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March 23, 2017

MEMORANDUM TO: Gary Taverman
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

FROM: James Doyle
Director, Office V
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Rescission of the Countervailing Duty New Shipper Review of Calcium Hypochlorite from the People's Republic of China: Haixing Jingmei Chemical Products Sales Co., Ltd.

SUMMARY

The Department of Commerce (the Department) analyzed the case and rebuttal briefs submitted by interested parties in the new shipper review (NSR) of Haixing Jingmei Chemical Products Sales Co., Ltd. (Jingmei), with respect to the countervailing duty order on calcium hypochlorite from the People's Republic of China (PRC).[1] Based on this analysis, we have not revised our *Preliminary Results*[2] of the NSR of Jingmei. We recommend that you approve the positions described in the "Discussion of Issues" section of this memorandum. The issues for which we received comments from interested parties are listed below.

BACKGROUND

The Department published its *Preliminary Results* of this NSR on January 3, 2017.[3] On February 2, 2017, Jingmei submitted its case brief. On February 6, 2017, the Department rejected Jingmei's case brief because it contained untimely new factual information, and

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[1] For a discussion of the parties to the sale under review, *see* Memorandum to the File from Elizabeth Lobaugh, International Trade Analyst, "Business Proprietary Information Memo for Final Rescission of the Countervailing Duty New Shipper Review of Calcium Hypochlorite from the People's Republic of China: Haixing Jingmei Chemical Products Sales Co., Ltd," dated concurrently with this memorandum (Final BPI Memo) at Note 1.
[2] *See Calcium Hypochlorite from the People's Republic of China: Preliminary Intent to Rescind the New Shipper Review of Haixing Jingmei Chemical Products Sales Co., Ltd.*, 82 FR 83 (January 3, 2017) (*Preliminary Results*).
[3] *Id.*

provided Jingmei an opportunity to resubmit its case brief.[4] On February 7, 2017, Jingmei submitted its revised case brief.[5] On February 8, 2017, Arch Chemicals, Inc. (petitioner) submitted its rebuttal brief.[6]

SCOPE OF THE ORDER

The product covered by the order is calcium hypochlorite, regardless of form (*e.g.*, powder, tablet (compressed), crystalline (granular), or in liquid solution), whether or not blended with other materials, containing at least 10% available chlorine measured by actual weight. The scope also includes bleaching powder and hemibasic calcium hypochlorite.

Calcium hypochlorite has the general chemical formulation $Ca(OCl)_2$, but may also be sold in a more dilute form as bleaching powder with the chemical formulation, $Ca(OCl)_2.CaCl_2.Ca(OH)_2.2H_2O$ or hemibasic calcium hypochlorite with the chemical formula of $2Ca(OCl)_2.Ca(OH)_2$ or $Ca(OCl)_2.0.5Ca(OH)_2$. Calcium hypochlorite has a Chemical Abstract Service (CAS) registry number of 7778-54-3, and a U.S. Environmental Protection Agency (EPA) Pesticide Code (PC) Number of 014701. The subject calcium hypochlorite has an International Maritime Dangerous Goods (IMDG) code of Class 5.1 UN 1748, 2880, or 2208 or Class 5.1/8 UN 3485, 3486, or 3487.

Calcium hypochlorite is currently classifiable under the subheading 2828.10.0000 of the Harmonized Tariff Schedule of the United States (HTSUS). The subheading covers commercial calcium hypochlorite and other calcium hypochlorite. When tableted or blended with other materials, calcium hypochlorite may be entered under other tariff classifications, such as 3808.94.5000 and 3808.99.9500, which cover disinfectants and similar products. While the HTSUS subheadings, the CAS registry number, the U.S. EPA PC number, and the IMDG codes are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.[7]

DISCUSSION OF THE ISSUE

Comment: Whether the Record Contains Sufficient Information to Conduct a *Bona Fides* Analysis

Jingmei's Comments:

- The Department has ample information on the record to determine the costs and profits

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[4] *See* Letter to Jingmei from Catherine Bertrand, Program Manager, Office V, "New Shipper Review of Calcium Hypochlorite from the People's Republic of China: Rejection of Untimely Filed New Factual Information in Case Brief" (February 6, 2017); *see also* Memorandum to the File from Elizabeth Lobaugh, International Trade Analyst, Enforcement and Compliance, Office V, "Rejection of Untimely Filed New Factual Information" (February 7, 2017).
[5] *See* Letter to the Secretary of Commerce from Jingmei, "Calcium Hypochlorite from the People's Republic of China Refiling Case Brief" (February 7, 2017) (Jingmei's Case Brief).
[6] *See* Letter to the Secretary of Commerce from Petitioners, "Countervailing Duty New Shipper Review: Calcium Hypochlorite from the People's Republic of China: Rebuttal Brief" (February 8, 2017) (Petitioner's Rebuttal Brief).
[7] *See Calcium Hypochlorite from the People's Republic of China: Countervailing Duty Order*, 80 FR 5082 (January 30, 2015).

of each party, and should determine that the new shipper sale is *bona fide* and calculate a countervailing duty rate for Jingmei.[8]

