Slip Op. 23-57

UNITED STATES COURT OF INTERNATIONAL TRADE

DALIAN MEISEN WOODWORKING CO., LTD., Plaintiff, and CABINETS TO GO, LLC, and THE ANCIENTREE CABINET CO., LTD., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and AMERICAN KITCHEN CABINET ALLIANCE, Defendant-Intervenor.	Before: Richard K. Eaton, Judge Court No. 20-00110 **PUBLIC VERSION**

OPINION AND ORDER

[U.S. Department of Commerce's Final Results of Redetermination Pursuant to Court Remand are remanded.]

Dated: April 20, 2023

Stephen W. Brophy, Husch Blackwell, LLP, of Washington, D.C., argued for Plaintiff Dalian Meisen Woodworking Co., Ltd. With him on the brief was *Jeffrey S. Neeley*.

Alexandra H. Salzman, deKieffer & Horgan, PLLC, of Washington, D.C., argued for Plaintiff-Intervenor The Ancientree Cabinet Co., Ltd. With her on the brief were *Gregory S. Menegaz* and *J. Kevin Horgan*.

Mark R. Ludwikowski, Clark Hill PLC, of Washington, D.C., argued for Plaintiff-Intervenor Cabinets to Go, LLC.

Tara K. Hogan, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendant the United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Ioana Cristei*, Trial Attorney. Of Counsel on the brief was *Elio Gonzalez*, Senior Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

Christopher T. Cloutier, Schagrin Associates, of Washington, D.C., argued for Defendant-Intervenor American Kitchen Cabinet Alliance. With him on the brief was *Luke A. Meisner*.

Eaton, Judge: Before the court are the U.S. Department of Commerce's ("Commerce" or the "Department") final results on redetermination pursuant to the court's remand order in *Dalian Meisen Woodworking Co. v. United States*, No. 20-00110, 2022 WL 1598896 (Ct. Int'l Trade May 12, 2022) (not reported in Federal Supplement) ("*Dalian I*"). *See* Final Results of Redetermination Pursuant to Court Remand, ECF No. 86 ("Remand Results").

Plaintiff Dalian Meisen Woodworking Co., Ltd. ("Meisen") and Plaintiff-Intervenor The Ancientree Cabinet Co., Ltd. ("Ancientree") (collectively, "Plaintiffs") have each filed comments contesting the Remand Results.[1] *See* Meisen Cmts. Opp'n Remand Results, ECF No. 89 ("Meisen Cmts."); Ancientree Remand Cmts. ("Ancientree Cmts."), ECF No. 91. The United States ("Defendant"), on behalf of Commerce, and Defendant-Intervenor American Kitchen Cabinet Alliance have responded to their comments. *See* Def.'s Resp., ECF No. 95; Def.-Int.'s Reply, ECF No. 94.

Commerce's Remand Results will be sustained unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2018). For the following reasons, the court sustains the Remand Results in part and remands this matter to Commerce for further action in accordance with this Opinion and Order.

[1] Plaintiff-Intervenor Cabinets to Go, LLC did not file comments on the Remand Results.

BACKGROUND

This case involves Commerce's countervailing duty investigation of wooden cabinets and vanities from the People's Republic of China ("China"). *See Wooden Cabinets and Vanities and Components Thereof From the People's Republic of China*, 85 Fed. Reg. 11,962 (Dep't Commerce Feb. 28, 2020) (final determination) and accompanying Issues and Decision Mem. (Feb. 21, 2020) ("Final IDM"). Plaintiffs and mandatory respondents Meisen and Ancientree dispute Commerce's inclusion of a 10.54% subsidy rate[2] for China's Export Buyer's Credit Program, as adverse facts available,[3] in the calculation of their respective countervailing duty rates.

Commerce based its use of facts available on its finding that there were gaps in the factual record, in particular information that it requested from the government of China concerning the operation of the Export Buyer's Credit Program. During the course of the investigation, Commerce

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[2] The 10.54% rate is the highest rate determined for, what Commerce found to be, a similar program in the *Coated Paper* proceeding. *See* Final IDM 37-38 (citing *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China*, 75 Fed. Reg. 70,201, 70,202 (Dep't Commerce Nov. 17, 2010) (amended final determination)).

