sultanate of Oman: Final Results of Antidumping Duty Administrative Review; 2021–2022*, 88 Fed. Reg. 85878 (Dec. 11, 2023).

2514–16, 2531–36, 2655–65, 2670, 2893, 2895.[3] Counsel for Oman Fasteners did not send Commerce any "notification . . . of filing difficulties or an additional request for extension of the deadline." J.A. 120, 2669.

The files submitted on February 14th had business proprietary information and were marked as such, with the marking properly indicating that the markings could be corrected within one day. J.A. 2651–65; 19 C.F.R. § 351.303(d)(2)(v) (authorizing the respondent to bracket such information and mark the document with the warning that "Bracketing of Business Proprietary Information Is Not Final for One Business Day After Date of Filing" at the top of each page containing such information). Pursuant to Commerce's "one-day lag rule," 19 C.F.R. §§ 351.303(c), 351.303(d)(2)(v)–(vi), 351.304(c), counsel for Oman Fasteners submitted the final business confidential submission with confidential information bracketed and a public version with confidential information redacted by 5:00 PM the next business day. J.A. 2516, 2558–66, 2892. Those versions differed from the February 14th submissions only in the information bracketed or redacted and in the removal of the February 14th version's warning that the bracketing was not final. 19 C.F.R. § 351.303(c)(2)(ii).

Commerce notified counsel for Oman Fasteners on March 22, 2022, that it was rejecting the tardy submission and would not consider it part of the record for the proceeding. J.A. 120–21 (citing 19 C.F.R. §§ 351.303(b)(1), 351.302(d)(i)); *see also* 19 U.S.C. § 1677m(d). Counsel for Oman Fasteners requested that Commerce reconsider the rejection and grant an extension. J.A. 138–51, 240–55. Commerce rejected the request, explaining that (1) Oman Fasteners had not requested an extension before the deadline or demonstrated extraordinary circumstances justifying an extension, (2) the late submissions were important for "calculat[ing] an accurate [dumping] margin," and (3) Commerce "does not bear the burden of demonstrating it or an interested party was impeded or prejudiced by a late submission to justify its rejection," and such a requirement would impede its "ability to manage its proceedings and administer its statutory mandate." J.A. 263–66.

In July 2022, Commerce issued its preliminary results for the administrative review and found a dumping margin of 154.33% for

[3] Regarding the files in a different format from that of the already-submitted files—*i.e.*, what Oman Fasteners characterizes as certain "back-up files"—Oman Fasteners later argued that the submission of such files was voluntary, not required. J.A. 145–46. Commerce rejected the argument, stating that those files constituted the required "copy of the computer program/spreadsheet/worksheet . . . used to calculate the prices, expenses, and adjustments." J.A. 265; *see Issues and Decision Memorandum for the Final Results of the 2020–2021 Administrative Review of Antidumping Duty Order on Certain Steel Nails from the Sultanate of Oman* at 20 (Dep't of Commerce Dec. 16, 2022).

the 2020–2021 Oman Fasteners entries. *Certain Steel Nails From the Sultanate of Oman: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2020–2021*, 87 Fed. Reg. 43240, 43241 (July 20, 2022) (*Prelim. Results*). In its accompanying decision memorandum, Commerce reasoned: "Oman Fasteners failed to provide necessary U.S. sales information by the deadline for submission of that information and failed to demonstrate that any extraordinary circumstances caused the untimely filed extensions request and submission"; "necessary information [was] not available on the record"; and it should turn to information otherwise in the record under 19 U.S.C. § 1677e(a). *Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review of Certain Steel Nails from the Sultanate of Oman; 2020–2021* at 6–10 (Dep't of Commerce July 1, 2022) (*Prelim. Results Dec. Mem.*). Commerce then concluded that because Oman Fasteners "failed to cooperate to the best of its ability," it would use an inference adverse to the interests of Oman Fasteners, under 19 U.S.C. § 1677e(b)(1), in selecting from among the facts otherwise available in the record. *Prelim. Results*, 87 Fed. Reg. at 43241; *see Prelim. Results Dec. Mem.*, at 10–11. Specifically, it selected "the highest dumping margin alleged in [Mid Continent's 2014] Petition"—154.33%. *Prelim. Results Dec. Mem.*, at 11–12; *see Prelim. Results*, 87 Fed. Reg. at 43241.

Oman Fasteners asked Commerce to extend the deadline for its issuance of the administrative review's final results and to postpone, pending judicial review, its issuance to Customs of the cash-deposit instructions based on this new rate (if it was adopted in the final results) because, Oman Fasteners alleged, failure to do so would result in "irreparable harm" to Oman Fasteners. J.A. 2748–64. Commerce refused those requests. J.A. 2878–79.

On December 22, 2022, Commerce issued its final results, adopting the 154.33% rate. *Certain Steel Nails From the Sultanate of Oman: Final Results of Antidumping Duty Administrative Review; 2020–2021*, 87 Fed. Reg. 78639 (Dec. 22, 2022) (*Final Results*). In its accompanying memorandum, Commerce stated that "Oman Fasteners did not provide a convincing explanation for why its submission was late" and "did not notify Commerce of its error in not filing the complete submission, or attempt to remedy it." *Issues and Decision Memorandum for the Final Results of the 2020–2021 Administrative Review of the Antidumping Duty Order on Certain Steel Nails from the Sultanate of Oman* at 19–20 (Dep't of Commerce Dec. 16, 2022) (*Final Results Dec. Mem.*). Commerce reasoned that the statute authorizes it to adopt any dumping margin "including the highest such

rate or margin" and that, on the record here, although "calculated margins" ranged "from 0.63 percent to 9.10 percent," it was "appropriate to assign Oman Fasteners the Petition rate of 154.33 percent [from the petition initiating the underlying antidumping investigation] based on [Oman Fasteners'] failure to cooperate, *because it is a rate on the record which would confer an adverse inference and induce cooperation*." *Id.* (emphasis added). Commerce added that the statute "does not require that Commerce demonstrate that the . . . rate used reflects an alleged commercial reality of an interested party," so it was "not required to consider whether such a rate reasonably reflects the commercial reality of Oman Fasteners." *Id.* at 19.

C

The next day, Oman Fasteners, an "interested party" under 19 U.S.C. §§ 1516a(f)(3), 1677(9), brought suit in the Trade Court under 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and (B)(iii) and 28 U.S.C. § 1581(c), to challenge Commerce's decision. Arguing that Commerce erred in rejecting the response to the supplemental questionnaire, applying an adverse inference to "select the wholly discredited and punitive 154.33% petition rate," and refusing to postpone implementation of the cash-deposit rate, Oman Fasteners sought a remand to Commerce for a redetermination. J.A. 1673–91. A few days later, Oman Fasteners moved for a preliminary injunction. J.A. 2360–441. The Trade Court ordered that the government, in its opposition brief, should address whether preliminary-injunction proceedings should be consolidated under Court of International Trade Rule 65(a)(2) with a trial on the merits—more specifically, with consideration of judgment on the agency record under Rule 56.2. J.A. 48, ECF No. 26. The Trade Court also granted Mid Continent's motion to intervene as a defendant as a matter of right under 28 U.S.C. § 2631(j)(1)(B). J.A. 49, ECF No. 37.

After a confidential hearing, which the Trade Court instructed the parties to treat as a trial on the merits, J.A. 52, ECF No. 78; J.A. 3655–56, 3671, the Trade Court issued a judgment on the agency record on February 15, 2023, *Trade Court Decision*, at *13. Stating that "this is not a close case," *id.* at *4, the Trade Court concluded that Commerce abused its discretion in denying the retroactive extension and applying an adverse inference to select the "draconian sanction" of the 154.33% antidumping duty, *id.* at *7–8. "Because Commerce's challenged actions here are the very definition of abuse of discretion," the Trade Court remanded the case to Commerce for further proceedings consistent with the court's opinion. *Id.* at *2. Moreover, because Oman Fasteners had met "the requirements for obtaining injunctive

relief, including showing irreparable injury, the [Trade C]ourt enjoin[ed] the government to collect cash deposits at the previous rate of 1.65 percent pending further order of the [Trade C]ourt." *Id.*

The United States declined to appeal from the injunction, but Mid Continent timely filed an interlocutory appeal to this court on March 23, 2023.[4] In January 2024, Oman Fasteners filed a motion to dismiss the appeal as moot. Appellee's Mot. to Dismiss Appeal as Moot, ECF No. 48 (Oman's Motion to Dismiss). We have jurisdiction under 28 U.S.C. §§ 1292(c)(1) and 1295(a)(5).

II

Before turning to the merits of Mid Continent's appeal, we first address Oman Fasteners' arguments that Mid Continent lacked standing to bring this interlocutory appeal, Oman Fasteners Response Br. at 33–38, and that this appeal is now moot, Oman's Motion to Dismiss at 15–22.

"Article III of the Constitution grants the Judicial Branch authority to adjudicate 'Cases' and 'Controversies.'" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013). To demonstrate Article III standing to pursue its appeal, a party invoking the Article III judicial power "must have already suffered or be imminently threatened with a concrete, particularized injury, that is fairly traceable to the challenged conduct, and that is likely to be redressed by a favorable court ruling." *Shenyang Yuanda Aluminum Industry Engineering Co., Ltd. v. United States*, 918 F.3d 1355, 1364 (Fed. Cir. 2019); *see Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016); *Already*, 568 U.S. at 90; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992). In applying those standards, we generally assume that Mid Continent is right about its

[4] After the present appeal was filed, Commerce, in the remand ordered by the Trade Court, recalculated the dumping margin for the 2020–2021 administrative review using the previously disregarded information, and it arrived at a 0.00% rate, which the Trade Court sustained on January 5, 2024. *Oman Fasteners, LLC v. United States*, No. 22–00348, Slip Op. 24–1, 2024 WL 163368, at *1 (Ct. Int'l Trade Jan. 5, 2024) (affirming *Final Results of Redetermination Pursuant to Court Remand*, Case No. A-523–808, Slip Op. 23–17 (Dep't of Commerce July 17, 2023)). That ruling is still in litigation, because Mid Continent (not the government) appealed the Trade Court's decision. *Oman Fasteners v. United States*, No. 24–1350 (Fed. Cir. appeal docketed Jan. 12, 2024), ECF No. 1. When Mid Continent moved to stay that appeal pending decision in the present case, Mot. to Stay Further Proceedings in this Appeal or, in the Alternative, to Consolidate with Related Appeal, *Oman Fasteners*, No. 24–1350, ECF No. 11 (Jan. 29, 2024), the government informed the court that it did not "intend to either challenge or defend the trial court's determination that Commerce abused its discretion by applying an adverse inference to Oman Fasteners," which it "underst[oo]d . . . to be the sole issue in dispute in th[e] appeal" of the Trade Court's 2024 results-sustaining decision, Def.'s Resp. to Mot. to Stay, *Oman Fasteners*, No. 24–1350, ECF No. 14 (Feb. 8, 2024). *See also* Docketing Statement, *Oman Fasteners*, No. 24–1350, ECF No. 15 (Feb. 12, 2024) (government's docketing statement, checking box labeled "None/Not Applicable" for "Relief sought on appeal"). We granted the requested stay. Order Granting Mot. to Stay, *Oman Fasteners*, No. 24–1350, ECF No. 18 (Mar. 25, 2024).

claim on the merits. *See Rocky Mountain Helium, LLC v. United States*, 841 F.3d 1320, 1325 (Fed. Cir. 2016). The term "standing" also covers non-constitutional "prudential" inquiries—including, as relevant here, an inquiry into whether a plaintiff's "interests fall within the zone of interests protected by the law invoked," which, though called "statutory standing," is an inquiry into whether the plaintiff has a statutory right of action. *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125–128 (2014) (internal quotations marks and citation omitted); *see*, *e.g.*, *United States v. Windsor*, 570 U.S. 744, 756–58 (2013); *Bank of America Corp. v. City of Miami, Fla.*, 581 U.S. 189, 196–97 (2017).

After a case (including an appeal) has been initiated, it "becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Already*, 568 U.S. at 91 (citing *Murphy v. Hunt*, 455 U.S. 478, 481 (1982)); *see id.* at 90–91 (explaining that "an 'actual controversy' must exist not only 'at the time the complaint is filed,' but through 'all stages' of the litigation") (quoting *Alvarez v. Smith*, 558 U.S. 87, 92 (2009)). "[A] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (internal quotation marks omitted). The mootness inquiry goes to "Article III jurisdiction[,] . . . not to the merits of the case." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66–67 (1997); *see also Chafin*, 568 U.S. at 174 (explaining that it is improper to "confuse[] mootness with the merits").

A

Oman Fasteners argues that "Mid Continent lacks Article III standing to challenge this injunction against the government." Oman Fasteners Response Br. at 33–38. We assume for this inquiry that (as Mid Continent argues on the merits) the Trade Court committed reversible error in displacing the 154.33% duty on entries during the 2020-2021 period and enjoining use of that rate to set the cash deposit for entries starting from Commerce's December 22, 2022 ruling. We conclude that Mid Continent has Article III standing as well as "statutory" standing.