- The payment terms and amount were consistently reported by Jingmei, Jingmei's customer, an intermediary trader, and the ultimate U.S. customer, and are supported with documentation.[9]
- Jingmei and its unaffiliated customers provided a variety of documentation (*e.g.*, sales contracts stating sale and payment terms, commercial invoices and packing lists stating sales terms, brokerage and handling invoice, payment documentation of import duties, bank receipt for import duties, ocean freight invoice, air freight bill, ocean bill of lading, and a picture of packaging materials) that consistently established which parties incurred and paid which expenses.[10]
- These companies are small private companies, with more informal books and records.[11] As such, the accounting documents are handwritten and less detailed, but this does not make the records unreliable, as the parties have explained how the handwritten documents tie to official documents.[12]
- Documentation on the record substantiates the purported price of the sale, because the sales packaging consistently reports the weight and price for the sale, bank notices show the payments made and received, and the same prices are converted and then entered into accounting vouchers provided.[13]
- There is nothing unusual in Jingmei's sales terms. The Department has come to its analysis with unwarranted doubt concerning the payments made and demanded an unreasonably high burden of proof to overcome the doubt from unaffiliated downstream nonparties.[14]
- There is sufficient record evidence to demonstrate that both Jingmei's customer[15] and its downstream U.S. customer resold the subject merchandise at a profit.[16] The Department never claimed there was a deficiency in the information provided and cannot now claim that the ultimate U.S. customer failed to provide the requested or necessary information.[17]
- The ultimate U.S. customer agreed on a price with Jingmei's customer prior to when it placed the packaging order, and it is illogical for the Department to assume that the two companies were not in communication to finalize the shipment before signing the sales contract.[18]
- The ultimate U.S. customer required its own packaging, not Jingmei or Jingmei's customer.[19] Additionally, the decision to provide packaging is not unusual in

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[8] *See* Jingmei's Case Brief at 1.
[9] *Id.* at 8.
[10] *Id.* at 3, 4-8.
[11] *Id.* at 3-4.
[12] *Id.* at 4.
[13] *Id.* at 9.
[14] *Id.* at 3.
[15] *Id.* at 10.
[16] *Id.* at 11-12.
[17] *Id.*
[18] *Id.* at 13.
[19] *Id.* at 14.

international trade.[20] Substantial evidence and the Department's practice support the *bona fide* nature of this practice.[21]

- The Department has no reason to believe that Jingmei's customer's payment was inherently late. If it does determine it to be late, the Department should impute a small credit expense to the seller rather than find the sale non-*bona fide*.[22]
- If the Department required additional evidence to support Jingmei's explanations, it was required to issue Jingmei a supplemental questionnaire, rather than merely concluding that the sale was not *bona fide*. The Department cannot draw an adverse inference against Jingmei.[23]
- If the Department doubted the facts on the record, it should have elected to verify Jingmei rather than demand unaffiliated parties to surrender their confidential accounting systems. It is unreasonable for the Department to cut off further investigation of Jingmei's records and determine it needed unaffiliated parties' records beyond the transactional documents provided.[24]

Petitioner's Rebuttal Comments:

- Jingmei has not demonstrated that its sale is *bona fide*,[25] and the Department correctly issued a preliminary decision to rescind the review because there was no sale on which a countervailing duty analysis could be conducted.[26]
- The issue before the Department is whether the respondent had a *bona fide* sale, a necessary condition precedent before an exporter or producer is entitled to an individual rate. For the Department to set an accurate rate, it must have before it a transaction from which it can reasonably review.[27]
- The payment and, therefore, the price of this sale, cannot be tied to the accounting records of either the seller or the buyer.[28]
- Jingmei erroneously claims that it provided sufficient information to identify all expenses tied to the sale and who paid them.[29] However, since no party provided accounting information that reconciled these expenses, it is impossible to know who paid them.[30]
- The ultimate U.S. customer and Jingmei's customer failed, despite repeated requests, to reconcile their sales and expenses to their accounting records. Thus, profitability could not be determined.[31]
- Contrary to Jingmei's claim in its case brief, the evidence demonstrates that having the customer supply the packaging is not typical for any of these companies.[32]

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[20] *Id.* at 15.
[21] *Id.*
[22] *Id.* at 16.
[23] *Id.* at 5.
[24] *Id.* at 16.
[25] *See* Petitioner's Rebuttal Brief at 2.
[26] *Id.* at 10.
[27] *Id.* at 2.
[28] *Id.* at 3.
[29] *Id.* at 4.
[30] *Id.* at 6.
[31] *Id.* at 7.
[32] *Id.*

- Additionally, there is no evidence to support Jingmei's claims that the ultimate U.S. customer provided the packaging because it required unique packaging.[33]
- Jingmei provides no support for its statements regarding the timing of payment. According to Jingmei, because it never said explicitly that payment was overdue, it was incorrect of the Department to take the terms of the sale, as indicated on the invoice, at face value.[34]
- Jingmei did not bother to address the additional factors that the Department considered in concluding that it could not find the sale to be *bona fide*. Jingmei did not discuss or explain the discrepancy in the labels, nor the weight discrepancy that the Department noted in its Preliminary *Bona Fides* Memo.[35] [36]
- The price and terms of the sale raise questions as to the typical nature of this transaction. Evidence demonstrated that the sales terms, as reported by Jingmei and its customers, were atypical and, therefore, could not be considered to represent what the likely terms of a future sale would be, as required by law.[37]

Department's Position: For the reasons detailed below, the Department continues to find that a determination cannot be made based on the record information that the sale at issue is *bona fide,* because the respondent failed to provide a substantial portion of the requested information necessary to conduct the statutory *bona fide* analysis.

