IN THE
SUPREME COURT OF THE UNITED STATES

No. ___

PAPIERFABRIK AUGUST KOEHLER SE,

Applicant,

v.

UNITED STATES and APPVION, INC.,

Respondents.

APPLICATION TO THE CHIEF JUSTICE OF THE UNITED STATES FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

To the Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Federal Circuit:

Papierfabrik August Koehler SE ("Koehler")[1] respectfully requests, pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of the Supreme Court of the United States, that the time to file a petition for a writ of certiorari be extended for 59 days, up to and including September 21, 2018.

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1. Papierfabrik August Koehler SE has no parent corporation, and no publicly held company owns 10% or more of its stock.

The United States Court of Appeals for the Federal Circuit issued its judgment at issue on February 7, 2018 (Exhibit 1).[2] *Papierfabrik August Koehler SE v. United States*, No. 16-2425 (Fed. Cir. Feb. 7, 2018). The Federal Circuit affirmed the Court of International Trade's decision and did not issue an opinion. The Federal Circuit denied Koehler's petition for panel rehearing and rehearing *en banc* on April 25, 2018 (Exhibit 2). This Court has jurisdiction under 28 U.S.C. § 1254(1). Absent an extension of time, the petition for a writ of certiorari would be due on July 24, 2018. *See* Sup. Ct. R. 13.1, 13.3. Koehler is filing this application more than ten days before that date. *See* Sup. Ct. R. 13.5. Respondents United States and Appvion Operations, Inc. do not oppose this request. In support of this application, Koehler states as follows:

1. Koehler is a family-owned paper company based in Germany that has been operating for 211 years (since 1807). Koehler entered the U.S. market in 1987 and has been defending antidumping proceedings involving imports of lightweight thermal paper. This case involves the final results of the second administrative review conducted by the United States Department of Commerce ("Commerce") of the antidumping duty order covering those imports. *See* Final Remand Redetermination Pursuant to Court Remand, *Papierfabrik August Koehler AG v. United States*, 180 F. Supp. 3d 1211 (Ct. Int'l Trade 2016) (No. 1:12-cv-00091-TCS), ECF 76-1, *aff'd sub nom., Papierfabrik August Koehler SE v. United States*, 710 F.

2. The Federal Circuit only issued a Rule 36 judgment and did not issue an opinion.

App'x 889 (Fed. Cir. 2018).[3] Commerce assigned a 75.36% weighted-average dumping margin for Koehler's imports during the period from November 1, 2009 through October 31, 2010, which resulted in approximately $80 million in additional duties being retroactively assessed against Koehler and which was in addition to more than $100 million in additional duties that were assessed by Commerce during the third administrative review.

2. Commerce based its excessive duty rate not on verifiable evidence voluntarily submitted by Koehler on its pricing activities but on "adverse facts available" (or "AFA") pursuant to 19 U.S.C. § 1677e(b). In doing so, Commerce disregarded the premise of the statute, provided in § 1677e(a), that the AFA provision is to be applied "if necessary information is not available on the record" or if an interested party withholds information requested by the Government, significantly impedes an antidumping or countervailing duties proceeding, or fails to provide the requested information in a timely or verifiable manner. Here, Koehler voluntarily notified Commerce that it had failed to provide certain information about five out of more than 1,000 sales in Germany and made multiple attempts to submit supplementary information, which was rejected by Commerce each time. *See* Brief of Appellant at 7–8, *Papierfabrik August Koehler SE v. United States,* No. 16-2425 (Fed. Cir. Nov. 2, 2016). Even though there were only discrete

3. Page references to materials on the Court of International Trade's docket refer to the automatically-generated pagination supplied by the Court of International Trade's electronic filing system.

gaps in the record, which Koehler had voluntarily disclosed to Commerce, Commerce disregarded the entirety of Koehler's sales information and relied on a total use of adverse facts available and an adverse inference. *See Papierfabrik August Koehler AG v. United States*, 180 F. Supp. 3d 1211, 1219–1220 (Ct. Int'l Trade 2016).

3. Pursuant to 19 U.S.C. § 1677e(c), Commerce was required to corroborate the 75.36% rate. To do so, Commerce selected a single, facially aberrational, transaction-specific margin of 144.63%, from more than 3,300 available transaction-specific margins. The next-highest transaction-specific margin in the record was 48.68%, the third-highest margin was 29.22%, and the remaining margins were 25% or less. Nevertheless, Commerce concluded that the 144.63% outlier margin corroborated the 75.36% rate. The Court of International Trade found that the 144.63% margin was clearly "aberrant" and that Commerce "erred in finding that the transaction underlying its calculated 144.63% margin could serve to corroborate its 75.36% rate." *Papierfabrik August Koehler AG v. United States*, 180 F. Supp. 3d at 1229–30. Yet, despite finding that the rate was not corroborated by the record, the court ultimately affirmed Commerce's assignment of the 75.36% AFA rate, on its view that the purpose of subsection (b)'s "adverse inference" provision trumped the plain text of subsection (c)'s corroboration requirement. *Id.* at 1231–32.

4. This case represents just one of many in which the Court of International Trade and the Federal Circuit have permitted Commerce to utilize

adverse facts available to punish a foreign respondent for purported misconduct rather than to incentivize cooperation and fill gaps in the record according to the best evidence. But that pattern clearly contravenes the plain statutory text and the established purpose of § 1677e. As Koehler will explain in its petition for a writ of certiorari, neither the statutory language nor fundamental principles of due process permit such a sweeping and punitive use of the AFA standard. The statute authorizes Commerce only to utilize AFA where information is missing or deficient, meaning total AFA should not be applied when partial AFA is entirely feasible and sufficient, and it does not permit Commerce to disregard timely submitted, verifiable information in an effort to punish respondents. On the contrary, it expressly commands Commerce to "corroborate" the information it relies on through "sources that are reasonably at their disposal." 29 U.S.C. § 1677e(c)(1). And due process requires that the agency reach its determination based on the actual evidence. Moreover, this case represents a disturbing trend in which the Federal Circuit has granted Commerce virtually unfettered deference, declining to even issue an opinion while upholding $80 million in punitive duties. In short, this case involves a troubling pattern of agency overreach, compounded by an unreasonable degree of judicial deference, both of which present important questions of federal law that have not been, but should be, settled by this Court.

5. The extension requested would permit Koehler's counsel the necessary time to thoroughly prepare and sharpen the petition for a writ of certiorari. The petition involves distilling the relevant information from a voluminous factual

record and from numerous precedents. The extension would also afford the parties additional time to conduct potential settlement discussions. Given the summer recess, the extension should not affect the Court's disposition of a petition for a writ of certiorari, and no party will be prejudiced by an extension. As noted above, Respondents United States and Appvion Operations, Inc. do not oppose Koehler's request for an extension.

For the foregoing reasons, Koehler respectfully requests that the time to file a petition for a writ of certiorari be extended to and including September 21, 2018.

Dated: July 9, 2018

Respectfully submitted,

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