The challenged dramatic reduction in the government-imposed burden on Oman Fasteners effected by the Trade Court's injunction caused competitive economic injuries to Mid Continent, the domestic steel-nail manufacturer that has taken the lead, in its own name, in requesting the antidumping-duty investigation initially and in opposing Oman Fasteners, year after year, in litigation and administrative

reviews. *See Food and Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 383–84 (2024) (recognizing competitive injury for standing); *cf. McKinney v. U.S. Department of Treasury*, 799 F.2d 1544, 1554–55 (Fed. Cir. 1986) (explaining that "allegations of competitive injury" can confer standing but not in circumstances, unlike the present case, where the alleged injury is not tied to specific companies). Mid Continent asserts that "ordering Commerce to use a cash deposit rate of 1.65% rather than 154.33%" led to significant "real-world consequences" such as "lost sales and lost revenue by virtue of improperly facilitated import competition." Mid Continent Opening Br. at 75. That commonsensical assertion is materially undisputed. According to Oman Fasteners itself, when Commerce imposed a 154.33% cash-deposit rate in late December 2022, Oman Fasteners "had no choice but to cease all U.S. imports of the subject merchandise," as "[i]t could neither raise prices to offset the rate nor pay the sky-high deposits for more than a couple months before depleting its cash reserves." Oman Fasteners Response Br. at 15; *see also Trade Court Decision*, at *10, *12–13. And it is undisputed that, when the Trade Court's February 2023 injunction reduced the cash-deposit rate to 1.65%, Oman Fasteners resumed its entry of substantial volumes of its nails, causing competitive harm to Mid Continent. *See*, *e.g.*, Oral Arg. at 4:45–6:00. Mid Continent has thus adequately established harm to its sales traceable to the challenged Trade Court decision in February 2023.

We also find the redressability requirement of standing to be met. In its merits briefs, Mid Continent argues that, if we reverse the injunction, the proper remedy is for this court to "order retroactive imposition of the 154.33% cash deposit rate on imports of steel nails by or from [Oman Fasteners] effective on and after December 22, 2022," the date of Commerce's *Final Results*. Mid Continent Opening Br. at 76; *id.* at 19; *see also* Mid Continent Reply Br. at 12–13; 87 Fed. Reg. at 78639. A variant of that position would be a reversal of the injunction and a remand for the Trade Court to decide whether to order a retroactive collection of cash deposits. Here, it suffices for us to make a very limited point—that, on the arguments presented by the parties, we have no sufficient basis for declaring such retroactive collection to be unavailable, generally or in this case, as a matter of law. That limited conclusion suffices for redressability here because the results for the 2020-2021 administrative review have not achieved finality in court, *see supra* n.4, and we cannot, in the present appeal, rule out the possibility of a rate for that review period above the 1.65% collected since the February 2023 injunction was issued.

On those bases, we conclude that a reversal of the injunction could lead to redress for Mid Continent of the competitive harm at issue through retroactive collection of cash deposits. *See* Oral Arg. at 22:50–24:10; 25:02–25:52.

In addition, we conclude that Mid Continent has met "prudential" or "statutory" standing requirements. *See*, *e.g.*, *Lexmark*, 572 U.S. at 125–26. Mid Continent's interlocutory appeal of the injunction seeks protection of an interest that is within the "zone of interests" protected by the antidumping-duty provisions of the Tariff Act of 1930 (as amended). *See id.* at 127 (relying on "zone of interests" formulation); *Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319, 1335 (Fed. Cir. 2008) (same). "[I]mposed to protect [domestic] industries against unfair trade practices," *Canadian Wheat Board v. United States*, 641 F.3d 1344, 1351 (Fed. Cir. 2011), an antidumping duty is the result of proceedings that, Congress has provided, can be initiated by a petition filed by a domestic-industry manufacturer "to address harm to domestic manufacturing from foreign goods sold at an unfair price," *United States v. Eurodif S.A.*, 555 U.S. 305, 310–11 (2009); 19 U.S.C. §§ 1673a(b)(1), 1677(9)(C). Mid Continent, a domestic manufacturer of steel nails, exercised its right to that process by filing a petition for, and then participating in, an antidumping investigation, which resulted in the 2015 antidumping order that covers Oman Fasteners.

Mid Continent then had an undisputed right to intervene in Oman Fasteners' court challenge to the final results of the administrative review because it would be "adversely affected or aggrieved by [the Trade Court's] decision," 28 U.S.C. § 2631(j)(1), as it is a manufacturer of a "domestic like product," 19 U.S.C. § 1677(9)(C), and thus an "interested party," 19 U.S.C. § 1516a(f)(3). Oman Fasteners does not dispute that Mid Continent may appeal the final judgment of the Trade Court sustaining Commerce's 2023 redetermination on remand of the antidumping duty, *see supra* n.4; in fact, Oman Fasteners argues that Mid Continent could and should raise in such an appeal some of the arguments Mid Continent makes here. Oman Fasteners Response Br. at 31, 33, 36–37. Accordingly, the statute plainly authorizes a member of the domestic industry like Mid Continent to challenge antidumping-duty decisions and Trade Court rulings about such decisions (if it becomes a party) as mistakenly too lax. For zone-of-interests purposes, we see no reason it should make a difference that the particular remedial device used by the Trade Court was an injunction. That injunction lowered the antidumping-duty and cash-deposit rate, producing recommencement of imports by Oman

Fasteners, with an evident impact on the interest of Mid Continent that is legally protected by a statutory right to seek redress before the agency and in court.

We therefore reject Oman Fasteners' challenge to Mid Continent's standing.

B

We also reject Oman Fasteners' argument that this appeal became moot after it was filed, an argument that rests on the assertion that, because of an intervening development, "[t]he relief that Mid Continent seeks through this [interlocutory] appeal—to reverse or vacate the injunction—would have no effect on Oman Fasteners' cash deposit rate." Oman's Motion to Dismiss at 3, 22. Oman Fasteners points to the issuance by Commerce on December 11, 2023, of its decision setting the final calculated antidumping duty (at 0.00%) for the 2021–2022 administrative review, covering entries from July 1, 2021, through June 30, 2022, the review period following the period at issue here. *See supra* n.2. By law, Oman Fasteners says, that rate governs the cash deposits required for entries after the December 2023 decision, *see supra* p. 5, and therefore a decision by this court in the present case to set aside the injunction before us, as Mid Continent requests, could not result in reinstatement of the 154.33% cash deposit. Oman's Motion to Dismiss at 12–13.

We do not agree. Mid Continent retains a "concrete interest, however small," *Chafin*, 568 U.S. at 172, in our reversal or vacatur of the Trade Court's injunction because Mid Continent could benefit from such a result, depending on what occurs in other proceedings not now before us. *See Gilda Industries, Inc. v. United States*, 446 F.3d 1271, 1279 (Fed. Cir. 2006) (explaining that standing can exist when overturning the challenged action would provide an otherwise-foreclosed opportunity to secure relief, depending on decisions not yet made). Specifically, for imports subject to the 2020-2021 administrative review itself, still-active proceedings might produce an ultimate duty assessed at liquidation higher than the 0.00% rate that Commerce determined on remand from the Trade Court's ruling now before us. *See supra* n.4 (appeal of Trade Court's affirmance of Commerce's remand rate of 0.00% stayed in this court). And for imports by Oman Fasteners made while the injunction was in effect but covered by

other administrative reviews, other proceedings might produce a cash-deposit rate and actual duty higher than 1.65%.[5]

We cannot determine here whether Mid Continent will succeed in its separate appeal of the remand redetermination in the 2020–2021 administrative review or what rates will ultimately be found proper for imports addressed in other administrative reviews but covered by the cash-deposit rate set by Commerce in December 2022 and then the drastically reduced rate set by the Trade Court's injunction in February 2023. Above, we concluded that, on the arguments presented to us, we cannot rule out the possibility of a retroactive collection of cash deposits if Mid Continent wins on the merits here (as we must assume for the mootness analysis, *Chafin*, 568 U.S. at 174). Reflecting that conclusion, we determine here only that, if Mid Continent wins here, it might—to its benefit—be put into a position it would have been in had the injunction never been issued through a requirement of retroactive cash deposits covering entries not yet subject to a final, no longer appealable, determination of the actual duty rate. *See*, *e.g.*, Oral Arg. at 9:46–12:24, 18:38–21:20. That is enough for us to reject Oman Fasteners' assertion of mootness. *See Chafin*, 568 U.S. at 177 (explaining that "even the availability of a 'partial remedy' is 'sufficient to prevent [a] case from being moot'" where the relief available is "not [] 'fully satisfactory'" (quoting *Calderon v. Moore*, 518 U.S. 149, 150 (1996))); *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160–61 (2016).

III

On the merits of Mid Continent's appeal, we affirm the Trade Court's injunction. Mid Continent argues that the Trade Court abused its discretion in enjoining Commerce from implementing the 154.33% antidumping-duty and cash-deposit rate and also challenges the Trade Court's consolidation of the hearing on the preliminary injunction with a trial on the merits (which led to the issuance of the

[5] The 2022–2023 administrative review (for entries from July 1, 2022, through June 30, 2023) will establish the actual duty for entries made between December 22, 2022, through June 30, 2023, which would have been subject to the 154.33% cash-deposit rate in the absence of the injunction before us. Commerce issued preliminary results for the 2022–2023 administrative review on August 12, 2024, preliminarily adopting an actual antidumping duty of 0.00%. *Certain Steel Nails From the Sultanate of Oman: Preliminary Results and Rescission, in Part, of Antidumping Duty Administrative Review; 2022–2023*, 89 Fed. Reg. 65593, 65594 (Aug. 12, 2024). Commerce adopted the same 0.00% rate in the final results. *Certain Steel Nails From the Sultanate of Oman: Final Results of Antidumping Duty Administrative Review; 2022–2023*, 89 Fed. Reg. 106428 (Dec. 30, 2024). The recently initiated 2023–2024 administrative review (covering entries from July 1, 2023, through June 30, 2024), *see Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 89 Fed. Reg. 66035, 66038–39 (Aug. 14, 2024), will establish the actual duty for other entries—made from July 1, 2023, through December 11, 2023—that also would have been subject to the 154.33% cash deposit in the absence of the injunction.

injunction). We reject both contentions. We first address the merits of the Trade Court's granting of its injunction and then its procedure in doing so.

A plaintiff seeking a permanent injunction must demonstrate "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). "The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff [for a preliminary injunction] must show a likelihood of success on the merits rather than actual success." *Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531, 546 n.12 (1987); *see*, *e.g.*, *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20–21 (2008). We review the Trade Court's grant of an injunction for abuse of discretion. *eBay*, 547 U.S. at 391; *Wind Tower Trade Coalition v. United States*, 741 F.3d 89, 95 (Fed. Cir. 2014); *Apple Inc. v. Samsung Electronics Co., Ltd.*, 735 F.3d 1352, 1359 (Fed. Cir. 2013). An abuse of discretion may be established by showing that the Trade Court "made a clear error of judgment in weighing the relevant factors or exercised its discretion based on an error of law or clearly erroneous fact findings." *Wind Tower Trade Coalition*, 741 F.3d at 95 (citation omitted). To the extent the Trade Court's decision to grant or deny an injunction "hinges on questions of law," this court reviews those determinations without deference. *Id.*

"We review Commerce's decision using the same standard of review applied by the Trade Court, while carefully considering that court's analysis. We decide legal issues de novo and uphold factual determinations if they are supported by substantial evidence." *Mid Continent Steel & Wire, Inc. v. United States*, 941 F.3d 530, 537 (Fed. Cir. 2019) (citations omitted); 19 U.S.C. § 1516a(b)(1)(B)(i); 28 U.S.C. § 2640(b). We have applied the review standard of the Administrative Procedure Act (APA), 5 U.S.C. § 706, to Commerce decisions like this one covered by 19 U.S.C. § 1516a(b)(1)(B)(i). *SolarWorld Americas, Inc. v. United States*, 962 F.3d 1351, 1359 n.2 (Fed. Cir. 2020). The APA provides for setting aside an agency decision if, for example, it is "an abuse of discretion," 5 U.S.C. § 706(2)(A), and we have reviewed decisions like the one here for an abuse of discretion, *see Goodluck India Ltd. v. United States*, 11 F.4th 1335, 1342–44 (Fed. Cir. 2021) (citing cases). When discretion is granted by Congress, it "should be exercised in light of the considerations underlying the grant of that discretion."

Halo Electronics, Inc. v. Pulse Electronics, Inc., 579 U.S. 93, 103 (2016) (internal quotation marks and citation omitted). Discretion is abused if, for example, its exercise rests on "'a clear error of judgment'" in the "'consideration of the relevant factors.'" *Weyerhaeuser Co. v. United States Fish & Wildlife Service*, 586 U.S. 9, 25 (2018) (quoting *Judulang v. Holder*, 565 U.S. 42, 53 (2011)).