Section 751(a)(2)(B) of the Tariff Act of 1930, as amended, (the Act) was recently amended to curb what Congress viewed as abuse of the statute's NSR provision.[38] Congress expressed concern that NSRs, which allow new exporters and producers to obtain their own individual weighted-average dumping margin or individual countervailing duty rate from the Department on an expedited basis, had been abused by new exporters and producers to secure low cash deposit rates that are not reflective of their future commercial behavior.[39] In particular, Congress expressed concern over the ability of new exporters or producers to enter into a scheme to structure a few sales to show little or no dumping or subsidization when those sales are reviewed by the Department during a new shipper review, resulting in a low or zero antidumping duty margin or countervailing duty rate for that producer or exporter.[40] An importer could then bring in that producer's or exporter's merchandise at highly dumped or subsidized prices but with little or no cash deposit.[41]

[33] *Id.* at 8.
[34] *Id.* at 9.
[35] *Id.* at 9-10.
[36] *See* Memorandum to James C. Doyle, Director, Office V, Antidumping and Countervailing Duty Operations, through Catherine Bertrand, Program Manager, Office V, Antidumping and Countervailing Duty Operations, from Elizabeth Lobaugh, International Trade Analyst, "*Bona Fide* Nature of the Sale in the Countervailing Duty New Shipper Review of Calcium Hypochlorite from the People's Republic of China: Haixing Jingmei Chemical Products Sales Co., Ltd.," (December 27, 2016) (Preliminary *Bona Fides* Memo).
[37] *Id.* at 10.
[38] *See* Section 433 of the Trade Facilitation and Trade Enforcement Act of 2015, Pub. Law 114-125 (Feb. 24, 2016) (adding a new section 751(a)(2)(B)(iv) entitled, "Determinations based on bona fide sales"); *see also* H. Rpt. No. 114-114 (2015) (May 14, 2015) (H. Rpt. No. 114) at 89.
[39] *See* H. Rpt. No. 114 at 89.
[40] *Id.*
[41] *Id.*

To prevent this abuse, Congress amended the Act by adding section 751(a)(2)(B)(iv), which creates the requirement that U.S. sales that serve as the basis of an individual countervailing duty rate in an NSR be *bona fide* sales, and sets forth criteria for considering whether sales are *bona fide*.[42] Thus, pursuant to section 751(a)(2)(B)(iv) of the Act, any weighted-average dumping margin or countervailing duty rate determined in an NSR must be based solely on *bona fide* sales during the period of review (POR).[43] This requires an affirmative determination, supported by evidence on the record, that a sale is *bona fide* for the Department to determine an individual countervailing duty rate in this new shipper review.

To determine whether a sale in an NSR is *bona fide*, the Department is statutorily obligated to consider, "depending on the circumstances surrounding such sales":

> (I) the prices of such sales; (II) whether such sales were made in commercial quantities; (III) the timing of such sales; (IV) the expenses arising from such sales; (V) whether the subject merchandise involved in such sales was resold in the United States at a profit; (VI) whether such sales were made on an arm's-length basis; and (VII) any other factor {it} determines to be relevant as to whether such sales are, or are not, likely to be typical of those the exporter or producer will make after completion of the review.[44]

In light of this statutorily-mandated analysis, the Department must consider any factors it determines are relevant to assessing whether a sale is likely to be typical of a new shipper's future sales. Although some *bona fides* issues may share commonalities across various administrative cases, the Department examines the *bona fide* nature of a sale on a case-by-case basis, and the analysis may vary with the facts surrounding each sale.[45] The Court of International Trade (CIT) has affirmed the Department's practice of examining objective, verifiable factors in a *bona fides* analysis to ensure that a sale is not being made to circumvent an antidumping or countervailing duty order.[46] A prospective new shipper is, therefore, on notice that it is unlikely to establish the *bona fides* of a sale merely by claiming to have sold in a manner representative of its future commercial practices.[47] As such, in order for a new shipper to demonstrate under the statute that its sales are *bona fide*, it must provide the Department with objective, record evidence concerning "the circumstances surrounding such sales."[48] Thus, we agree with petitioner that we appropriately conducted a *bona fides* analysis to determine whether the reported sale was *bona fide* and, therefore, a sale for which a rate can be calculated. Here, notwithstanding the Department's repeated requests, the record contains insufficient information for the Department to conduct a *bona fides* analysis, and conclude that the sale is *bona fide*.