[3] If, during the investigation or review of a countervailing duty order, Commerce determines that (1) "necessary information is not available on the record" or (2) "an interested party or any other person . . . withholds information that has been requested by [Commerce]," "fails to provide such information by the deadlines . . . or in the form and manner requested," "significantly impedes a proceeding," or "provides such information but the information cannot be verified," Commerce must use "facts otherwise available." 19 U.S.C. § 1677e(a). Where requested information is not made available on the record, regardless of the reason for the respondent's failure to provide it, the statute requires Commerce to use facts otherwise available to replace the missing information in order to complete the record. *See id.*; *see also Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003) ("The mere failure of a respondent to furnish requested information—for any reason—requires Commerce to resort to other sources of information to complete the factual record on which it makes its determination."). Where Commerce determines that the use of facts available is warranted, it may apply adverse inferences to those facts only if it makes the requisite additional finding that that party has "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).

sought information on the revisions made to the Program in 2013 regarding the $2 million minimum contract amount, and the role of third-party banks in the disbursement of loans. China failed to provide this information, which Commerce insists was necessary to its investigation of the Program. In addition, for Commerce, the evidence that the respondents (Meisen and Ancientree) provided to support their claims that neither company used or benefitted[4] from the Program—specifically, their U.S. customers' declarations of non-use—could not be verified in the absence of the operational information that China failed to provide.

In *Dalian I*, familiarity with which is presumed, the court remanded Commerce's final affirmative countervailing duty determination with respect to its adverse facts available finding that Meisen and Ancientree used and benefitted from the Export Buyer's Credit Program.[5] *See Dalian I*, 2022 WL 1598896, at *8-9. Commerce made this finding, notwithstanding the companies' uncontroverted sworn U.S. customer declarations of non-use on the record. The court found that remand was required because Commerce's use of facts available was not supported by substantial evidence:

> Here, as in other cases, to justify the substitution of relevant evidence placed on the record by cooperating respondents with facts available, Commerce has constructed an argument that is difficult to credit—*i.e.*, that operational information was withheld by China and therefore there are gaps regarding the use of the program. The problem with this argument is that the withheld information is (at best) only indirectly related to alleged actual use of the program by Meisen's and Ancientree's U.S. customers. Moreover, Commerce's argument that the operational information is necessary to verify the accuracy of the non-use information because without it, verification is unreasonably burdensome using its typical procedure, rings hollow when Commerce fails to even try.

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[4] The benefit to the companies would result from their customers' cost of buying the subject wooden cabinets and vanities being reduced by the customers receiving preferential rates on loan proceeds used to buy the merchandise.

[5] In *Dalian I*, the court also sustained Commerce's plywood benchmarking determination. *See Dalian I*, 2022 WL 1598896, at *10-11.

Id. at *8. The court thus directed that

> on remand, Commerce shall either (1) find a practical solution to verify the non-use information on the record, such as the reopening of the record to issue supplemental questionnaires to respondents and their U.S. customers; or (2) recalculate the countervailing duty rates for Meisen and Ancientree to exclude the subsidy rate for the Export Buyer's Credit Program, and recalculate the all-others rate accordingly.

Id. at *11.

In the Remand Results, Commerce stated that it had elected to "find a practical solution to verify the non-use information on the record." Remand Results at 1-2 ("[I]n this remand proceeding, Commerce reopened the record of the investigation and attempted to verify non-use of the program for Ancientree and Meisen."). Specifically, Commerce sent supplemental questionnaires to Meisen and Ancientree, asking them to report "all loans/financing to each of your U.S. importers/customers that were received and/or outstanding during the period of investigation . . . regardless of whether you consider the financing to have been provided under the Export Buyer's Credit program," including non-traditional loans. *See, e.g.*, Export Buyer's Credit Suppl. Questionnaire at 1 (May 19, 2022), PRR 1. Commerce asked that the parties "[s]ubmit the information requested in the ***Loan Template*** as an attachment to your response." *Id.* The loan template asked for: the names of lenders, the date of the loan agreement, the date of the loan receipt, the purpose of the loan, the initial loan amount, the currency of the loan, the life of the loan, the type of interest (i.e., fixed or variable rate), the interest rate specified in the agreement, the date of principal payments, amount of principal payments, dates of interest payment, amounts of interest paid, principal balance to which each interest payment applied, and the total number of days each payment covered, for each loan with interest payments during the period of investigation. *See* Remand Results at 18.