The Trade Court, like all trial courts, has "broad discretion to manage [its] docket[]." *Proctor & Gamble Co. v. Kraft Foods Global, Inc.*, 549 F.3d 842, 848–49 (Fed. Cir. 2008). Exercise of that inherent power requires judgment and "weigh[ing] competing interests and maintain[ing] an even balance." *Landis v. North American Co*., 299 U.S. 248, 254–55 (1936). We thus review management decisions by trial courts under the abuse-of-discretion standard. *See id.* at 253–57; *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984); *Jazz Photo Corp. v. United States*, 439 F.3d 1344, 1349 (Fed. Cir. 2006).

A

We conclude that the Trade Court did not abuse its discretion by enjoining Commerce from enforcing the 154.33% antidumping-duty and cash-deposit rate. We first address the Trade Court's conclusion that Commerce reversibly erred in imposing that rate, which is the heart of the public-interest element of the injunction analysis. We then address the elements of irreparable injury, inadequacy of remedies available at law, and balance of hardships.

1

The Trade Court's determination that "[i]njunctive relief here will not disserve the public interest" rested on its conclusion that the "154.33 percent duty rate set by Commerce is unlawful." *Trade Court Decision*, at *13. The court explained that "the government has no legitimate interest in collecting cash deposits at that rate" and an injunction would not "undermine the statute's remedial purposes, because Oman has no liability to pay 154.33 percent duties." *Id*. The Trade Court reasoned that Commerce abused its discretion in denying Oman Fasteners a retroactive extension of time as well as in applying an adverse inference to select the 154.33% rate. *Id.* at *4–9. It suffices for our affirmance of the injunction for us to conclude, as we do, that applying an adverse inference to select the 154.33% rate was unsupported by the required substantial evidence and was an abuse

of discretion, considering the rate selected and the facts surrounding the slightly tardy completion of the submission at issue.[6]

Commerce invoked the adverse-inference authority and made the necessary threshold finding that respondent Oman Fasteners "failed to cooperate by not acting to the best of its ability to comply with a request for information," 19 U.S.C. § 1677e(b)(1). *See Prelim. Results*, 87 Fed. Reg. at 43241; *Prelim. Results Dec. Mem.*, at 10–11; *Final Results*, 87 Fed. Reg. at 78639. To make such a determination, Commerce must "examine respondent's actions and assess the extent of respondent's abilities, efforts, and cooperation in responding to Commerce's requests for information." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). If, based on such an examination, the prerequisite is met, Commerce then has authority, but is not compelled, to adopt an adverse inference. Commerce "may use an inference that is adverse to the interests of [the respondent] in selecting from" available facts to arrive at a rate, § 1677e(b)(1)(A), without being "required" to make "assumptions" about what the information, if properly submitted, would establish, § 1677e(b)(1)(B).

That "may use" grant of discretion, like any grant of discretion, must be exercised within the constraints of the statute and record. *See Weyerhaeuser*, 586 U.S. at 25. Importantly, regarding the specific rates Commerce may adopt through this discretion, we have long held that "the 'inference' that Commerce 'may use' in 'selecting from among the facts otherwise available' must 'be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance.'" *Diamond Sawblades Manufacturers' Coalition v. United States*, 986 F.3d 1351, 1367 (Fed. Cir. 2021) (quoting *F.lli de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)) (first citing *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1276 (Fed. Cir.

[6] We need not separately address the Trade Court's conclusion that Commerce erred when deciding to disregard Oman Fasteners' February 14, 2022 submission in the first place. After the Trade Court set aside Commerce's December 2022 final results and remanded (on a ground we uphold here), Commerce decided to accept and consider that submission, without protesting that it disagreed with the Trade Court on the submission-rejection point, and Commerce, upon consideration of the submission, adopted a 0.00% rate. *See supra* n.4. When Mid Continent challenged the remand redetermination in the Trade Court, the government urged affirmance, without qualification and without preserving a challenge to the Trade Court's earlier conclusion on the threshold submission-rejection point. *See* Def.'s Resp. to Comments on Remand Redetermination, *Oman Fasteners, LLC v. United States*, No. 1:22-cv-00348 (Ct. Int'l Trade), ECF No. 120 (Sept. 22, 2023). Then, after the Trade Court affirmed the remand redetermination and Mid Continent appealed, the government told this court that it does not plan to challenge the Trade Court's earlier submission-rejection or § 1677e conclusions. *See supra* n.4. We do not decide whether those filings by Commerce make clear that it has chosen or would choose to exercise discretion to accept the submission (as it certainly could do) even if not compelled by the Trade Court to do so or whether for such a reason the Trade Court's specific conclusion that rejection was improper might no longer be material to the final rate adopted.

2012); and then citing *Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319, 1324 (Fed. Cir. 2010)); *see also F.lli de Cecco di Filippo Fara S. Martino S.p.A.*, 216 F.3d at 1032 ("[T]he purpose of section 1677e(b) is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins."). That well-established standard, focusing on accuracy but allowing a departure for deterrence, takes due account not only of the overall statutory regime but also of particular statutory guides—that Commerce is not "required" to "estimate" what the rate "would have been" if the relevant party "had cooperated" or to "demonstrate" that the rate chosen "reflects an alleged commercial reality of the interested party," 19 U.S.C. § 1677e(d)(3), and that Commerce "may apply any of the . . . dumping margins . . . *based on the evaluation by [Commerce] of the situation that resulted in [Commerce] using an adverse inference in selecting among the facts otherwise available," id.* § 1677e(d)(2) (emphasis added).

Under the governing standard, we conclude—relying on the combination of considerations we discuss—that the reasoning by Commerce and the evidence before it cannot support the 154.33% result it reached. Most strikingly, Commerce's decision to use the adverse-inference authority to select a 154.33% rate, based on a 16-minute delay in submitting the requested information, is a gross departure from the established principle that Commerce, when applying the adverse-inference provision, must pursue accuracy, with any departure limited to what is needed to deter non-compliance with Commerce rules and orders. As we have noted, the Commerce-determined rates for Oman Fasteners preceding the present review were 0.63%, 0.00%, 0.00%, 0.00%, and 1.65% (after the original investigation had adopted a 9.10% rate, which had been reduced to 4.22% by early August 2022). *See supra* pp. 6–7 & n.1. Even before Commerce, when considering the initially excluded information, recalculated the rate for the present administrative review as 0.00%, *see supra* n.4, a rate of 154.33% stood out as highly implausible as an accurate figure for Oman Fasteners' dumping margin for the 2020–2021 administrative-review period. Commerce did not establish a basis for reasonably finding, in light of its past findings or of the evidence in the record in this case, that the 154.33% was even remotely close to an accurate amount by which the normal value of the steel nails at issue exceeded the export price. *See* J.A. 1670–71; 19 U.S.C. §§ 1673, 1677(35)(A); *Diamond Sawblades*, 986 F.3d at 1367.

We need not decide what if any circumstances could justify such a result. A logical implication of our precedent on the governing con-

straints, quote *supra*, is that a *necessary* condition would be the establishment of a particularly strong need to deter non-compliance, which would have to rest on a particularly serious failure to cooperate—considering, *e.g.*, such common factors as intent, consequences for Commerce's processes and ability to carry out its statutory mandate, and recidivism. The record here cannot support any such characterization.

In its preliminary decision, Commerce devoted just two paragraphs to explaining why it proposed to apply an adverse inference under § 1677e(b). The first paragraph restates the general law and practice of Commerce, and the second states simply that Oman Fasteners failed to "act to the best of its ability" by submitting its response by the deadline and "fail[ing] to demonstrate that extraordinary circumstances existed that would warrant" granting of an untimely filed extension request. *Prelim. Results Dec. Mem.*, at 10–11. In its final decision, Commerce included just one sentence on this issue (as part of a longer discussion about the threshold issue about missing information, under § 1677e(a)), stating only that "because Oman Fasteners failed to cooperate by not acting to the best of its ability when it failed to provide information to Commerce within established deadlines, we are applying an adverse inference when selecting from the facts available." *Final Results Dec. Mem.*, at 15. Explaining the selection of the 154.33% figure based on its "evaluation . . . of the situation that resulted in" the application of the adverse inference, Commerce merely declared, in conclusory fashion, that Oman Fasteners' failure to "act to the best of its ability . . . greatly inhibited Commerce's ability to calculate an accurate dumping margin based on the respondent's own data." *Id.* at 19.

That discussion fails to address facts relevant to assessing the character of the actions at issue under the governing standard. *See Hitachi Energy USA Inc. v. United States*, 34 F.4th 1375, 1385–86 (Fed. Cir. 2022) (determining that applying an adverse inference was unsupported by substantial evidence in the record because Commerce failed to provide a reasonable justification for why it refused information and applied an adverse inference). As discussed *supra*, counsel began the filing process as far in advance of the deadline as he had found sufficient when making previous filings. J.A. 143–44 (certain prior submissions took 9 to 32 minutes). He used the "check file" feature in the electronic filing system and got a positive indication that the files would be accepted. J.A. 2513, 2894–95. When the system nevertheless rejected files, counsel immediately reformatted and began to resubmit the files, and some were accepted before the deadline and the rest were accepted just 16 minutes after the deadline. J.A.

2514–16, 2527–36, 2894–96. Counsel then complied with the "one-day lag rule" by submitting the final redacted versions and public versions the next day before the 5:00 PM deadline. J.A. 2516, 2558–66, 2892. And the record does not reveal that the 16-minute delay in completion of the initial filing interfered in any way with Commerce's review processes, except for the interference that resulted in Commerce's own decision to reject the response and limit the record available for its calculation.

We have explained that the "best of its ability" standard of § 1677e(b)(1) "does not require perfection and recognizes that mistakes sometimes occur." *Nippon Steel Corp.*, 337 F.3d at 1382. Even considering counsel's failure to notify Commerce officials of the delay, Commerce has not explained why the evidence here establishes more than the kind of mistake that falls short of failure to cooperate—or, what is crucial, a serious failure to cooperate that would be necessary (we do not say sufficient) to justify the rate selected. The evidence here contrasts, rather than aligns, with the evidence in other cases discussing a failure to cooperate. For example, Oman Fasteners' late submission was not the result of "intentional conduct, such as deliberate concealment or inaccurate reporting." *Id.* at 1383. Nor is this a case of simply not providing requested information, *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1361 (Fed. Cir. 2017), or of a party's failure to "(a) take reasonable steps to keep and maintain full and complete records[;] . . . (b) have familiarity with all of [its] records[;] . . . and (c) conduct prompt, careful, and comprehensive investigations of all relevant records," *Nippon Steel Corp.*, 337 F.3d at 1382. Nor, further, are the facts like those addressed in *Dongtai Peak Honey Industry*, where Commerce excluded responses filed 10 days after the deadline and the party knew several days before the deadline that it was not going to meet it and yet filed no timely extension request. 777 F.3d at 1351. Here, Commerce got the information 16 minutes after it was due, without having to prompt Oman Fasteners, which was diligently pursuing completion in circumstances that suggest nothing more than failure to build in temporal leeway beyond what had been needed in earlier filings. And recidivism has not been found.

Commerce has itself treated the kind of slight tardiness at issue here as more suitable for a warning than for the harsh treatment meted out in this matter. First, Commerce has stated (but not codified) a policy under which, if a party facing a 5:00 PM deadline seeks an extension before that time, but Commerce is "not able to notify the party requesting the extension of the disposition of the request by 5:00 p.m," Commerce treats the deadline as extended automatically

until the start of the next business day. *Extension of Time Limits*, 78 Fed. Reg. 57790, 57792 (Sept. 20, 2013); *see Trade Court Decision*, at *5. Oman Fasteners' counsel was apparently unaware of the policy, but it appears that, had he sent in an extension request at 4:55 PM, he would have automatically had an extension until 8:30 AM the next morning—long after the 5:16 PM time when the submission was actually completed. Treating the 16-minute delay here as a failure to cooperate that triggers an adverse inference (and supports a punishingly high duty and cash-deposit rate) is in considerable tension with Commerce's policy. Second, Commerce has stated in other proceedings that it has a policy of "leniency" toward law firms that miss a deadline for the first time, promptly contact Commerce, and adopt better practices for the future. *See Trade Court Decision*, at *6. It appears that this policy applied here except for the fact that Oman Fasteners did not notify Commerce about the delay. *Id.* ; J.A. 241–44, 310. Perhaps that fact, as Commerce suggested, J.A. 306, makes the policy inapplicable even when the information was fully submitted within 16 minutes of the deadline, but the policy itself undermines any conclusion that any failure-to-cooperate determination on the record here could support the harsh result reached.

In short, the 154.33% duty rate is very far from an accurate antidumping duty. There is no adequate basis on this record for finding the type of failure to cooperate that could (if any could) justify such a gross departure from accuracy. For those reasons, we hold that the Trade Court correctly ruled that the 154.33% rate could not stand, and it was therefore in the public interest to enjoin enforcement of that rate, including through its use as the cash-deposit rate.