[42] *Id.*
[43] *See* Section 751(a)(2)(B)(iv) of the Act.
[44] *Id.*
[45] *See Hebei New Donghua Amino Acid Co., Ltd. v. United States*, 374 F. Supp. 2d 1333, 1340, n.5 (CIT 2005) (*New Donghua*), *citing Tianjin Tiancheng Pharmaceutical Co. v. United States*, 366 F. Supp. 2d 1246, 1263 (CIT 2005) (*TTPC*); *see also Certain Preserved Mushrooms from the People's Republic of China: Final Results and Partial Rescission of the New Shipper Review and Final Results and Partial Rescission of the Third Antidumping Duty Administrative Review*, 68 FR 41304 (July 11, 2003), and accompanying Issues and Decision Memorandum at Comment 2.
[46] *See New Donghua*, 374 F. Supp. 2d at 1339.
[47] *Id.*
[48] *See* Section 751(a)(2)(B)(iv) of the Act; *see also New Donghua*, 374 F. Supp. 2d at 1339.

Because we have not found that the reported sale is *bona fide*, pursuant to section 751(a)(2)(B)(iv) of the Act, we are unable to calculate a countervailing duty rate for Jingmei's sale under review.

<u>The Information Provided Does Not Substantiate Payment for the Sale</u>

Jingmei argues that the record contains sufficient information to substantiate the payment for the sale. We disagree. To substantiate payment for the sale, Jingmei argues that the sales packaging consistently reports the weight and price for the sale, bank notices show the payments made and received, and the same prices are converted and then entered into the provided accounting vouchers. Jingmei also argues that the bank account numbers on its bank notices match the bank account numbers on other documentation on the record and that Jingmei and its customer showed the Department how the sales value was clearly booked in the sales ledger and accounting voucher.[49]

However, as explained in the Preliminary *Bona Fides* Memo and the Final BPI Memo,[50] the record lacks requested information needed to tie payment for the sale under review to the companies' books and records. Specifically, in response to our request for a detailed explanation of the payment process for the subject merchandise, in which we requested the parties to identify each step involved in the payment process, to provide proof-of payment documentation (*e.g.*, bank statements, copies of the checks, bank withdrawal slips, payment entries in the accounts payable and general ledger, and wire-transfer documentation) that illustrate the amount paid to Jingmei for the purchase of the subject merchandise, Jingmei replied that its customer and ultimate U.S. customer do not keep sales ledgers in the ordinary course of business.[51] Although Jingmei did provide its own sales ledger, this did not include any identifier such as customer name or invoice number that would allow us to tie it to the transaction in question.[52] Further, the Department cannot substantiate payment of the sale based on the bank notices and wire transfer sheets provided, because these documents also lack the detail necessary to determine affirmatively that Jingmei's customer's purported payments were, in fact, related to the sales transaction under review. The payment documentation provided includes payment "instructions" that do not identify the remitter.[53] Apart from providing insufficient detail (*i.e.*, remitter name), Jingmei's customer's "payment" documentation also is not evidence of payment, because it does not appear to be a final transaction confirmation. In other words, the payment "instructions" are not evidence that the payment in the amount referenced in the instructions was ever completed and, therefore, does not support payment. The Department sent two supplemental questionnaires, again requesting proof of payment to substantiate the sales transaction under review.[54] The parties provided an array of handwritten accounting documents, all of which include entries, that, in the ordinary course of business, are entered without an identifier, such as

[49] *See* Jingmei's Case Brief at 9.
[50] *See* Preliminary *Bona Fides* Memo at 9-10; *see also* Final BPI Memo at Note 2.
[51] *See* Final BPI Memo at Note 2; *see also* Preliminary *Bona Fides* Memo at 9.
[52] *Id.*
[53] *See* Jingmei's Case Brief at Attachment 7.
[54] *See* Letter to the Secretary of Commerce from Jingmei "Calcium Hypochlorite from the People's Republic of China Second Supplemental Questionnaire Response" (August 24, 2016) (Supp2) at 1, 6, 8-9, 13-14 and Exhibit SQ 2-4; *see also* Letter to the Secretary of Commerce from Jingmei "Calcium Hypochlorite from the People's Republic of China Fourth Supplemental Questionnaire Response" (November 14, 2016) at 7.

an invoice number or customer name.[55] Additionally, as explained in the Preliminary *Bona Fides* Memo, Jingmei, Jingmei's customer, and the ultimate U.S. customer further reported that, in the ordinary course of business, they combine multiple unidentified invoice amounts into each entry. As a result, the Department was unable to use the accounting records Jingmei, Jingmei's customer, and the ultimate U.S. customer provided on the record. Without reliable documentation as to the payment, we are unable to determine that the price reported is accurate, and without such accurate information, we cannot ascertain whether the price is indicative of a *bona fide* sale. Consequently, we are unable to examine fully claims as to who purchased the goods under review from Jingmei and at what price, as directed by section 751(a)(2)(B)(iv)(I) of the Act.