The loan information Commerce received from each of the respondents was incomplete. Meisen reported that all of its U.S. customers were affiliates, and most were small businesses with simple accounting systems. *See* Meisen Export Buyer's Credit Suppl. Questionnaire Resp. at 1, 3-4 (June 10, 2022), PRR 13. For Meisen, this meant that the customers were unable to provide the level of detail requested in the loan template. Additionally, Meisen deemed "irrelevant" most of the loan information that Commerce asked for, stating that most loans were shareholder loans or vehicle/property financing, apparently ignoring Commerce's request for non-traditional, as well as traditional, loan information. *Id.* at 1-2 ("None of these companies had any relevant loans/financing outstanding during the period of investigation.").

Additionally, in preparing its initial response to the questionnaire, Meisen did not use the loan template. Instead of providing all of the information that Commerce asked for, in the form requested, Meisen provided tax returns and trial balances, along with a description of the loans and interest payments. After Commerce issued a second supplemental questionnaire to Meisen, directing the use of the loan template and asking Meisen to provide documentation for the "five largest loans for each of U.S. importer/customer that are reported in the **Loan Template**," Meisen completed the loan template by simply stating "NA" or "0" in the lines under each item of requested information. *See* Meisen Resp. 2nd Export Buyer's Credit Suppl. Questionnaire Resp. (June 21, 2022) attach. 1, PRR 18.

For its part, Ancientree reported the requested information for fifteen of its twenty-seven unaffiliated U.S. customers, representing approximately 90% of its U.S. sales by volume and by value during the period of investigation. *See* Ancientree Export Buyer's Credit Suppl. Questionnaire Resp. (June 13, 2022) at 1, PRR 14. One of the twelve U.S. companies whose loan information Ancientree failed to report had gone out of business. *Id.* With respect to the remaining

eleven companies, Ancientree stated that despite its efforts, it could not reach, or could not convince, those companies to provide the loan information that Commerce requested. *Id.* at 1-2.

In other words, Meisen provided incomplete information for numerous U.S. customers, and Ancientree provided complete information for some, but not all, of its U.S. customers. *See* Remand Results at 27 ("[W]e did not receive a complete response for all customers from Ancientree, and we received only a partial response from Meisen for numerous customers (despite Commerce's second requests to Meisen for the same information).").

In the Remand Results, Commerce found that it could not verify the respondents' claims of non-use because Meisen and Ancientree failed to provide complete responses for all of their U.S. customers:

> The fact that the respondents in this remand did not provide complete responses for all their U.S. customers guaranteed that the record would remain incomplete as to usage information, thus, rendering futile any efforts to verify non-usage. For this reason, Commerce took no further steps to verify non-use from respondents with respect to those U.S. customers that did provide complete responses, including the loan template, since Commerce could not reasonably expect that the incomplete information gathered would yield a meaningful basis for verification. Consequently, as noted above, the respondents' incomplete information would not, for purposes of verification and an ultimate determination, overcome the deficiencies in the program information due to [China]'s non-cooperation. Therefore, Commerce must continue to find usage of the program on an [adverse facts available] basis.

Id. at 21. Thus, Commerce did not attempt to verify any of the non-use information placed on the remand record, even that which was provided by Ancientree's U.S. customers in the form and manner requested, because neither Meisen nor Ancientree provided 100% of the loan information requested for 100% of its U.S. customers. Because it did not receive all of the information it asked for in the form directed, Commerce found that it "could not reasonably expect that the incomplete information gathered would yield a meaningful basis for verification." *Id.* at 21. Plaintiffs contest this finding.