2

The Trade Court did not abuse its discretion in holding that Oman Fasteners had established a "viable threat of serious harm which cannot be undone." *Trade Court Decision*, at *9 (quoting *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983)). The Trade Court cited four different irreparable harms: (1) insolvency from running out of cash due to a dramatic loss of revenue after the December 2022 Commerce ruling, either from ceasing its imports, *id.* at *10–11, or from losing customers by raising its prices to try to recoup part of or all the cash deposits, *id.* at *12–13, (2) an immediate risk of insolvency through default with lenders, *id.* at *11, (3) damage to its customer relationships resulting from its inability to sell nails to current customers, *id.* at *11, and (4) disruption to its business as a result of employee terminations it had made, and would need to

make, in the absence of an injunction, *id.* at *11–12. Although Mid Continent contests whether the antidumping duty of 154.33% would have necessarily led to, or been the main reason for, Oman Fasteners' insolvency, Mid Continent Opening Br. at 65–69, Mid Continent does not demonstrate that the Trade Court erred in its findings regarding the layoffs and damage to goodwill, which are independently sufficient to establish irreparable harm. *See*, *e.g.*, *AstraZeneca LP v. Apotex, Inc.*, 633 F.3d 1042, 1061–63 (Fed. Cir. 2010).

3

Given the readily affirmed finding of irreparable injury, we see no substantial issue concerning the inadequacy of remedies at law for the injuries, an element of the justification for a permanent injunction. The Trade Court noted that there was no other remedy at law against the government, which is the party that committed the asserted wrong. *Trade Court Decision*, at *9 n.14. Mid Continent cites no authority or factual basis in this record for treating a potential recovery from third parties (*e.g.*, Oman Fasteners' law firm or its insurer) as establishing an adequate remedy at law for the government adjudicated wrong, and for all the harm suffered, including the irreparable consequences. That is enough for the injunction on appeal, but we also note the Trade Court's observation that, in the present context, the "permanent" injunction is temporally similar to a preliminary injunction, in that it is in effect before there is a final appealable judgment—which occurs (as it has in the present case, *see supra* n.4) when Commerce completes its work on remand and the dispute returns to the Trade Court. *Id.* at *9 n.13. If the injunction is viewed as a preliminary injunction, the requirement of a likelihood of success on the challenge to the 154.33% duty is established by the Trade Court's determination that the challenge is actually meritorious. *Trade Court Decision*, at *13. **[A37–38]**

4

The Trade Court determined that the balance of hardships was "lopsidedly" in Oman Fasteners' favor because it faced "catastrophe" "[a]bsent injunctive relief," while "[t]he harm to the government . . . [was] minimal to non-existent." *Trade Court Decision*, at *13. Oman Fasteners stopped importing nails in response to the 154.33% antidumping duty, so the government would very likely not have received *any* cash deposits in the absence of an injunction. Although Mid Continent argues on appeal that the Trade Court "failed to consider the balance of equities as it relates to Mid Continent, a party to this litigation," Mid Continent Opening Br. at 74, Mid Continent never argued to the Trade Court that it would suffer any hardships, instead

focusing on the balance of hardships between Oman Fasteners and the government. J.A. 3116–17; Oman Fasteners Response Br. at 54–55. In any event, the merits determination that the 154.33% cash deposit was unlawful weakens or nullifies any assertion by Mid Continent of cognizable harm from being deprived of the competitive benefit that cash deposit would confer on it and makes certain Mid Continent has identified no harm to it that compares with the irreparable injury to Oman Fasteners. We see no reversible error in this element of the Trade Court's injunction analysis.

B

We conclude by addressing Mid Continent's challenge to the Trade Court's decision to grant a permanent injunction after consolidating Oman Fasteners' motion for a preliminary injunction with a trial on the merits. We have already noted that the legal effect of the permanent injunction here is similar to that of a preliminary injunction, a similarity that weakens Mid Continent's challenge as a theoretical matter. But in any event, the Trade Court followed the procedure that the Supreme Court in *University of Texas v. Camenisch* identified as appropriate for deciding a permanent injunction where an expedited decision on the merits is appropriate. 451 U.S. 390, 395–96 (1981). On December 28, 2022, before Mid Continent intervened and before the parties briefed the motion for the preliminary injunction that had been filed,[7] the Trade Court ordered the government to address, in its response, the merits of consolidating the proceedings under Rule 65(a) and treating the motion for preliminary injunction as a motion for judgment on the agency record under Rule 56.2. J.A. 48, ECF No. 26. That order provided clear notice "before the hearing commence[d] or at a time which . . . still afford[ed] the parties a full opportunity to present their respective cases." *University of Texas*, 451 U.S. at 395 (quotations omitted); *see also id.* at 395–96 (suggesting that the issuance of a permanent injunction, instead of a preliminary injunction, may save a case from becoming moot). And Mid Continent has not established that it suffered concrete, identifiable, material harm from any lack of a necessary opportunity to present its case and challenge Oman Fasteners' case. We thus see no reversible error in the Trade

[7] Oman Fasteners filed its initial (public) motion for preliminary injunction on December 26, 2022, but filed its amended motion on December 30, 2022, after the court's order. J.A. 47, ECF No. 15; J.A. 49, ECF No. 38. Mid Continent intervened on December 30, 2022, J.A. 48, ECF No. 32, and filed its (public) response to the motion for a preliminary injunction on January 10, 2023, J.A. 50, ECF No. 46. The government filed its (public) response to the motion for a preliminary injunction on January 11, 2023. J.A. 50, ECF No. 48.

Court's grant of a permanent injunction after exercising its discretion to consolidate the motion for a preliminary injunction with a trial on the merits.

IV

For the foregoing reasons, we affirm the Court of International Trade's injunction.

AFFIRMED

Slip Op. 25–02

UNITED STATES, Plaintiff, v. RAYSON GLOBAL AND DORIS CHENG, Defendants.

Before: Timothy C. Stanceu, Judge
Court No. 23–00201

[Denying without prejudice plaintiff's motion for judgment by default on plaintiff's claims for recovery of a civil penalty and collection of unpaid duties]

Dated: January 8, 2025

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, D.C., for plaintiff. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Ina Zing*, Attorney, U.S. Customs and Border Protection, Seattle, Washington.

Henry Ng, Law Office of Henry L. Ng, of Tustin, California, for defendants.

OPINION AND ORDER

Stanceu, Judge:

Plaintiff United States (the "government") seeks to recover a civil penalty and unpaid duties under section 592 of the Tariff Act of 1930, 19 U.S.C. § 1592 ("Section 592"), from defendants Rayson Global, Inc. ("Rayson Global"), a California corporation, and Doris Cheng, its chief executive officer. Plaintiff alleges that Rayson Global and Doris Cheng negligently introduced merchandise ("uncovered mattress innersprings" or "innersprings") into the commerce of the United States under false declarations of country of origin, depriving the United States of ordinary duties, antidumping duties, and "Section 301" duties. Plaintiff alleges that entry documentation falsely declared Thailand as the country of origin of the innersprings, which plaintiff alleges to have been products of the People's Republic of China ("China"). Am. Compl. ¶ 1, 22–24, 27 (Sept. 22, 2023), ECF No. 4 ("Compl.").

Before the court is the government's motion for a judgment by default, which seeks "lost revenue pursuant to 19 U.S.C. § 1592(d), in the amount of $2,431,225.93, plus prejudgment interest; and a penalty pursuant to 19 U.S.C. § 1592(c) in the amount of $3,381,607.03." Mot. for Entry of Default J. 8 (June 12, 2024), ECF Nos. 19 (conf.), 20 (public) ("Pl.'s Mot.").

The court denies plaintiff's motion without prejudice. Plaintiff describes the civil penalty it seeks, in the amount of $3,381,607.03, as equal to the domestic value of the merchandise on the entries at issue, *id.* at 3, which also would be the maximum civil penalty allowed under Section 592(c), 19 U.S.C. § 1592(c).[1] The court concludes that the claimed domestic value, as alleged in the complaint upon which the government's motion is based, is not a "well-pled" fact. Because it cannot grant relief on the claim for a civil penalty based on that complaint, the court declines at this time to address plaintiff's related Section 592(d) claim for lost revenue.

I. BACKGROUND

Plaintiff brought this action in September 2023. Summons (Sept. 22, 2023), ECF No. 1; Compl. Previously, the Clerk of the Court entered defendants' default at the court's direction, defendants having failed to answer the amended complaint ("Complaint") within the time period allowed by the court after two consent motions for enlargements of time. Order (May 23, 2024), ECF No. 14; Entry of Default (May 23, 2024), ECF No. 15. Following the entry of default, plaintiff filed the instant motion for a default judgment. Pl.'s Mot. Defendants have made no filings since the entry of default.

II. DISCUSSION

A. Standard and Scope of Review

The court exercises jurisdiction over this action according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1582. This Court has exclusive jurisdiction "of any civil action which arises out of an import transaction and which is commenced by the United States . . . to recover a civil penalty under section 592," 28 U.S.C. § 1582(1), or "to recover customs duties," *id*. § 1582(3). As Section 592 provides, the court determines all issues *de novo,* including the amount of any penalty. 19 U.S.C. § 1592(e)(1).

In evaluating a motion for judgment by default, the court accepts as true all well-pled facts in the complaint but must reach its own legal conclusions. *Nishimatsu Constr. Co., Ltd. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975) (citing *Thomson v. Wooster*, 114 U.S. 104, 113 (1885)); 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 2688.1 (4th ed. 2024). An entry of default, however, does not necessarily entitle plaintiff to the relief it seeks; rather, the pleadings must contain well-pled facts

[1] References to the United States Code and to the Harmonized Tariff Schedule of the United States herein are to the 2018 editions.

sufficient to support a judgment by default. *See Nishimatsu*, 515 F.2d at 1206.

B. Allegations Pertaining to a Claim for Monetary Penalty under Section 592(c)

1. Facts Pled in the Complaint Claiming a Violation of Section 592(a) Based on a Level of Culpability of Negligence

It is unlawful for any person, by fraud, gross negligence, or negligence, to enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of material and false documents, statements, or acts or material omissions, or to aid or abet another to do so. 19 U.S.C. § 1592(a)(1)(A), (B). Therefore, in ruling on plaintiff's motion for a judgment by default, the court must determine whether the well-pled facts in the Complaint, if accepted as true, establish the liability of defendants for a civil penalty in the amount sought by plaintiff.

When the United States seeks to recover a Section 592 monetary penalty based on a level of culpability of negligence, "the United States shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence." *Id*. § 1592(e)(4).

Plaintiff bases its motion for a default judgment on 46 consumption entries, made by Rayson Global at the direction of Doris Cheng, between September 26, 2018 and November 8, 2019 inclusive, of innersprings imported from Thailand. Pl.'s Mot. 2; *see* Compl. ¶ 23 & Exhibit A to Compl., ECF No. 4–1 ("Exhibit A"). As acts "constituting the violation," 19 U.S.C. § 1592(e)(4), the Complaint alleged that defendants, as to each of the entries at issue in this action, "falsely declared, or caused to be falsely declared, that the subject entries of innersprings were produced in Thailand." Compl. ¶ 23.

The Complaint alleged, further, that a loss of revenue to the United States resulted from the violations. Exhibit A to the Complaint lists four entries, made between September 26, 2018 and October 24, 2018 inclusive, for which is alleged an "Actual Loss of Revenue" of $205,723.83, which it calculates as the sum of ordinary duties at 6% *ad valorem*, duties owed under Section 301 of the Trade Act of 1974, 19 U.S.C. §§ 2411–20 ("Section 301"), at 10% *ad valorem*, and antidumping duties at 234.51% *ad valorem*. Exhibit A. The duties are calculated based on an alleged entered value of $82,122.00. *Id.*

For the remaining 42 entries, made between November 7, 2018 and November 8, 2019 inclusive, which apparently were unliquidated as

of the filing of the Complaint, Exhibit A alleges a "Potential Loss of Revenue" of $2,225,502.10, presented as the sum of ordinary duties at 6% *ad valorem*, duties owed under Section 301, and antidumping duties at 234.51% *ad valorem*. The duties are calculated based on alleged entered value of $863,800, for a total entered value on all 46 entries (liquidated and unliquidated) of $945,922.00. *See id*.

The allegations pertaining to a loss of revenue to the United States are described in further detail below.

a. Ordinary Duties

Subheading 9404.29.90, Harmonized Tariff Schedule of the United States ("HTSUS") (2018) contains the article description ". . . articles of bedding and similar furnishing . . . fitted with springs . . . whether or not covered: Mattresses: Of other materials [other than cellular rubber or plastics]: Other [not of cotton], Uncovered innerspring units." This article description applies to the merchandise alleged in the Complaint to have been imported by defendants. It was unchanged in the 2019 version of the HTSUS.