<u>The Information Provided Does Not Substantiate Payment of Sales Expenses</u>

Jingmei argues that, along with its unaffiliated customers, it provided a variety of documentation establishing which parties incurred and paid which expenses. Under the sales terms reported by Jingmei, the Chinese inland freight and port charges and the import duties were incurred by its customer, and the ocean freight and U.S. inland freight were incurred by the ultimate U.S. customer. Thus, it was necessary to request accounting records from Jingmei's customer and the ultimate U.S. customer to substantiate the accuracy of the expenses reported and to determine affirmatively which parties incurred these expenses for purposes of the Department's analysis, pursuant to section 751(a)(2)(B)(iv)(IV) of the Act. As stated in the Preliminary *Bona Fides* Memo, the Department requested this information to understand the payment terms and to conduct a *bona fides* analysis. However, the parties provided partial answers to our requests for information, and did not submit copies of accounting documents showing where payment for each expense was incurred (*i.e.*, booked). When asked for further documentation to link the handwritten documents to the sale of the subject merchandise, Jingmei's customer and the ultimate U.S. customer provided no supporting documentation to substantiate the purported expense payments. Additionally, Jingmei, its customer, and the ultimate U.S. customer reported that, in the ordinary course of business, they do not maintain accounting records, such as payment ledgers.[56] Instead, the companies provided payment summaries created for this review, which combined multiple invoices into each entry.[57] Thus, the documentation provided by Jingmei, its customer, and the ultimate U.S. customer failed to tie payment of expenses for the sale under review to the individual company's books and records.

Jingmei argues that the Department's analysis requires Jingmei and its unaffiliated customers to keep more detailed records than they do in normal business operations, and to open fully these books and records before the Department can trust the consistent transactional documentation.[58] However, as explained in the Preliminary *Bona Fides* Memo, the Department cannot analyze whether the sales expenses are typical without a complete and accurate record of each expense. This analysis requires documentation supporting the amount of each expense incurred, which

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[55] *See* Letter to the Secretary of Commerce from Jingmei "Calcium Hypochlorite from the People's Republic of China First Supplemental Questionnaire Response" (July 22, 2016) at 2 and at Exhibit SQ1-1; *see also* Supp2 at SQ2-11 and SQ2-13.
[56] *See* Preliminary *Bona Fides* Memo at 10.
[57] *Id*.; *see also* Final BPI Memo at Note 2.
[58] *See* Jingmei's Case Brief at 1-2; *see also* Final BPI Memo at Note 2 and 5.

party paid each expense, and documentation to tie the payment of those expenses to both the sale and the companies' books and records.[59] Additionally, as explained above, for a new shipper to demonstrate under the statute that a sale is *bona fide*, it must provide the Department with objective, record evidence concerning the sale. Generally, documentation from a party's accounting system, linked to its audited financial statements, serves as support to show that expenses were incurred and revenue was earned by the company, and those expenses/revenues were recorded in their financial records. Without such documentation, we cannot be confident that the company incurred the purported expenses and revenues.[60]

In addition to the lack of information provided to tie payment of expenses to accounting books and records, record information contains discrepancies in the sales terms, which further calls into question the payment of expenses as reported.[61] First, in its case brief, Jingmei acknowledges that the PRC customs declaration form shows different sales terms than those reported by Jingmei in its NSR request and responses to the Department's questionnaire, but argues that, if the Department doubted Jingmei's explanation regarding this discrepancy, it was required to issue Jingmei a supplemental questionnaire and cannot use this discrepancy to draw an adverse inference against Jingmei.[62] As explained in greater detail below, no adverse inferences have been drawn against Jingmei in rescinding this review. Second, as explained in the Preliminary *Bona Fides* Memo, the Department repeatedly requested accounting documentation from Jingmei, Jingmei's customer, and the ultimate U.S customer, to confirm payment of certain expenses under the sales terms.[63] Rather than providing the requested support, however, Jingmei's final supplemental response raised new questions about which parties were responsible for the payment of certain expenses.[64] Jingmei's customer and the ultimate U.S. customer failed to explain these discrepancies and, thus, the record does not contain the detail necessary to ascertain whether the purported payment expenses were incurred, and if so, by which party. Lacking such information, a determination cannot be made as to whether the expenses arising from the sale are typical and, therefore, potentially reflective of a *bona fide* sale.[65]

Jingmei argues that there is nothing unusual in the sales terms that warranted the Department to doubt the veracity of the parties' statements and documentation on the record, and to require the internal accounting documentation from Jingmei's unaffiliated customers.[66] However, as explained above and in the Preliminary *Bona Fides* Memo, the handwritten documents submitted on the record do not tie to the parties' books and records and, therefore, do not provide reliable support for the parties' statements. Given Jingmei's customer's and the ultimate U.S. customer's failure to provide sufficient documentation, the Department is unable to fully examine claims as to movement expenses, as directed by section 751(a)(2)(B)(iv)(IV) of the Act. Accordingly, the Department cannot determine that the circumstances of the expenses arising from the reported sale—*e.g.*, the amount of the expenses and which party paid which expense—are typical of

[59] *See* Preliminary *Bona Fides* Memo at 8.
[60] *Id* at 10.
[61] *See* Preliminary *Bona Fides* Memo at 8.
[62] *See* Jingmei's Case Brief at 5.
[63] *See* Preliminary *Bona Fides* Memo at 8-10.
[64] *See* Final BPI Memo at Note 3.
[65] *Id* at 9.
[66] *See* Final BPI Memo at Note 4.