DISCUSSION

Plaintiffs challenge the scope of the loan information Commerce asked for in its non-use questionnaire and the finding that Commerce could not verify any of the non-use information that Plaintiffs placed on the record. Verification procedures are reviewed for an abuse of discretion. *See Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1396 (Fed. Cir. 1997) ("[W]e review verification procedures employed by Commerce in an investigation for abuse of discretion . . . ."). "The purpose of verification is 'to test information provided by a party for accuracy and completeness.'" *Goodluck India Ltd. v. United States*, 11 F.4th 1335, 1343-44 (Fed. Cir. 2021) (quoting *Micron Tech.*, 117 F.3d at 1396).

For Meisen, the scope of the information Commerce requested—i.e., all of the loan information for its U.S. importers/customers during the period of investigation—was unreasonable and an abuse of discretion: "Commerce has now resorted to creating gaps in the record by crafting a supplemental questionnaire so onerous and burdensome that the vast majority of respondents will never be able to fill out the forms in the manner requested." Meisen Cmts. at 7. Instead, according to Meisen, Commerce could have modified its general verification procedure and used a "spot check" method, whereby Commerce asks for a sample of the requested information from a subset of U.S. customers. *Id.* at 9. Moreover, Meisen argues that the information it provided was more than adequate for Commerce to be able to verify non-use, and Commerce unreasonably rejected it because of its form, not its content. *Id.* at 11.

Ancientree similarly argues that Commerce failed to find a practical way to verify, which was an abuse of discretion. And, like Meisen, Ancientree "maintains that the record *does* contain sufficient information to verify non-use of [Export Buyer's Credits] by its customers." Ancientree Cmts. at 2. Reciting the court's finding in *Dalian I* that "the declarations placed on the record by

Meisen and Ancientree show that their U.S. customers did not use the program to finance their purchases (*i.e.*, there can be no 'benefit' received under the program by Meisen or Ancientree), and there is no record evidence to the contrary," Ancientree argues that "[t]he additional information on this record, from customers representing over 90% of Ancientree's [period of investigation] sales, only constitutes additional evidence of non-use. It is still the case that nothing on the record suggests U.S. buyers['] use of the [Export Buyer's Credit] Program."[6] *Id.* at 3. Ancientree proposes that "[t]o comply with the Statute and the Court's order, for instance, as approximately 90% of Ancientree's buyers responded, the Department should at worst have applied an [Export Buyer's Credit] deposit rate of 10.54% x 0.1 = 1.054%." *Id.* at 8.

For its part, Defendant maintains that Commerce has wide latitude to design verification processes and procedures. *See* Def.'s Resp. at 9. Here, Commerce argues, the verification procedure, by which it required respondents to submit "all" U.S. customer loan information during the period of investigation to substantiate the declarations of non-use, was reasonable:

> To be able to verify non-use of the program, Commerce must review loan and financing information for the respondents and their customers to ensure that no loans were received either directly or indirectly from the China Ex-Im Bank. To those ends, Commerce issued supplemental questionnaires requesting respondents to report, in an attached loan template, all loans and financing (including non-traditional forms of financing) provided to each of their U.S. customers that were received or outstanding during the period of investigation. The loan information was requested regardless of whether the respondents considered the financing to have been provided under the Export Buyer's Credit Program.
>
> With this information, Commerce would be able to examine subledgers or bank statements containing the details of all individual loans and thus get "confirmation that a complete picture of relevant information is in front of the verifiers, by tying relevant books and records to audited financial statements or tax

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[6] Ancientree's confidential brief refers to a "Customer K," which had 68% of Ancientree's sales by value during the period of investigation, and no loans or outstanding financing during the period of investigation, and a "Customer H," described as its "next largest customer," which had loans, and provided all of the supporting documentation requested by Commerce. *See* Ancientree Remand Cmts. at 3, ECF No. 90.

> returns." By tying or tracing the subledgers or bank statements to the total amount of outstanding lending derived from the balance sheets, Commerce could be assured that the subledgers were complete and that it had the entire universe of loan information available to further proceed with verification. Using this information, Commerce could then reasonably assess whether a particular financing instrument was provided under the Export Buyer's Credit Program.