Products classified in subheading 9404.29.90, HTSUS are subject to a general (MFN) duty rate of 6% *ad valorem*. Products of Thailand classifiable under the subheading and qualifying under the Generalized System of Preferences ("GSP") are eligible for duty-free tariff treatment. *See* Compl. ¶¶ 26, 27. Products of China are not eligible for GSP duty-free tariff treatment. *See* General Notes 11–16, HTSUS (listing countries eligible for GSP duty-free tariff treatment).

The Complaint alleged that defendants "falsely declared, or caused to be falsely declared, that entries of innersprings qualified for duty free treatment under the GSP for merchandise manufactured in Thailand." Compl. ¶ 27. It alleged that the unpaid duties of 6% *ad valorem* amounted to $56,755.32. Exhibit A.

b. Antidumping Duties

The Complaint alleged that defendants "falsely omitted from entry documentation, or caused to be falsely omitted from entry documentation, the fact that entries of innersprings were subject to ADD [antidumping duty] order A-570–928," referring to the identifying number of an antidumping duty investigation on innersprings from China. Compl. ¶ 25. The Complaint further alleged that the imported innersprings were described by the scope language of an antidumping duty order ("Order") on innersprings from China published by the International Trade Administration, U.S. Department of Commerce. *Id*. ¶¶ 20, 25 (citing *Uncovered Innerspring Units from the People's Republic of China: Notice of Antidumping Duty Order*, 74 Fed. Reg. 7,661, 7,661–62 (Int'l Trade Admin. Feb. 19, 2009) ("*Order*")).

The scope language of the Order provides, in pertinent part, that the Order applies to "uncovered innerspring units composed of a series of individual metal springs joined together in sizes corresponding to the sizes of adult mattresses . . . and units used in smaller constructions, such as crib and youth mattresses." *Order*, 74 Fed. Reg. at 7,661. The government alleged that the innersprings at issue in this case conformed to the scope language of the Order. *See* Compl. ¶¶ 20, 25.

According to the Complaint, all of the entries upon which plaintiff seeks a default judgment were subject to a "China-wide" antidumping duty cash deposit rate of 234.51% *ad valorem*. *Id.* ¶ 20. The 234.51% China-wide rate was imposed by the Order. *Order*, 74 Fed. Reg. at 7,662. The China-wide rate continued through administrative reviews. *See*, *e.g.*, *Uncovered Innerspring Units From the People's Republic of China: Final Results of the Antidumping Duty Administrative Review*, 85 Fed. Reg. 6,907, 6,908 (Int'l Trade Admin. Feb. 6, 2020); *Uncovered Innerspring Units From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 88 Fed. Reg. 7,688 (Int'l Trade Admin. Feb. 6, 2023). The Complaint alleged that the total antidumping duties owed on the entries at issue are $2,218,281.68. Exhibit A.

c. Section 301 Duties

The Complaint alleged that the first 26 entries at issue, made between September 26, 2018 and May 1, 2019 inclusive, were subject to duties of 10% *ad valorem* imposed on products of China according to Section 301. Compl. ¶¶ 31, 32; Exhibit A. It alleged that the remaining 20 entries, made between May 17, 2019 and November 8, 2019 inclusive, were subject to 25% duties under Section 301. Compl. ¶¶ 31, 32; Exhibit A. The Complaint alleged a total loss of revenue (actual and potential) of $156,188.95 in Section 301 duties. Exhibit A.

The Section 301 duties became effective on September 24, 2018, when the United States imposed, through new subheading 9903.88.03, HTSUS, a 10% *ad valorem* duty on products of China specified in certain other HTSUS subheadings. *See Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 47,974, 47,974, 47,976–48,001 (Office of the U.S. Trade Representative Sept. 21, 2018). The notice included subheading 9404.29.90, HTSUS. *Id*., 83 Fed. Reg. at 48,000. The Complaint alleged that the action "includes the HTSUS subheading for the merchandise covered by the subject entries." Compl. ¶¶ 31, 32; *see* subheading 9404.29.90, HTSUS (2018). Effective May 10, 2019, the 10%

ad valorem Section 301 duties were increased to 25% *ad valorem*. *Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 20,459, 20,459 (Office of the U.S. Trade Representative May 9, 2019); Compl. ¶ 31. The Complaint listed in Exhibit A "9903 Duties that Should Have Been Paid" pursuant to a "9903 Classification Entered Rate" of 10% or 25%, depending on the date of the entry. *See* Exhibit A.

2. Agency Procedures Conducted under 19 U.S.C. § 1592(b)

The Complaint alleges that U.S. Customs and Border Protection ("Customs") issued pre-penalty and penalty notices to defendants in the amount of $4,200,081.76, which the Complaint alleged as the domestic value of the merchandise on the entries identified in those notices.[2] Compl. ¶¶ 37–39. It alleges, further, that defendants did not respond to the penalty notice. *Id.* ¶ 43.

3. Claim for a Monetary Penalty of $3,381,607.03 in the Statutory Maximum Amount under Section 592(c)

For a violation that is based on a level of culpability of negligence and that results in a loss of revenue to the United States, section 592(c) provides for "a civil penalty in an amount not to exceed . . . the lesser of . . . the domestic value of the merchandise, or . . . two times the lawful duties, taxes, and fees of which the United States is or may be deprived." 19 U.S.C. § 1592(c)(3)(A).

The government alleges that the entries on which it seeks a civil penalty resulted in an actual loss of revenue of $205,723.83, and a "potential" loss of revenue of $2,225,502.10, to the United States, for a total loss of revenue of $2,431,225.93. Exhibit A. Two times the alleged loss of revenue exceeds the $3,381,607.03 domestic value of the merchandise as alleged in the Complaint, ¶ 46, and in plaintiff's motion for a judgment by default, Pl.'s Mot. 3. The government seeks a civil penalty in that amount.

The government's current position is that the domestic value of the merchandise on the 46 entries for which the statute of limitations has not expired is $3,381,607.03. *Id.* at 3–4. While this fact is alleged in paragraph 46 of the Complaint, it is not a "well-pled" fact. The Complaint states no supporting facts upon which the court may accept this assertion of the domestic value of the merchandise. The

[2] Plaintiff explained that "[b]ecause the statute of limitations had expired for certain entries, in our original and amended complaints, we sought reduced lost revenue pursuant to 19 U.S.C. § 1592(d), in the amount of $2,431,225.93, plus prejudgment interest; and a penalty pursuant to 19 U.S.C. § 1592(c) in the amount of $3,381,607.03." Mot. for Entry of Default J. 4 (June 12, 2024), ECF Nos. 19 (conf.), 20 (public) ("Pl.'s Mot.").

court notes, additionally, that a domestic value of $3,381,607.03 is more than three and one-half times the entered value of $945,922.00, as stated in the Complaint.[3] *See* Exhibit A. Without further allegations to support the claimed domestic value of the merchandise at issue in this case, the court cannot reconcile that alleged domestic value with the alleged entered value of that same merchandise.

Because the alleged domestic value of the merchandise is the basis for the government's penalty claim, the court must deny relief on that claim, and it does so without prejudice.

C. Claim for Unpaid Duties Pursuant to Section 592(d)

Regardless of whether a monetary penalty under 19 U.S.C. § 1592(a) is assessed, Customs is directed to require payment of any "lawful duties, taxes, or fees" resulting from a violation of § 1592(a). 19 U.S.C. § 1592(d).

Because the court cannot grant relief on the government's claim for a civil penalty under Section 592(c) upon the Complaint now before the court, it declines to address at this time the government's other claim, which is for "lost revenue pursuant to 19 U.S.C. § 1592(d), in the amount of $2,431,225.93, plus prejudgment interest." Pl.'s Mot. 8. Accordingly, the court declines to consider, *sua sponte*, the entry of a partial judgment pursuant to USCIT Rule 54(b).

III. CONCLUSION

From its review of the Complaint and of plaintiff's motion for judgment by default, the court concludes that plaintiff has not established its entitlement to a judgment by default against defendants for a civil penalty under 19 U.S.C. § 1592. Upon consideration of all papers and proceedings herein, it is hereby

ORDERED that plaintiff's application for judgment by default against defendants Rayson Global, Inc. and Doris Cheng be, and hereby is, denied without prejudice.

Dated: January 8, 2025
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU, JUDGE

[3] Plaintiff's motion for a default judgment cites a "declaration of Import Specialist Jeanelle Brooks," along with two exhibits, to support the figure it claims as the domestic value. *See* Pl.'s Mot. 2 n.1, 3. The declaration and its exhibits are not part of the complaint upon which plaintiff relies for its motion.

Slip Op. 25–03

THE MOSAIC COMPANY, Plaintiff, v. UNITED STATES, Defendant, and OCP S.A., Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge
Consol. Court No. 21–00116

[Sustaining in part, and remanding in part, an agency decision responding to court order in litigation arising out of a countervailing duty investigation of phosphate fertilizers from Morocco]

Dated: January 8, 2025

Stephanie E. Hartmann, Wilmer Cutler Pickering Hale and Dorr LLP, of Washington, D.C., for plaintiff and defendant-intervenor The Mosaic Company. With her on the brief were *David J. Ross* and *Alexandra S. Maurer*.

William R. Isasi, Covington & Burling LLP, of Washington, D.C., for plaintiff and defendant-intervenor OCP S.A. With him on the brief were *Cynthia C. Galvez*, *Wanyu Zhang*, *Micaela McMurrough*, and *Jordan B. Bakst*.

Ravi D. Soopramanien, Trial Attorney, U.S. Department of Justice, Commercial Litigation Branch, Civil Division, of Washington, D.C., for defendant. With him on the brief were *L. Misha Preheim*, Assistant Director, *Brian M. Boynton*, Principal Deputy Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel on the brief was *Ashlande Gelin*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION AND ORDER

Stanceu, Judge:

In this consolidated action, plaintiffs The Mosaic Company ("Mosaic") and OCP S.A. ("OCP") contested the final affirmative determination of the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") in a countervailing duty investigation of phosphate fertilizers from the Kingdom of Morocco ("Morocco") and the resulting countervailing duty order.

Before the court is the Department's "Remand Redetermination," issued in response to the court's opinion and order in *The Mosaic Company v. United States*, 47 CIT __, 659 F. Supp. 3d 1285 (2023) ("*Mosaic I*"). Final Results of Redetermination Pursuant to Court Remand (Int'l Trade Admin. Jan. 12, 2024), ECF No. 115–1 ("*Remand Redetermination*").

Mosaic, a domestic producer of phosphate fertilizer, and OCP, the only known phosphate fertilizer producer in Morocco, oppose the Remand Redetermination in part, raising different objections. Consol. Pl. and Def.-Int. OCP S.A.'s Comments on Final Results of Redetermination Pursuant to Ct. Remand (Feb. 12, 2024), ECF Nos. 125 (conf.), 126 (public) ("OCP's Comments"); The Mosaic Co.'s Comments on Commerce's Remand Redetermination (Feb. 12, 2024), ECF Nos. 123 (public), 124 (conf.) ("Mosaic's Comments"). Defendant argues that the court should sustain the Remand Redetermination. Def.'s

Response to Pls.' Comments on Commerce's Remand Redetermination (Mar. 13, 2024), ECF No. 131 ("Def.'s Resp.").

Sustaining certain of the decisions in the Remand Redetermination and concluding that others are contrary to law, the court issues a second remand order to Commerce.

I. BACKGROUND

Background is provided in the court's previous opinion and order and is supplemented herein. *Mosaic I*, 47 CIT at __, 659 F. Supp. 3d at 1290–92.

A. The Contested Decision

The Final Determination was published as *Phosphate Fertilizers From the Kingdom of Morocco: Final Affirmative Countervailing Duty Determination*, 86 Fed. Reg. 9,482 (Int'l Trade Admin. Feb. 16, 2021), P.R. Doc. 480, ECF No. 94–4 ("*Final Determination*").[1] Commerce incorporated by reference an accompanying "Issues and Decision Memorandum" in the Final Determination. *Issues and Decision Memorandum for the Final Affirmative Determination of the Countervailing Duty Investigation of Phosphate Fertilizers from the Kingdom of Morocco* (Int'l Trade Admin. Feb. 8, 2021), P.R. Doc. 473, ECF No. 94–4 ("*Final I&D Mem*."). The Final Determination concluded a countervailing duty investigation conducted with a period of investigation ("POI") of January 1, 2019 through December 31, 2019. *Mosaic I*, 47 CIT at __, 659 F. Supp. 3d at 1291 (citation omitted).

In the Final Determination, Commerce determined that OCP benefited from six countervailable programs and issued a total countervailable subsidy rate for OCP of 19.97%. *Final Determination*, 86 Fed. Reg. at 9,483; *Phosphate Fertilizers From the Kingdom of Morocco and the Russian Federation: Countervailing Duty Orders*, 86 Fed. Reg. 18,037, 18,038 (Int'l Trade Admin. Apr. 7, 2021), P.R. Doc. 492, ECF No. 94–4; *Final I&D Mem*. 5–6. The programs and rates were as follows: (1) government loan guarantees, 0.06%; (2) the government of Morocco's provision of phosphate mining rights to OCP for less than adequate remuneration ("LTAR"), 18.42%; (3) tax incentives for export operations, 1.27%; (4) a government program providing for reductions in OCP's tax fines and penalties, 0.05%; (5) revenue exclusions for minimum tax contributions, 0.07%; and (6) customs duty exemptions for capital goods, machinery, and equipment, 0.10%. *Final I&D Mem*. 5–6.