Jingmei's future sales, because the supporting information provided does not reliably demonstrate the degree of the expenses or which party was responsible for which expense.

The Information Provided Is Insufficient to Determine Resale Profit

We disagree with Jingmei's argument that there is sufficient record evidence to demonstrate that both Jingmei's customer and its ultimate U.S. customer resold the subject merchandise at a profit. As an initial matter, although Jingmei raises claims about the profit of its customer, the Department's inquiry is focused on whether the ultimate U.S. customer made a profit, rather than on whether the importer made a profit.[67] Here, while Jingmei argues that record evidence is sufficient to evaluate whether the ultimate U.S. customer resold the subject merchandise at a profit, the record lacks the required documentation for the Department to conduct its analysis. Specifically, as described above, the information on the record does not reliably demonstrate which party paid each expense arising from the sale, which is required for us to calculate the U.S. customer's resale profit in this case.[68] Further, the U.S. ultimate customer provided only a limited number of invoices demonstrating resale of the subject merchandise. Jingmei argues that the ultimate U.S. customer answered the questionnaires and provided all the requested documentation for determining resale profit—providing a substantial amount of documentation without discrepancies.[69] However, as discussed in the Preliminary *Bona Fides* Memo and in the Final BPI Memo, the ultimate U.S. customer submitted a sample of invoices accounting for only a small portion of resales of subject merchandise.[70] Sample invoices for such a small portion of resales are not adequate for determining whether the subject merchandise was resold at a profit.[71] Furthermore, we asked for a complete list of the subject merchandise sold by Jingmei's ultimate U.S. customer during the POI. Instead, the company provided a list that included both subject and non-subject merchandise, with no means to determine which sales were subject merchandise, or even those that were sold by Jingmei.[72] Thus, the Department is unable to determine whether the ultimate U.S. customer resold the subject merchandise at a profit, because the record lacks information regarding which sales expenses the ultimate U.S. customer paid. Similarly, we cannot determine profit based on a small portion of the ultimate U.S. customer's resales, and we were not provided useable information on the resale of subject merchandise.

The Record Reflects Atypical Payment

Jingmei argues that the Department has no reason to believe Jingmei's customer made a late payment, or that making payment after the due date means that payment is inherently late or unusual.[73] We disagree. Jingmei argues that "late payment is, in fact, the norm in business," and that the Department's practice is merely to impute a small credit expense to the seller rather than striking a sale from a database as non-*bona fide*.[74] However, the company provides no support for either of these statements, and the Department finds Jingmei's explanation of late payment

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[67] *See Jinxiang Yuanxin Imp. & Exp. Co. v. United States*, 71 F. Supp. 3d 1338, 1354 (CIT 2015).
[68] *See* Preliminary *Bona Fides* Memo at 10.
[69] *See* Jingmei's Case Brief at 11.
[70] *See* Preliminary *Bona Fides* Memo at 11; *see also* Final BPI Memo at Note 5.
[71] *Id.*
[72] *Id.* at 11.
[73] *See* Jingmei's Case Brief at 16.
[74] *Id*.

unavailing. As explained in the Preliminary *Bona Fides* Memo, the Department looked at the sales terms and determined when payment was due. If payment was not made on time, the Department looked further at whether there was any attempt to collect on the overdue payment.[75] The Department previously has found that allowing payment to go uncollected departs from normal commercial business practices.[76] The payment terms for the sale under review were clearly defined, yet payment was not made at the designated time. Further, nothing on the record indicates Jingmei attempted to collect payment. While late payment alone may not indicate that a sale is non-*bona fide*, letting late payment go uncollected departs from normal commercial business practices. Thus, the timing of Jingmei's customer's payment for the sale under review and Jingmei's failure to seek payment suggest that this was an atypical transaction.[77]

<u>The Record Reflects Atypical Circumstances Relating to Packaging</u>

Jingmei argues that the timing and the circumstances surrounding the ultimate U.S. customer's purchase of the packaging is typical. We disagree. Here, the ultimate U.S. customer purchased the packaging from an outside party, and had the packaging shipped directly to Jingmei's producer's factory before Jingmei and Jingmei's customer had finalized the sale. Jingmei argues that providing packaging prior to the sale being finalized is typical, because the parties already had a relationship from a previous smaller sale,[78] had been in communication, and had already agreed on a price and to finalize the shipment before the actual sales contract was signed.[79] The Department has previously found that irregularities surrounding the timing of production prior to sales negotiations may be indicative of a non-*bona fide* transaction.[80] We similarly find that irregularities with regard to the purchase and shipment of packaging prior to final sale may also be indicative of a non-*bona fide* purchase. Here, the ultimate U.S. customer reported no business relationship with either Jingmei or Jingmei's producer; yet, this U.S. customer was willing to purchase packaging, which it supplied directly to the producer's factory, prior to its supplier having confirmed the sale of the subject merchandise. Jingmei reported that there were several discussions between the companies, concerning the shipment, before the ultimate U.S. customer formally placed the order for the packaging.[81] However, when asked for documentation of any communication between the companies, Jingmei, Jingmei's customer, and the ultimate U.S. customer did not provide any documentation of sales negotiations.[82] The U.S. customer's willingness to invest in packaging before sale terms were finalized does not appear to be a normal sales practice.