Def.'s Resp. at 7-8 (quoting Remand Results at 19). For Commerce, the respondents' failure to provide the requested information prevented Commerce from proceeding with verification:

> If Commerce had received the requested information in full, Commerce would have been able to proceed with tracing the subledgers or bank statements to the total amount of outstanding lending derived in the balance sheets. This ability to trace the loans would have given Commerce the information it needed to determine whether in fact any loans had come from the China Ex-Im Bank. As Commerce explained, confirmation that a complete picture of relevant information is in front of verifiers, by tying relevant books and records to audited financial statements or tax returns, is critical to meaningfully conduct verification.

Def.'s Resp. at 10 (citing Remand Results at 18-19). Thus, Defendant argues, since Commerce was unable to verify the respondents' U.S. customers' non-use because of the failure of the respondents to provide all of the requested information, that record evidence was not a reliable basis to find non-use.

The court finds that Commerce has complied with the court's instruction in *Dalian I* to find a practical solution to verify Plaintiffs' U.S. customers' non-use declarations on the record. Indeed, Commerce followed the court's express suggestion when it "reopen[ed] . . . the record to issue supplemental questionnaires to respondents and their U.S. customers." *Dalian I*, 2022 WL 1598896, at *11. The court did not instruct Commerce on the *scope* of information to request by supplemental questionnaire, however, and that is where Plaintiffs' main challenge to the Remand Results lies.

Plaintiffs argue that the scope of information sought by Commerce was too broad, i.e., Commerce abused its discretion by asking for *all* of the loan information for the U.S. customers,

including non-traditional financing, and requiring Plaintiffs to complete the loan template. Further, Plaintiffs question whether substantial evidence supports Commerce's finding that it could not verify *any* of the loan information placed on the remand record because it did not have *all* of the loan information it requested, i.e., they contest the "completeness" pre-requisite for verification.

It is worth noting that, although Commerce found that neither Meisen nor Ancientree submitted complete loan information and so it could not proceed to verify the loan information submitted by either company, each Plaintiff complied to a different degree with Commerce's requests for information. For its part, Meisen made unilateral decisions about what parts of the questionnaire were "relevant" and what information should suffice for Commerce's purposes. This Court has observed in other cases that respondents may not unilaterally employ "alternate methods" instead of follow Commerce's questionnaire instructions. *See, e.g.*, *Ghigi 1870 S.p.A. v. United States*, 45 CIT __, __, 547 F. Supp. 3d 1332, 1348 (2021) ("Rather than contact Commerce with a question about the meaning of the purportedly ambiguous reporting instructions when it received the initial questionnaire, or propose alternate methods of reporting protein content or shape, Ghigi/Zara responded to the questionnaires in its own special way, 'correcting' what it found to be flaws or ambiguities in the instructions, without alerting Commerce.").

But Ancientree, on the other hand, provided complete loan information for more than half of its U.S. customers. That number included its largest customers, representing approximately 90% of its U.S. sales (by volume and by value) during the period of investigation. Still, since the loan information for *all* U.S. customers was not provided, Commerce did not proceed to verify.

Bearing all of this in mind, the court sustains Commerce's finding that it could not verify Meisen's responses to the supplemental questionnaires. Meisen failed to provide the information Commerce asked for in the form and manner requested. Initially, the company did not even attempt

to use the loan template to provide its responses, contrary to Commerce's instructions. Moreover, instead of providing the information Commerce asked for, which Meisen believed was irrelevant to its U.S. customers (all of which were affiliates), it provided other information. After Commerce sent Meisen a supplemental questionnaire again asking the company to use the loan template, Meisen indicated, in the template, that the information requested in each of the line items was "not applicable." Meisen argues that Commerce's request for all loan information for all U.S. customers was impractical. But there is no evidence that Meisen contacted Commerce when preparing its responses to offer a reasonable alternative. Thus, on this record, Commerce reasonably found that Meisen's responses to the questionnaires and claims of non-use of the Export Buyer's Credit Program could not be verified.

