

UNITED STATES COURT OF INTERNATIONAL TRADE  
NEW YORK, NEW YORK

**LOTUS FOODS, INC.,**

**Plaintiff,**

**v.**

**UNITED STATES OF AMERICA; OFFICE OF THE  
UNITED STATES TRADE REPRESENTATIVE;  
ROBERT E. LIGHTHIZER, U.S. TRADE  
REPRESENTATIVE; U.S. CUSTOMS & BORDER  
PROTECTION; MARK A. MORGAN, U.S.  
CUSTOMS & BORDER PROTECTION ACTING  
COMMISSIONER**

**Defendants.**

Court No. 20-00886

**COMPLAINT**

Plaintiff Lotus Foods, Inc., by and through its counsel, alleges as follows:

**INTRODUCTION**

1. This action concerns a trade war between the United States and China that impacts over \$500 billion in imports from China.
2. On September 21, 2018, the Office of the United States Trade Representative (“USTR”) imposed a third round of tariffs on products covered by a list commonly known as “List 3.” *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 (Sept. 21, 2018). On August 20, 2019, USTR imposed a fourth round of tariffs, commonly known as “List 4.” *Notice of Modification of Section 301 Action: China’s Acts, Policies, and*

*Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 43,304 (Aug. 20, 2019). The imposition of tariffs under List 3 and List 4 is unlawful.

3. Pursuant to Section 301 of the Trade Act of 1974 (“Trade Act”) (19 U.S.C. § 2411), the USTR investigated China’s unfair intellectual property policies and practices. Section 304 of the Trade Act (19 U.S.C. § 2414) required USTR to determine what action to take, if any, within 12 months after initiation of that investigation. USTR failed to issue List 3 or the subsequent List 4 within that time.

4. Section 307 of the Trade Act (19 U.S.C. § 2417) does not permit USTR to expand the imposition of tariffs to other imports from China for reasons disconnected from the unfair intellectual property policies and practices it originally investigated under Section 301 of the Trade Act. Yet that is exactly what Defendants did here. Defendants promulgated the List 3 and List 4 duties in response to China’s retaliatory duties and other unrelated issues separate from USTR’s original investigation. Defendants’ promulgation of List 3, and later List 4, was not a valid modification of its initial action because it was not based on the acts, policies, or practices covered by USTR’s original investigation.

5. The arbitrary manner in which Defendants implemented the List 3 and List 4 tariff actions also violate the Administrative Procedure Act (“APA”). USTR (1) failed to provide sufficient opportunity for comment; (2) failed to consider relevant factors when making its decision, e.g., undertaking no analysis of the supposed “increased burden” imposed on U.S. commerce from the unfair policies and practices that it originally investigated; and (3) failed to connect the record facts to the choices it made. Indeed, despite receiving over 9,000 comments from the public, USTR said absolutely nothing about how those comments shaped its final promulgation of List 3 and List 4.

6. The Court should set aside Defendants' actions as *ultra vires* and otherwise contrary to law, as well as order Defendants to refund (with interest) any duties paid by Plaintiff pursuant to List 3 and List 4.

### **JURISDICTION**

7. The Court possesses subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1581(i)(1)(B), which confers "exclusive jurisdiction" to the Court over "any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." 28 U.S.C. § 1581(i)(1)(B).

### **PARTIES**

8. Plaintiff Lotus Foods, Inc. is a privately-owned company based in California that imports and sells rice, rice-based noodles, and soups. Lotus Foods has made numerous entries of rice, rice-based noodles, and paper packaging materials (e.g., cartons, boxes, and cups) classified under HTSUS subheadings 1006.30.9015, 1006.30.9065, 1902.19.2090, 1902.19.4000, 4819.20.0040, and 4823.69.0020, respectively, which are subject to the additional *ad valorem* duties under List 3. Lotus Foods also made numerous entries of soups and broths classified under HTSUS subheadings 2104.10.0020, which are subject to the additional *ad valorem* duties under List 4.

9. Defendant United States of America is the Federal Government of the United States of America. Defendant United States of America received the disputed tariffs and is the statutory defendant under the APA, 5 U.S.C. § 702, and 28 U.S.C. § 1581(i)(1)(B).

10. The Office of the USTR is an executive agency of the United States charged with investigating a foreign country's trade practices under Section 301 of the Trade Act and

implementing “appropriate” responses, subject to the direction of the President. USTR conducted the Section 301 investigation at issue and made numerous decisions regarding List 3 and List 4.

11. Ambassador Robert Lighthizer currently holds the position of USTR and serves as the director of the Office of the USTR. In these capacities, he made numerous decisions regarding List 3 and List 4.

12. Defendant U.S. Customs and Border Protection (“CBP”) is the executive agency of the U.S. Government responsible for collecting duties on imports. CBP collected payments made by Plaintiff to account for the tariffs imposed by USTR under List 3 and List 4.

13. Defendant Mark A. Morgan is the Acting Commissioner of the CBP and is sued in his official capacity only. He oversees CBP’s collection of duties paid by Plaintiff under List 3 and List 4.

### **STANDING**

14. Plaintiff Lotus Foods has standing to sue because it is “adversely affected or aggrieved by agency action within the meaning of” the APA. 5 U.S.C. § 702; *see* 28 U.S.C. § 2631(i) (“Any civil action of which the Court of International Trade has jurisdiction . . . may be commenced in the court by any person adversely affected or aggrieved by agency action within the meaning of Section 702 of title 5.”). Tariffs imposed by Defendants pursuant to List 3 and List 4 adversely affected and aggrieved Plaintiff Lotus Foods because it was required to pay these unlawful duties.

### **TIMELINESS OF THIS ACTION**

15. A plaintiff must commence an action under 28 U.S.C. § 1581(i)(1)(B) “within two years after the cause of action first accrues.” 28 U.S.C. § 2636(i).

16. Plaintiff's claims accrued at the earliest on September 21, 2018, when USTR published notice of List 3 in the Federal Register. *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 (Sept. 21, 2018). Plaintiff Lotus Foods has therefore timely filed this action.

### **RELEVANT LAW**

17. Section 301 of the Trade Act authorizes USTR to investigate a foreign country's trade practices. 19 U.S.C. § 2411(b). If the investigation reveals an "unreasonable or discriminatory" practice and "burdens or restricts United States commerce," USTR may take "appropriate" action, such as imposing tariffs on imports from the country that administered the unfair practice. *Id.* § 2411(b)(1), (c)(1)(B).

18. Section 304 of the Trade Act requires USTR to determine what action to take, if any, within 12 months after the initiation of the underlying investigation. *Id.* § 2414(a)(1)(B), (2)(B).

19. Section 307 of the Trade Act, in relevant part, allows USTR to "modify or terminate" an action taken pursuant to Section 301 of the Trade Act either when the "burden or restriction on United States commerce" imposed by the investigated foreign country's practice has "increased or decreased" or when the action "is no longer appropriate." *Id.* § 2417(a)(1)(B), (C). Section 307 further requires USTR to "consult with . . . representatives of the domestic industry concerned, and . . . provide opportunity for the presentation of views by other interested persons affected by the proposed modification or termination concerning the effects of the modification or termination and whether any modification or termination of the action is appropriate." *Id.* § 2417(a)(2).

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.