The record reveals additional irregularities with regard to the provision of packaging. Jingmei acknowledges that the ultimate customer did not provide the packaging for any other sale of

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[75] *See Preliminary Bona Fides* Memo at 6; *see also* Final BPI Memo at Note 6.
[76] *See TTPC*, 366 F. Supp. 2d at 1259, 1260.
[77] *See* Preliminary *Bona Fides* Memo at 8.
[78] *See* Final BPI Memo at Note 1.
[79] *See* Jingmei's Case Brief at 13.
[80] *See* Preliminary *Bona Fides* Memo at 6-7; *see also Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Rescission of Antidumping Duty New Shipper Reviews; 2013-2014*, 80 FR 36970 (June 29, 2015), and accompanying Issues and Decision Memorandum at Comment 1.
[81] *See* Jingmei's Case Brief at 13.
[82] *See* Preliminary *Bona Fides* Memo at 7.

calcium hypochlorite during the POR.[83] Similarly, Jingmei notes that Jingmei's customer had no other calcium hypochlorite transactions during the POR where the ultimate U.S. customer provided the packaging.[84] However, Jingmei argues that the decision to provide packaging is the ultimate U.S. customer's decision, and not a decision Jingmei or Jingmei's customer makes. Jingmei also reports that the packaging appears to have been out of the ordinary, stating it was "perhaps a style used elsewhere in the world but not regularly used in China, which is why Jingmei's sales to other countries had no such requirements and why the ultimate U.S. customer did not have to specify this in its purchases from other countries."[85] In addition, Jingmei notes, the packaging came with additional customized features,[86] further suggesting why the ultimate U.S. customer sent the packaging to Jingmei's producer. Jingmei claims there are reasonable explanations for the packaging arrangement, and that the Department does not have a reasonable basis to assume that this is atypical and render decisions based on speculation. However, there is nothing on the record to suggest that the packaging the ultimate U.S. customer provided was unusual, or a style not used by Jingmei. Jingmei, in fact, provided images of its calcium hypochlorite sold in third markets during the POR, which appeared to have indistinguishable packaging. Yet, despite two requests, the record contains no clear image of the label the ultimate U.S. customer provided,[87] thus calling into question Jingmei's contention that the customer's packaging was specialized. Although Jingmei argues that there are reasonable explanations for the packaging arrangement, it provided no documentation to substantiate this claim.[88] Regardless, though the U.S. customer may have specific packaging needs, there is no record information to show that the U.S. customer purchasing and shipping the packaging prior to the sale being finalized reflect typical arrangements for these parties' sale or purchase of subject merchandise.

Jingmei also argues that it is not unusual in international trade for the customer to provide packaging, and references two cases in support of its argument.[89] However, the Department finds Jingmei's analysis and application of these cases unpersuasive. The Department examines the *bona fide* nature of a sale on a case-by-case basis, and the analysis may vary with the facts surrounding each sale.[90] The Department's concern is whether the sale under review is typical of these companies and, therefore, is indicative of their future transactions. The cases cited by Jingmei contain different companies in a different industry, and are, thus, not reflective of Jingmei's future transactions. Further, as explained above, the record evidence is insufficient to determine that the manner in which the packaging was supplied is typical for Jingmei, Jingmei's customer, or the ultimate U.S. customer.

<u>Verification Would Not Provide an Opportunity to Remedy Deficiencies</u>

Jingmei argues that the Department should have verified Jingmei rather than demand unaffiliated parties to surrender their confidential accounting systems. We disagree. The purpose of

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[83] *See* Jingmei's Case Brief at 14-15.
[84] *Id*.
[85] *See* Jingmei's Case Brief at 14-15.
[86] *See* Final BPI Memo at Note 7.
[87] *See* Preliminary *Bona Fides* Memo at 11.
[88] *See* Jingmei's Case Brief at 15.
[89] *Id*.
[90] *See New Donghua*, 374 F. Supp. 2d at 1340, n.5.

verification is to confirm the accuracy of information previously submitted on the record, not to continue the information-gathering stage of the review.[91] Therefore, verification is not an opportunity for Jingmei to submit new information on the record to remedy deficiencies relating to prior requests for information. Here, we are unable to conduct a *bona fides* analysis because the information submitted on the record either lacks sufficient detail to confirm, or simply does not provide sufficient support for the details of the sale and payment of expenses. Thus, the record does not contain the information necessary to verify Jingmei's claims. Further, contrary to Jingmei's assertion, it is not unreasonable or unprecedented for the Department to request internal accounting records from U.S. customers. Indeed, similar requests have been made in past new shipper reviews[92] and are reflected in the Department's standard practice.[93] Thus, while Jingmei would have liked the Department to verify Jingmei in order to remedy deficiencies in the record resulting from information that was requested but not provided, that is not the purpose of verification. In sum, information that would allow us to verify the accuracy of Jingmei's claims has not been submitted to the record and verification is not an opportunity for a company to submit new, previously-requested information. Accordingly, it would not have been appropriate to verify Jingmei under the circumstances presented in this case.