[1] Documents in the Joint Appendix (Apr. 27, 2022), ECF Nos. 93 (conf.), 94 (public) are cited herein as "P.R. Doc. __." Documents in the Remand Joint Appendix (Mar. 27, 2024), ECF Nos. 132 (conf.), 133 (public) are cited herein as "P.R.R. Doc. __." Citations to Joint Appendix and Remand Joint Appendix documents are to the public versions.

B. The Court's Previous Opinion and Order

In *Mosaic I*, the court ruled on motions for judgment on the agency record submitted by Mosaic and OCP under USCIT Rule 56.2. Pl. The Mosaic Co.'s Rule 56.2 Mot. for J. on the Agency Rec. (Oct. 15, 2021), ECF Nos. 55 (conf.), 56 (public); Rule 56.2 Mot. for J. on the Agency Rec. of OCP S.A. (Oct. 15, 2021), ECF Nos. 53 (conf.), 54 (public). The court directed Commerce, on remand, to reconsider two aspects of its benefit calculation in its determination on OCP's obtaining phosphate mining rights. One aspect was the Department's exclusion of certain selling, general, and administrative (collectively, "SG&A") costs incurred by OCP, specifically, "headquarters, support and debt" costs, when performing a calculation of an estimated price for OCP's production of "beneficiated phosphate rock," an upstream product in the production of phosphate fertilizer. *Mosaic I*, 47 CIT at __, 659 F. Supp. 3d at 1301. The second aspect was the calculation of a profit rate for OCP in that same calculation. *Id.*, 47 CIT at __, 659 F. Supp. 3d at 1305. The court also directed Commerce to reconsider its affirmative "specificity" determination for the government program providing for reductions in tax fines and penalties. *Id.*, 47 CIT at __, 659 F. Supp. 3d at 1317.

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1516a, including an action contesting a final determination that Commerce issues to conclude a countervailing duty investigation, *id.* § 1516a(a)(2)(B)(iii).[2]

In reviewing a final determination, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence refers to "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. of New York v. Nat'l Lab. Rels. Bd.*, 305 U.S. 197, 229 (1938)).

[2] All citations to the United States Code herein are to the 2018 edition. All citations to the Code of Federal Regulations herein are to the 2019 edition.

B. The Remand Redetermination Issued in Response to *Mosaic I*

In the Remand Redetermination, Commerce included the headquarters, support and debt costs, as allocated by OCP, in its calculation of an estimated price for OCP's production of beneficiated phosphate rock and redetermined the profit rate for the benefit calculation. *Remand Redetermination* 9–10, 18–19. The changes to the LTAR determination for the provision of phosphate mining rights to OCP reduced the subsidy rate for that program from 18.42% to 5.86%. *OCP S.A. Calculations for the Final Determination* 2 (Int'l Trade Admin. Feb. 8, 2021), P.R. Doc. 475, ECF No. 94–4 ("*Final Det. Calc. Mem.*"); *Draft Remand Redetermination Calculations for OCP S.A.* 2 (Int'l Trade Admin. Nov. 21, 2023), P.R.R. Doc. 2, ECF No. 133–1 ("*Draft Remand Redetermination Calc.*"). This change reduced the total subsidy rate from 19.97% to 7.41%. *Remand Redetermination* 33.

Commerce reconsidered its specificity determination for the government program providing for reductions in tax fines and penalties, concluding that the program meets the specificity requirement under a different statutory provision than the one upon which Commerce previously relied. *Id.* at 10–11. Commerce, therefore, made no change to the 0.05% subsidy rate for that program.

OCP supports the Department's inclusion of the headquarters, support and debt costs as determined by OCP, OCP's Comments 6–13, and opposes the Department's recalculated profit rate and the Department's new determination that the tax fines and penalties reduction program is *de facto* specific, *id.* at 13–25. Mosaic opposes the Department's inclusion of the headquarters, support and debt costs and, in the alternative, argues that the Department's method overstated those costs. Mosaic's Comments 5–26. Mosaic supports the Department's profit recalculation and the new finding of *de facto* specificity for the tax fines and penalties reduction program. *Id.* at 26–30. Defendant "request[s] that the Court sustain Commerce's remand redetermination and enter final judgment for the United States." Def.'s Resp. 2.

C. The Benefit Calculation for the Provision of Mining Rights for Less than Adequate Remuneration

A "countervailable subsidy" may exist where a government authority provides a financial contribution to a person, a benefit is thereby conferred, and the subsidy meets a "specificity" requirement as defined by the Tariff Act. 19 U.S.C. § 1677(5). "A benefit shall normally be treated as conferred where there is a benefit to the recipient,

including—," *id.* § 1677(5)(E), ". . . in the case where goods or services are provided, if such goods or services are provided for *less than adequate remuneration*," *id.* § 1677(5)(E)(iv) (emphasis added).

Commerce found that "[t]he Moroccan government, which owns all mineral reserves, granted OCP a monopoly to mine phosphate, including during the POI." *Mosaic I*, 47 CIT at __, 659 F. Supp. 3d at 1298 (citing *Decision Memorandum for the Preliminary Affirmative Determination of the Countervailing Duty Investigation of Phosphate Fertilizers from the Kingdom of Morocco* 11 (Int'l Trade Admin. Nov. 23, 2020), P.R. Doc. 386, ECF No. 94–3 ("*Prelim. Decision Mem.*"); *Final I&D Mem*. 31). Commerce found that the government provided the phosphate mining rights for less than adequate remuneration and thereby conferred a benefit upon OCP. *Id.*, 47 CIT at __, 659 F. Supp. 3d at 1298–99.

The Tariff Act directs Commerce to determine the adequacy of remuneration "in relation to *prevailing market conditions* for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review." 19 U.S.C. § 1677(5)(E)(iv) (emphasis added). Addressing the statutory reference to "prevailing market conditions" in the subject country, the Department's regulations establish a hierarchy of methodologies for determining what is adequate remuneration. 19 C.F.R. § 351.511(a)(2). Under a "tier-one" analysis, Commerce compares "the government price to a market-determined price for the good or service resulting from actual transactions in the country in question." *Id.* § 351.511(a)(2)(i). If there is no usable market-determined price, Commerce applies a "tier-two" analysis, comparing "the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question." *Id.* § 351.511(a)(2)(ii). The preamble accompanying promulgation of § 351.511 provides that a tier-two benchmark is inappropriate in situations "where the government is the sole provider of a . . . service." *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,377–78 (Int'l Trade Admin. Nov. 25, 1998). Because Commerce was investigating OCP's exclusive mining rights provided by the Moroccan government, Commerce applied a "tier-three" analysis, under which it "will normally measure the adequacy of remuneration by assessing whether the government price is consistent with market principles." 19 C.F.R. § 351.511(a)(2)(iii).

The statutory requirement to determine the adequacy of remuneration "in relation to prevailing market conditions," 19 U.S.C. § 1677(5)(E)(iv), posed a difficulty in the investigation because, as Com-

merce found, "the 'good or service' provided by the governmental authority consists of an intangible legal right (in this case, mineral rights)," *Mosaic I*, 47 CIT at __, 659 F. Supp. 3d at 1298. "Commerce stated that, in such situations, it may 'find it appropriate to conduct a benefit analysis not on mining rights *per se*, but on the value of the underlying good conveyed via the mining rights.'" *Id.* (quoting *Final I&D Mem.* 23). The "underlying good" that OCP mined was phosphate ore, but another difficulty arose when Commerce found that it could not identify a global market for this good. *Id.*, 47 CIT at __, 659 F. Supp. 3d at 1299. Noting that OCP, using a "beneficiation" process, converted phosphate ore into phosphate rock, an intermediate product in phosphate fertilizer production, Commerce chose to use "'phosphate rock beneficiated in 2019 to calculate the total benefit.'" *Id.*, 47 CIT at __, 659 F. Supp. 3d at 1298–99 (citing *Prelim. Decision Mem.* 11–12; *Final I&D Mem*. 29 & n.197). To do this, Commerce calculated a per-unit "world benchmark price" for beneficiated phosphate rock by averaging various market prices submitted by Mosaic and OCP. *Id.*, 47 CIT at __, 659 F. Supp. 3d at 1299. Commerce then performed a "cost buildup" for OCP's own production of beneficiated phosphate rock, in which it then incorporated a profit component. *Id.*, 47 CIT at __, 659 F. Supp. 3d at 1299, 1301–02. As the court described in *Mosaic I*, "Commerce 'multiplied the difference between the calculated per-unit cost buildup, including the production cost of the phosphate rock and the extraction taxes paid, and the benchmark per-unit price of phosphate rock, by the total amount of phosphate rock mined and beneficiated by OCP during the POI.'" *Id.*, 47 CIT at __, 659 F. Supp. 3d at 1299 (quoting *Prelim. Decision Mem*. 12). OCP and Mosaic contested the resulting 18.42% subsidy rate, OCP maintaining "that, to the extent a benefit was conferred at all, the benefit found by Commerce was too large;" Mosaic, conversely, argued that the subsidy rate was too small. *Id.*, 47 CIT at __, 659 F. Supp. 3d at 1298.

On remand, both OCP and Mosaic contest the Department's methodology for calculating the benefit conferred, but for different reasons. Mosaic contests the Department's decision in the Remand Redetermination to include OCP's headquarters, support and debt costs in its calculation, and alternatively, its method of doing so, but asks the court to sustain the Department's recalculation of the profit component. Mosaic's Comments 3. OCP asks the court to sustain the Department's inclusion of the headquarters, support and debt costs in the cost of production buildup but objects to the Department's calculation of a new profit rate. OCP's Comments 4–5.

1. Valuation of Headquarters, Support and Debt Costs in the Calculation of OCP's Cost of Producing Beneficiated Phosphate Rock

In *Mosaic I,* the court held that Commerce improperly excluded the headquarters, support and debt costs from the calculation of OCP's cost of producing phosphate rock. *Mosaic I*, 47 CIT at __, 659 F. Supp. 3d at 1301. Noting that these costs were reported on a corporate-wide basis, Commerce excluded them in the entirety based on its finding that not all of the costs "were necessarily directly relevant to phosphate rock production and pricing." *Id.*, 47 CIT at __, 659 F. Supp. 3d at 1299–1300. According to Commerce, "'to the extent that some items in OCP's HQ/support expenses in the cost build up could arguably be related to mining operations, the record does not contain sufficient evidence that would allow us to segregate and remove those costs which are considered unrelated to mining operations.'" *Id.* (quoting *Final I&D Mem.* 24).

Because record evidence showed that OCP incurred SG&A expenses in the production of phosphate rock, the court rejected the Department's rationale that the costs at issue needed to be "segregated" in order to be included in the cost buildup. *Id.*, 47 CIT at __, 659 F. Supp. 3d at 1300–01. "To perform the task of identifying SG&A expenses for its production of beneficiated phosphate rock, OCP necessarily resorted to an allocation method." *Id.*, 47 CIT at __, 659 F. Supp. 3d at 1301 ("Defendant's argument implying that OCP could have segregated the relevant expenses is nonsensical. OCP could not place on the record 'segregated' SG&A cost data that did not exist."). The court concluded that Commerce, having chosen to use a cost of production buildup, was obligated to ensure that its methodology was reasonable and supported by substantial evidence but failed to do so. *Id.* ("On remand, Commerce either must accept OCP's SG&A cost allocation method or must show that it is unreasonable in light of a satisfactory alternative methodology it would use instead.").

In the Remand Redetermination, Commerce reversed its decision to exclude all headquarters, support and debt costs and, further, accepted OCP's allocation of those costs for use in the cost of production calculation for beneficiated phosphate rock. *Remand Redetermination* 2, 21, 23. Commerce found that "OCP's reported costs were reconciled with its financial statements, and therefore verified, with no discrepancies observed." *Id.* at 21 (citing an OCP questionnaire response). Based on that finding, Commerce further found that "OCP has adequately reconciled and demonstrated the relevancy of its reported production costs" and further found that "no record evidence . . . leads

us to doubt the reliability or veracity of OCP's reported costs incurred to produce phosphate rock," and that "the use of OCP's reported costs is appropriate for the tier- three COP [cost of production] buildup." *Id.*

Mosaic challenges the Department's treatment of the costs at issue, raising several arguments. First, Mosaic claims the exclusion of the costs from the Department's original calculation was lawful and that the court "went beyond its remit and inappropriately made a factual finding" by improperly equating SG&A costs with headquarters, support and debt costs. Mosaic's Comments 5–6. Second, Mosaic argues that OCP's accounting methodology counted the "site-specific indirect costs" subcategory twice, once in the total costs for the "Gantour" and "Khouribga" mine sites, and a second time in the headquarters, support and debt expense columns, maintaining that those "site-specific indirect costs" should also count as SG&A expenses. *Id.* at 7. Third, Mosaic claims that OCP failed to provide substantial evidence demonstrating the connection between its headquarters, support and debt costs and phosphate mining. *Id.* at 8–20, 22–24. Fourth, Mosaic contends that including the headquarters, support and debt costs in the cost of production buildup arbitrarily inflates the profit margin. *Id.* at 21–22. Finally, Mosaic claims Commerce "unlawfully failed" to consider its proposed alternative for allocating the headquarters, support and debt costs to the production of beneficiated phosphate rock. *Id.* at 24–26.

Mosaic's first challenge is meritless. Mosaic contends that the court conflated SG&A costs with headquarters, support and debt costs in its prior opinion and order. *Id.* at 6. The pertinent references to "SG&A" costs in *Mosaic I* were not intended to state a holding on costs other than the excluded headquarters, support and debt costs that were at issue in the case at that time. *See Mosaic I*, 47 CIT at __, 659 F. Supp. 3d at 1300–01. At various places, the Remand Redetermination uses the term "SG&A" to refer to these costs. *Remand Redetermination* 15–23. *Mosaic I* directed Commerce to include the excluded costs in the cost of production buildup on remand. 47 CIT at __, 659 F. Supp. 3d at 1299–1301.

Mosaic's second challenge, addressed to "site-specific indirect costs," Mosaic's Comments 7, is also unconvincing. Mosaic argues that these "site-specific indirect costs" incurred at the mine sites should be treated as the exclusive SG&A expenses related to the phosphate mining and beneficiation activities and that Commerce therefore should have excluded from the cost buildup "all of OCP's reported HQ/Support and Debt expenses . . . because Commerce already has accounted for OCP's site-specific SG&A expenses that have a documented connection to its phosphate mining and benefi-

ciation in the cost buildup." *Id.* at 7–8.

On remand, Commerce found that OCP "provided a reasonable explanation for why its reported HQ, Support and Debt costs should be accounted for in its COP [cost of production] build up calculation for the production of phosphate rock" and found that headquarters, support and debt costs include the "corporate indirect costs . . . as opposed to [] site-specific indirect costs." *Remand Redetermination* 19. OCP's headquarters, support and debt costs are incurred "in support of its day-to-day operations" and these costs, including the corporate indirect costs, are "recorded at the company-wide level," *id.* at 8, 18, whereas site-specific indirect expenses are incurred at the site level, even though both levels of costs "relate to SG&A," Def.'s Resp. 10–11.

The record supports the Department's finding that site-specific costs and corporate-level costs are distinct, such that including headquarters, support and debt costs in the cost buildup does not result in double-counting of indirect costs. OCP allocates costs incurred by the Gantour and Khouribga mine sites to the "phases" in its "phosphate rock mining value chain"[3] "based on the shares of total direct costs." *OCP S.A. Supplemental Questionnaire Response Part Three* 4, 8 (Nov. 6, 2020), P.R. Doc. 354, ECF No. 94–2 ("*Supp. Questionnaire Resp. Part Three*")). The site-specific indirect costs include "mainly" "[p]urchases of services (*e.g.*, facility management)"; "[e]xternal costs (*e.g.*, telecom, consulting, insurance, etc.)"; "personnel costs (*e.g.*, salaries, overtime, bonuses of the workers providing the indirect services)"; and "[a]mortization of site-specific costs that are not directly allocated to one of the rock value chain stages (*e.g.*, amortization for administrative building of the site)." *Response to Questionnaire in Lieu of On-Site Verification* 38 (Dec. 30, 2020), P.R. Doc. 436, ECF No. 133–1 ("*OCP's in Lieu of Verification Response*"); *see also Supp. Questionnaire Resp. Part Three* 8.

"OCP also allocates a portion of two corporate-level expenses to each of its mining operations/entities: (1) headquarters . . . and support expenses, and (2) cost of debt." *Id.* The categories to which the headquarters and support expenses relate are similar to the categories of site-specific indirect costs: "[p]urchases of services (*e.g.*, IT [information technology] services, catering, accounting services, facility management)"; "[e]xternal costs (*e.g.*, telecom, consulting and advertising, bank fees, insurance)"; "[p]ersonnel costs (the salaries, overtime, bonuses of the personnel undertaking the activities in the

[3] There are "four main phases" in the "value chain": "extraction, stone removal, beneficiation, and transportation." *OCP S.A. Supplemental Questionnaire Response Part Three* 4 (Nov. 6, 2020), P.R. Doc. 354, ECF No. 94–2 ("*Supp. Questionnaire Resp. Part Three*").

departments listed below)"; and "[a]mortization of equipment related to headquarters and equipment that is used across functions such as IT." *OCP's in Lieu of Verification Response* 39. But this similarity does not convince the court that Mosaic is correct in its allegation of double-counting of SG&A costs.

Commerce reasonably concluded from the record evidence that the corporate-level and site-level cost categories are both described by the term "SG&A" but cover different indirect costs, stemming from distinct departments, personnel, and activities. *Compare id.* at 38 (listing "site specific activities" associated with site-specific indirect costs), *with id.* at 40 (listing departments incurring costs related to headquarters and support activities). For example, site-specific personnel costs are for personnel who "generally work at the mining site." *Id.* at 38. Corporate-level personnel costs are for employees who "clearly support OCP's mining activities" but which "are booked in HQ and support centers in OCP's accounting system"; OCP's questionnaire response clarifies that even though "some of those costs are properly associated with [] mining activities," they "are recorded in HQ/Support in the accounting system." *Id.* at 6. In summary, the Department's finding, based on OCP's responses to the Department's inquiry, that corporate costs are distinct from site-specific indirect costs is supported by record evidence, and Commerce appropriately included headquarters, support and debt costs as indirect costs in its cost of production calculation.[4]

Mosaic's third and fourth arguments challenging the Remand Redetermination, i.e., an alleged lack of a connection between headquarters, support and debt costs and phosphate mining and a contention that inclusion of these corporate-wide costs arbitrarily inflated the profit margin, fail for the reasons stated in the court's prior opinion, when it ruled that OCP incurred certain identified corporate-wide SG&A costs that were reasonably related to its phosphate mining activities. *Mosaic I*, 47 CIT at __, 659 F. Supp. 3d at 1300–01.

Mosaic's final argument challenging the Remand Redetermination persuades the court that a remand is required. Commerce acknowledges in the Remand Redetermination that Mosaic submitted an alternative methodology to address the cost issue in its comments on a draft version of a remand redetermination, which Commerce, for no valid reason, declined to address on the merits. Commerce responded that "[t]he petitioner's alternative methodology relies on several estimations of OCP's reported costs which we have not had the time to

[4] The government states in its response brief that only OCP's company-wide costs were included in the cost buildup. Def.'s Response to Pls.' Comments on Commerce's Remand Redetermination 11 (Mar. 13, 2024), ECF No. 131. The court is not able to confirm this characterization on the basis of record evidence.

fully analyze and determine whether the petitioner's alternative is a more accurate or reasonable methodology to allocate OCP's SG&A costs." *Remand Redetermination* 23.

In submitting a draft remand redetermination for the consideration of the parties, Commerce solicited comments from both OCP and Mosaic as to its proposed treatment of the costs in question. Commerce agreed with, and adopted, OCP's position on the issue while maintaining that it did not have time to consider a contrary position of Mosaic on that same issue. If Commerce believed it would require additional time to prepare its Remand Redetermination, it was free to request an extension from the court for that purpose. The Department's rationale that time did not permit it to evaluate a party's comments was unreasonable *per se*. In a second remand, Commerce must evaluate Mosaic's proposed alternative and reach a decision on the allocation method based on a full and fair consideration of the arguments and record evidence before it.

2. Calculation of a Constructed Profit Rate for OCP

In the Final Determination, Commerce used a profit rate of 5.47% in its LTAR calculation pertaining to OCP's phosphate rock production. *Mosaic I*, 47 CIT at __, 659 F. Supp. 3d at 1303 (citing *Final Det. Calc. Mem.* 2; *OCP S.A. Section III Questionnaire Response* Ex. Gen-4(a)(iii) (Sept. 17, 2020), P.R. Docs. 130–42, ECF No. 94–1 ("*OCP's 2019 Profit and Loss Statement*")). OCP contested this rate on two grounds. First, noting that the rate was based on data pertaining to OCP's production of all products and thus was not limited to production of phosphate rock, the product being valued, OCP argued that Commerce should have used a rate proposed by OCP, which was based on the profit data for a producer of phosphate rock operating in Jordan, not Morocco. *Id.*, 47 CIT at __, 659 F. Supp. 3d at 1302. Second, OCP maintained that the calculation method was affected by two errors. *Id.*, 47 CIT at __, 659 F. Supp. 3d at 1303. OCP objected that Commerce included headquarters, support and debt costs in the denominator of the profit calculation even though it excluded this category of costs from the cost buildup for the phosphate rock. *Id.* OCP objected also that Commerce understated the profit rate by using a numerator, profit before tax, that was not on the same basis as the denominator, which was limited to operating expenses. *Id.*

The court rejected OCP's first argument, concluding that OCP had failed to show that the Department's use of OCP's own profit data instead of data from another company outside of Morocco was unreasonable. *Id.* Agreeing with OCP that the profit calculation otherwise-was not shown to be reasonable in light of the errors OCP identified,

the court ordered Commerce to reconsider that calculation. *Id*.

On remand, Commerce used a recalculated profit rate of 5.21%. *Draft Remand Redetermination Calc.* 2–3; *OCP's 2019 Profit and Loss Statement*.[5] Commerce calculated the profit rate using "Income Before Tax" as the numerator (as it had done previously) but changed the denominator from OCP's "Operating Expenses" to its "Costs at the Level of Income Before Tax." *Remand Redetermination* 24. Asserting that the changes achieve an "apples-to-apples comparison," Commerce explained that the revised denominator "is inclusive of all Operating Expenses (including HQ & Support Costs), and net Financial Expenses (including debt-related costs)." *Id.* In comments on the Remand Redetermination, no party objects to this change in the method of calculating the profit rate percentage. Nevertheless, OCP continues to object that the Department's profit rate calculation impermissibly represents profit on a company-wide basis rather than profit for the production of phosphate rock. OCP's Comments 13–15.

Rather than argue that Commerce should have used a profit rate for a producer in Jordan, OCP now argues, as it did in its comments on the draft version of the Remand Redetermination, that Commerce should use certain record evidence pertaining to OCP's phosphate rock production. *Id.* at 14. Specifically, OCP points to record evidence that it believes would allow Commerce to determine a profit rate based on actual profit data for two of the three types of phosphate rock that it produced, rock sold for export and rock sold to Jorf Fertilizers Companies ("JFC"), and that Commerce could use an estimated profit rate for the third, which was local rock not sold to JFC. *Id.* at 13–14; *OCP's Comments on Draft Results of Redetermination Pursuant to Court Remand* 10 (Nov. 30, 2023), P.R.R. Doc. 9, ECF No. 133–1 ("*OCP's Draft Comments*"). In support of its position, OCP argues, as it did in contesting the Final Determination, that the Tariff Act requires Commerce "to use a profit rate that is specific to the good being provided which, in this case, is phosphate rock." OCP's Comments 13 (discussing 19 U.S.C. § 1677(5)(E)).

The court previously rejected OCP's argument that the Tariff Act prohibited Commerce from using company-wide data on OCP's production activities, reasoning that Commerce had discretion to choose between two imperfect data bases. *Mosaic I*, 47 CIT at __, 659 F. Supp. 3d at 1303 ("While OCP advocates use of the JPMC [Jordan

[5] Commerce designated the numbers used for its profit rate calculation, as well as the determined profit rate, as confidential. *Draft Remand Redetermination Calc.* 2–3. The numbers used for the profit rate calculation are available on the public record in a publicly filed financial document, "OCP S.A. General Report of the Statutory Auditors Year Ended December 31, 2019," prepared by Ernst & Young. *OCP S.A. Section III Questionnaire Response* Ex. Gen-4(a)(iii) (Sept. 17, 2020), P.R. Docs. 130–42, ECF No. 94–1. The equation used for the calculation is also publicly available. *Draft Remand Redetermination Calc.* 2–3.

Phosphate Mines Company PLC] surrogate profit rate based on a factor of specificity to phosphate rock production, that rate is inferior as to other factors, being derived from business conditions of a different company in a different country."). OCP's current position, i.e., that Commerce should use a combination of available company profit data that relate specifically to production of phosphate rock and an estimate where such data are not available, raises the issue of whether OCP may present such an argument for the first time at this stage of the proceeding. Defendant argues that the court should not hear the argument, maintaining that OCP failed to exhaust its administrative remedies when it did not present the argument to Commerce during the investigation. Def.'s Resp. 19 (citing *Boomerang Tube LLC v. United States*, 856 F.3d 908, 912 (Fed. Cir. 2017)).

The court disagrees that the doctrine of exhaustion of administrative remedies applies in this instance. As the court recounted in *Mosaic I*, the preliminary determination included a cost of production buildup without accounting for profit, and accordingly OCP could not have raised in its case brief to Commerce the objection it raises now. *Mosaic I*, 47 CIT at __, 659 F. Supp. 3d at 1305. Nevertheless, the court declines to consider OCP's new argument for a different reason. OCP could have, but did not, raise this argument in its Rule 56.2 motion. Had OCP presented its argument at that time, defendant would have had the opportunity to present its counterarguments and the court would have had the opportunity to rule on the issue in *Mosaic I*. Allowing OCP to present the argument at this stage of the litigation will require additional proceedings upon remand, consuming time and expense that could have been avoided. *See* USCIT Rules 1 (prescribing "the just, speedy, and inexpensive determination of every action and proceeding") & 56.2(c) (requiring the movant to present in the Rule 56.2 brief the arguments according to which it objects to the contested agency action). Therefore, the court considers OCP's argument to have been waived.

In conclusion, the court sustains the Department's recalculation of a constructed profit rate for OCP's production of phosphate rock.

D. The Department's Determination that a Subsidy to OCP from the Program for Relief from Tax Fines and Penalties Was *De Facto* Specific

In the Remand Redetermination, Commerce again determined that the Moroccan government's program providing for relief from tax fines and penalties was a subsidy to OCP that was *de facto* specific. *Remand Redetermination* 10. In response to the court's ruling in *Mosaic I*, which remanded for reconsideration the Department's determination that OCP received a subsidy from this program that was

de facto specific under 19 U.S.C. § 1677(5A)(D)(iii)(I), *id.* at 5–7, Commerce did not reconsider whether that provision applied, deciding instead on remand that OCP received a subsidy that was *de facto* specific under a different provision, 19 U.S.C. § 1677(5A)(D)(iii)(III), *id.* at 10–11.

Mosaic agrees with the Department's determination on specificity. Mosaic's Comments 28–30. OCP contests the determination as "contrary to law and otherwise not supported by substantial record evidence." OCP's Comments 16. The court rules that the Department's redetermination on specificity must be set aside as unlawful.

In conducting its specificity analysis, Commerce may determine a subsidy to be *de facto* specific if any one of four factors are found:

(I) The actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number.
(II) An enterprise or industry is a predominant user of the subsidy.
(III) An enterprise or industry receives a disproportionately large amount of the subsidy.
(IV) The manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others.

Id. § 1677(5A)(D)(iii). The statute directs that "[i]n evaluating the factors set forth in subclauses (I), (II), (III), and (IV), the administering authority shall take into account the extent of diversification of economic activities within the jurisdiction of the authority providing the subsidy, and the length of time during which the subsidy program has been in operation." *Id.*

In *Mosaic I*, the court ruled that "the Department's determination that the tax fine and penalty reduction program was *de facto* specific was unsupported by the record evidence and, in the interpretation of 19 U.S.C. § 1677(5A)(D)(iii)(I), contrary to law." *Mosaic I*, 47 CIT at __, 659 F. Supp. 3d at 1317. The court reasoned that among other flaws, Commerce reached its finding that the "actual recipients" were "limited in number" by illogically comparing "the number of corporate taxpaying *recipients* of penalty relief, 8,761, to the total number of corporate *taxpayers*, 262,165, not the total number of corporate taxpayers who incurred penalties." *Id.*, 47 CIT at __, 659 F. Supp. 3d at 1314–15. "The resulting percentage (3.34%) is essentially meaningless from the standpoint of determining the 'specificity' of the program because the numerator and denominator were not logically comparable." *Id.*, 47 CIT at __, 659 F. Supp. 3d at 1315. "The only corporate taxpayers who could have applied for relief under the pro-

gram during the POI, i.e., the 'potential' recipients, were those that had incurred a tax penalty and had satisfied the requirement to pay all taxes they owed." *Id.* The court opined that "[t]he 'actual recipients,' for purposes of 19 U.S.C. § 1677(5A)(D)(iii)(I), that happened to be corporations—8,761—can scarcely be described as 'limited in number.'" *Id*. The court reasoned, further, that Commerce disregarded the record fact that "the program was available to all taxpayers, not only corporate ones." *Id*. In other words, Commerce impermissibly found that the "actual recipients of the subsidy . . . are limited in number" within the meaning of 19 U.S.C. § 1677(5A)(D)(iii)(I) without considering, or even mentioning, the actual number of recipients. That flaw alone required the court to rule that substantial evidence did not support the specificity finding.

In ruling that Commerce had misinterpreted 19 U.S.C. § 1677(5A)(D)(iii)(I), the court also concluded that "the Department's interpretation produces an absurd result" in that "[t]he record evidence does not establish that the tax fines and penalties reduction program is anything other than a common, ordinary tax administration program, available to all taxpayers, under which the taxing authority may mitigate a penalty." *Id.*, 47 CIT __, 659 F. Supp. 3d at 1316.

The Department's shifting its rationale from subparagraph (I) (limited number of actual recipients) to subparagraph (III) (receipt of disproportionately large amount of the subsidy by an industry or enterprise) of § 1677(5A)(D)(iii) does not make its decision any less absurd. It is a decision of a type disapproved by the Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–316, at 929–30 (1994) ("*SAA*"). Setting forth a guiding principle, the SAA explained that "the specificity test was intended to function as a rule of reason and to avoid the imposition of countervailing duties in situations where, because of the widespread availability *and use* of a subsidy, the benefit of the subsidy is spread throughout an economy." *SAA* 930. The SAA contrasts such non-countervailable subsidies with those "provided to or used by discrete segments of an economy." *Id.* The SAA quoted approvingly language in *Carlisle Tire & Rubber Co. v. United States*, 5 CIT 229, 233, 564 F. Supp. 834, 838 (1983), opining that "such things as public highways and bridges, as well as a tax credit for expenditures on capital investment" that is "available to all industries and sectors," should not be considered to satisfy the specificity requirement. *SAA* 929–30 (internal quotation marks omitted).

As the SAA instructs, Commerce must distinguish between subsidies that are provided to or used by discrete segments of the economy

and those that distribute a benefit throughout the entire economy. Subparagraph (III) of § 1677(5A)(D)(iii) must be interpreted consistently with this guiding principle, but Commerce has not done so here. *See SAA* 929 (describing the specificity requirement as a "screening mechanism to winnow out . . . broadly available and widely used" foreign subsidies and recognizing that "all governments, including the United States, intervene in their economies to one extent or another, and to regard all such interventions as countervailable subsidies would produce absurd results"). Neither the group consisting of all taxpayers (the potential beneficiaries), nor the actual beneficiaries (those taxpayers receiving some form of penalty relief) constitute a "discrete segment of the economy."

The statutory directive to "take into account the extent of diversification of economic activities within the jurisdiction of the authority providing the subsidy," 19 U.S.C. § 1677(5A)(D)(iii), is yet another indication that Congress did not consider a government benefit such as the one at issue here to be countervailable. The record evidence reveals that the "authority providing the subsidy" extends the potential benefit not only to all industries and sectors but also to all taxpayers in Morocco.[6] Commerce cited nothing to demonstrate that the broad availability of the program does not provide a benefit to the entire economy. This broad scope crosses all lines of economic "diversification." To the extent the program confers a "benefit" upon individual taxpayers, it also can be seen as benefiting the country's economy at large through sound tax administration, encouraging taxpayers to satisfy their tax debts voluntarily in return for a possible penalty reduction.

Commerce concluded that OCP received a share of reductions in fines or penalties that was "disproportionately large" within the meaning of 19 U.S.C. § 1677(5A)(D)(iii)(III) based on its finding that OCP's share was 82.87 times larger than the average amount received by other companies in Morocco. *Remand Redetermination* 27–28. Viewed in light of the correct interpretation of 19 U.S.C. § 1677(5A)(D)(iii) and subparagraph (III) in particular, this finding does not suffice to support the Department's conclusion.

In comments on the draft version of the Remand Redetermination, OCP argued that "[c]ontrary to Commerce's determination that OCP received a disproportionate benefit from the subsidy, OCP was only the tenth largest recipient of benefits through the program, despite being the largest employer in the country and representing around

[6] Commerce again found that the program was used by 8,761 companies during the period of investigation and, further, did not accord weight to the fact that the program was not limited to companies. *Remand Redetermination* 27–28.

five percent of Morocco's gross domestic product (GDP)." *Id.* at 25 (citing *OCP's Draft Comments* 15–16). The Remand Redetermination offers no convincing rebuttal to this argument, objecting that "neither the GOM [government of Morocco] nor OCP provided information which would draw a correlation between a company's size and the amount of tax fines and penalties it incurs." *Id.* at 32. This objection defies logic and common sense. Commerce cited no evidence to support its assumptions that a company's total reduction in tax fines or penalties has no relationship to the total amount of its revenue or to the total taxes for which it is liable. Nor did Commerce make any attempt to demonstrate that OCP got some preferential treatment or other atypical benefit from the Moroccan government's administration of the widely available tax fine and penalty relief program.

This case is distinguishable from *Government of Quebec v. United States*, 105 F.4th 1359 (Fed. Cir. 2024) ("*Gov't of Quebec*"), in which the Court of Appeals for the Federal Circuit ("Court of Appeals") affirmed a *de facto* specificity finding under 19 U.S.C. § 1677(5A)(D)(iii)(I) arising from a tax credit program that was confined to employers engaged in a business providing "on-the-job training" to trainees such as students or apprentices. *Id.* at 1366, 1374–75. The tax credit program allowed businesses to "claim a tax credit at a rate of 24% in respect to the salary or wages paid to" the trainee and the supervisor. *Gov't of Quebec v. United States*, 46 CIT __, __, 567 F. Supp. 3d 1273, 1281 (2022) (internal quotations omitted). Commerce found the actual number of credit recipients ("roughly 1.27%" of corporate tax filers) who received this benefit to be limited in number on an enterprise basis. *Gov't of Quebec*, 105 F.4th at 1374 & n.9; *see Gov't of Quebec v. United States*, 46 CIT at __, 567 F. Supp. 3d at 1290. Citing *Mosaic I*, 47 CIT at __, 659 F. Supp. 3d at 1314, 1315 n.10, the Court of Appeals expressly distinguished the tax credit program from the Moroccan tax fines and penalties reduction program at issue in this case in interpreting 19 U.S.C. § 1677(5A)(D)(iii)(I). *Gov't of Quebec*, 105 F.4th at 1375 n.10.

This case is distinguishable from the program evaluated in *Gov't of Quebec* in another respect: the "benefit" here is not analogous to that conferred by Quebec's program and is far less "beneficial." While the recipients of the tax credit at issue in *Gov't of Quebec* received beneficial business tax credits placing them in a better position than they otherwise would have been, the taxpayers who participated in the Moroccan program remained fully responsible for the taxes they owed. *See Supplemental Questionnaire Response of the Government of the Kingdom of Morocco – Part 2* S-IX-2 (Nov. 11, 2020), P.R. Docs. 359–64, ECF No. 94-2. The record demonstrates that the program is

limited to mitigation of "fines and penalties" and that any benefit conferred "is contingent upon settling the remaining tax liability in full." *Id.* In short, a program that may reduce a tax penalty for any taxpayer incurring one is not the same as a program that actually reduces the tax liability for a defined group of enterprises.

In summary, Commerce misinterpreted 19 U.S.C. § 1677(5A)(D)(iii)(III) and relied upon an unsupported finding that OCP received "a disproportionately large amount of the subsidy" in reaching a conclusion of *de facto* specificity for the tax fines and penalties reduction program.

III. CONCLUSION AND ORDER

For the reasons discussed in the foregoing, the court remands the Remand Redetermination to Commerce for consideration of Mosaic's proposed alternate method for allocating OCP's headquarters, support and debt costs to the production of beneficiated phosphate rock and directs Commerce to reach a decision on the allocation method based on a full and fair consideration of the arguments and evidence before it. The court also directs Commerce to reconsider its *de facto* specificity determination for any subsidy OCP received from Morocco's tax fines and penalties reduction program.

Therefore, upon consideration of all papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that the Final Results of Redetermination Pursuant to Court Remand (Int'l Trade Admin. Jan. 12, 2024), ECF No. 115–1, be, and hereby is, sustained in part and disallowed in part; it is further

ORDERED that Commerce shall issue a new determination upon remand (the "Second Remand Redetermination") that complies with this Opinion and Order; it is further

ORDERED that Commerce shall issue the Second Remand Redetermination within 90 days of the issuance of this Opinion and Order; it is further

ORDERED that plaintiff and defendant-intervenor shall have 30 days from the filing of the Second Remand Redetermination in which to submit comments to the court; and it is further

ORDERED that should plaintiff or defendant-intervenor submit comments, defendant shall have 15 days from the date of filing of the last comment to submit a response.

Dated: January 8, 2025
New York, New York

/*s*/ *Timothy C. Stanceu*
TIMOTHY C. STANCEU
JUDGE

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