The court does not sustain, however, Commerce's finding that it could not verify any of Ancientree's questionnaire responses. Ancientree provided complete loan information in the loan template for more than half of its U.S. customers, which represented approximately 90% of its sales during the period of investigation. Apparently, Commerce could have verified those responses—i.e., the requested information for fifteen of Ancientree's twenty-seven customers was on the record in the form and manner requested—but did not do so.

The court is aware that, under the "completeness" requirement described in the Remand Results, even if Commerce had successfully verified Ancientree's responses for 90% of its U.S. sales, it likely still would find that the missing information—i.e., loan information for the balance of Ancientree's U.S. customers, representing roughly 10% of its U.S. sales—constituted a gap in the record. But this Court recently held in *Risen Energy Co. v. United States*, a case with similar facts, that it was "unreasonable for Commerce to require perfection," when the information supplied by a respondent in response to Commerce's non-use questionnaire "essentially eliminated

any gap" left by China's non-compliance with Commerce's requests for information about the Export Buyer's Credit Program. *See Risen Energy Co. v. United States*, No. 20-03912, 2023 WL 2890019 47, at *5 (Ct. Int'l Tr. Apr. 11, 2023) (not reported in Federal Supplement).

In *Risen*, as in this case, Commerce issued non-use questionnaires to the respondents on remand. Respondent Risen had twelve U.S. customers during the relevant period. The company provided complete loan information for six of those twelve, representing roughly 95% of its U.S. sales during the relevant period. As to the other six U.S. customers, three did not respond to Risen's requests, one had gone out of business so could not provide the requested loan information, and the other two stated that its loans had "nothing to do" with the Program or Risen. *See id.* This information was in addition to the declarations of non-use that Risen had placed on the record previously for all of its U.S. customers. Risen proposed that Commerce should modify the subsidy rate for the Program to account for the fact that there is record evidence demonstrating that approximately 95% of sales were not benefited by the Program. *See id.* at *3.

Notwithstanding that Risen "substantially complied with Commerce's investigation efforts and provided near complete data for Commerce to review even after [a] long passage of time" (the period of review was five years ago), Commerce still found that it could not verify non-use because it did not have the *complete* universe of Risen's U.S. customers' loan information, i.e., 100% of the requested loan information from all twelve customers. *Id.* at *5. Thus, for Commerce, Risen had failed to fill the gap on the record, and, based on adverse facts available, Commerce found that the company used and benefitted from the Export Buyer's Credit Program.

The *Risen* Court found that, based on the record in that case, Commerce's finding that Risen had failed to fill the gap on the record was unreasonable:

> Here, Risen has supplied information so that there is no relevant missing information about the [Export Buyer's Credit Program]. Not only has Risen

> provided sworn declarations from each of its customers stating that they did not use financing from the [Export Buyer's Credit Program], but, after remand, Risen supplied financial, loan, and record information regarding 6 of its 12 customers, representing roughly 95% of sales during the [period of review]. Commerce's refusal to verify the customer data and continued application of other facts available is not supported by substantial evidence on this record because the information necessary to the determination, assuming it is verified, is not lacking.

Id. at *4. The record information, though not perfectly complete, pointed toward non-use:

> Considering that the [period of review] was five years ago, that Commerce changed its policy, and that Risen complied to the best of its ability, the court concludes it is unreasonable for Commerce to require perfection. All of the record evidence points to nonuse of the program at issue. Commerce's concern about potentially hiding the use of [the Export Buyer's Credit Program] in the nonresponding companies is not reasonable when considering the collateral impact of [adverse facts available] on the fully cooperating Risen, the age of this case, and the still-relevant initial complete set of nonuse declarations, which has not been seriously undermined. Substantial evidence does not support Commerce's continued application of [adverse facts available] to Risen's detriment on this record.

Id. at *5. The *Risen* Court thus remanded the matter to Commerce to "attempt to verify Risen's submissions to the extent Commerce finds appropriate, and if that is successful, it should either accept the proposed pro rata adjustment or conclude [the Export Buyer's Credit Program] was not used at all." *Id.*

The court makes a similar holding based on the record here. It was not reasonable for Commerce to find that Ancientree failed to fill the gap on the record as to non-use because the record contains not only uncontroverted non-use declarations by all of its U.S. customers, but also complete loan information for 90% of Ancientree's U.S. sales (more than half of its customers). Of Ancientree's twelve U.S. customers, six provided complete loan information which Ancientree reported to Commerce, including Customer K, which represented a large majority of Ancientree's sales by value during the period of investigation and had no loans or outstanding financing during the period of investigation, and Customer H, described as its "next largest customer," which had loans and provided all of the supporting documentation requested by Commerce. *See supra* note 6;

Ancientree Cmts. at 3. One of Ancientree's U.S. customers was no longer in business. With respect to the remaining eleven companies, Ancientree attempted, but could not reach, or could not convince, those companies to provide the loan information that Commerce requested. This is hardly surprising because, unlike Meisen's U.S. customers, Ancientree's U.S. customers were not affiliates; hence it had no control over their cooperation. Therefore, substantial evidence does not support the use of facts available for Ancientree with respect to the Export Buyer's Credit Program.

The court therefore remands this matter to Commerce. On remand the Department is instructed to attempt to verify Ancientree's submissions to the extent it finds appropriate, and if that is successful, it should either accept the *pro rata* adjustment proposed by Ancientree or conclude that the Export Buyer's Credit Program was not used at all, and recalculate the all-others rate accordingly.

In sum, the court finds that the use of facts available was supported by substantial evidence as to Meisen but not as to Ancientree. Because the court does not sustain Commerce's use of facts available with respect to Ancientree, it need not reach the issue of adverse inferences with respect to that company. *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003), (emphasis added) ("[19 U.S.C. § 1677e(b)] permits Commerce to 'use an inference that is adverse to the interests of [a respondent] in selecting from among the facts otherwise available,' *only if* Commerce makes the separate determination that the respondent 'has failed to cooperate by not acting to the best of its ability to comply.'").

With respect to Meisen, the court sustains Commerce's use of adverse inferences to find that the company used and benefitted from the Export Buyer's Credit Program. *See* Remand Results at 5 ("[D]ue to the lack of cooperation from the [government of China], we continue to find, as [adverse facts available], that the program constitutes a financial contribution pursuant to

[19 U.S.C. § 1677(5)(D)] and is specific pursuant to [19 U.S.C. § 1677(5A)(A) and (B)].”). Here, there is no serious dispute that China failed to act to “the best of its ability” to comply with Commerce’s requests for information, specifically with respect to the operation of the Program. 19 U.S.C. § 1677e(b)(1). Commerce’s use of adverse facts available to find that Meisen used and benefitted from the Export Buyer’s Credit Program is therefore sustained.

CONCLUSION AND ORDER

Based on the foregoing reasons, the court sustains the Remand Results in part and remands this matter to Commerce. It is hereby

ORDERED that Commerce’s finding that it could not verify Meisen’s questionnaire responses is sustained; it is further

ORDERED that Commerce’s use of facts available under 19 U.S.C. § 1677e(a) with respect to Meisen is sustained; it is further

ORDERED that Commerce’s finding that China failed to cooperate to the best of its ability under 19 U.S.C. § 1677e(b), thereby justifying the use of an adverse inference to find that Meisen used and benefitted from the Export Buyer’s Credit Program is sustained; and it is further

ORDERED that, on remand, Commerce attempt to verify Ancientree’s submissions to the extent the Department finds appropriate, and if that is successful, either accept the *pro rata* adjustment proposed by Ancientree or conclude that the Export Buyer’s Credit Program was not used at all, and recalculate Ancientree’s rate and the all-others rate accordingly.

/s/Richard K. Eaton
Judge

Dated: April 20, 2023
New York, NY

ERRATA

In *Dalian Meisen Woodworking Co. v. United States*, Court No. 20-00110, Slip Op. 23-57, dated April 20, 2023

Page 14: On line 27, replace “twelve” with “twenty-seven” and “six” with “fifteen”.

May 3, 2023