<u>The Record Lacks Sufficiency to Determine Whether Jingmei's Sale is *Bona Fide*</u>

Jingmei argues that, if the Department required additional evidence to support the record, it was required to issue Jingmei a supplemental questionnaire, rather than merely conclude that the sale was not *bona fide*,[94] and that the Department cannot draw an adverse inference against Jingmei.[95] We issued supplemental questionnaires to request clarification and information that Jingmei and its customers failed to provide.[96] The U.S. Court of Appeals for the Federal Circuit has held that it remains incumbent upon respondents to create adequate administrative records.[97] The CIT has

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[91] *See* 19 CFR § 351.307(d) (2012) (The purpose of verification is to "verify the accuracy and completeness of submitted factual information").
[92] *See, e.g., Certain Frozen Warmwater Shrimp from the People's Republic of China: Notice of Final Results and Rescission, in Part, of 2004/2006 Antidumping Duty Administrative and New Shipper Reviews*, 72 FR 52049 (September 12, 2007), and accompanying Issues and Decision Memorandum ("[T]he Department examines the companies on both sides of the transaction"); *see also Honey from the People's Republic of China: Final Results and Final Rescission, in Part, of Antidumping Duty Administrative Review*, 72 FR 37715 (July 11, 2007), and accompanying Issues and Decision Memorandum.
[93] *See* the Department's Antidumping New Shipper Review Questionnaire available at http://enforcement.trade.gov/questionnaires/questionnaires-ad.html ("Appendix IX includes importer specific questions to be answered by the exporter or, if the exporter is unable to fully respond, forwarded to the importer, with the answers to be included in the exporter's response").
[94] *See* Jingmei's Case Brief at 5.
[95] *Id.*
[96] *See* Letter from Catherine Bertrand, Program Manager, Office V, "Countervailing Duty New Shipper Review of Calcium Hypochlorite from the People's Republic of China – Supplemental Questionnaire" (July 12, 2016); Letter from Catherine Bertrand, Program Manager, Office V, "Countervailing Duty New Shipper Review of Calcium Hypochlorite from the People's Republic of China – Supplemental Questionnaire" August 10, 2016); Letter from Catherine Bertrand, Program Manager, Office V, "Countervailing Duty New Shipper Review of Calcium Hypochlorite from the People's Republic of China – Supplemental Questionnaire" (September 13, 2016); Letter from Catherine Bertrand, Program Manager, Office V, "Countervailing Duty New Shipper Review of Calcium Hypochlorite from the People's Republic of China – Supplemental Questionnaire" (October 28, 2016).
[97] *See Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1277 (Fed. Cir. 2012); *see also QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (brackets, quotation marks and citations omitted) (explaining that in

noted that axiom similarly applies in a new shipper review, where the respondent failed to establish that it made a *bona fide* sale during the relevant review period, and there remains little for the Department to do but rescind the review.[98] Additionally, the facts otherwise available and use of adverse inference statutory provisions have not been applied in this case. In this case, we find, based on the above analysis, we are unable to determine that the sale in question is, in fact, a *bona fide* sale. The record lacks the information necessary to support a finding that the sale subject to this new shipper review is *bona fide.*

Conclusion

As described above, the information on the record does not substantiate payment of the sale, which party incurred each expense, whether the subject merchandise was resold at a profit,[99] and whether the sale under review is typical, because Jingmei, Jingmei's customer, and the ultimate U.S. customer only provided partial responses to our request for information. Because the record information does not confirm the details of the sale under review, the Department cannot determine that the sale is reflective of Jingmei's future sales behavior. Furthermore, certain characteristics of the sale appear to be atypical, namely the timing of Jingmei's customers' payment, Jingmei's failure to seek payment, and the circumstances surrounding the provision of packaging for the subject merchandise at issue. In light of this analysis, the Department cannot find that the sale in question is *bona fide*, as required by section 751(a)(2)(B)(iv) of the Act. Consequently, it is appropriate to rescind this review.

antidumping proceedings "the burden of creating an adequate record lies with interested parties and not with Commerce").

[98] *See, e.g., Shandong Chenhe Trading Co. v. United States*, 34 CIT 1472,1473 (CIT 2010); *see also TTPC*, 366 F. Supp. 2d at 1249.

[99] *See* 751(a)(2)(B)(iv) (listing the factors necessary to conduct a *bona fide* analysis).

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all the above positions. If accepted, we will publish the final rescission of this NSR in the *Federal Register*.

☒ ☐

Agree	Disagree

3/23/2017

X 

Signed by: GARY TAVERMAN

Gary Taverman
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations