

UNITED STATES COURT OF INTERNATIONAL TRADE

A LA CARTE SPECIALTY FOOD LLC.

Plaintiff,

v.

Court No. 20-00984

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.

COMPLAINT

Plaintiff A La Carte Specialty Food LLC (“A La Carte”), by and through its attorneys, allege and state as follows:

1. This action concerns Defendants’ imposition of unlawful tariffs. The United States has initiated a trade war with the People’s Republic of China that impacts over \$500 billion worth of Chinese imports, with U.S. companies bearing the immediate cost of the tariffs imposed on these targeted Chinese goods. This Complaint focuses on Defendants’ unlawful escalation of that trade war through the imposition of a third round of tariffs on products covered by so-called “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).

2. The Office of the United States Trade Representative (“USTR”) conducted an investigation into China’s unfair intellectual property (“IP”) policies and practices pursuant to Section 301 of the Trade Act (19 U.S.C. § 2411). 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 took action to impose tariffs on imported Chinese goods identified in List 1 and List 2 within 12 months after the initiation of its Section 301 investigation and was based on the findings made in that investigation.

3. USTR, however, failed to issue List 3 (or subsequent List 4) within that 12-month window. Moreover, the basis for imposing tariffs on the List 3 and List 4 goods was not articulated in any way in the findings made pursuant to USTR's investigation. USTR has no legal basis to rely on its "modification" authority under Section 307 of the Trade Act (19 U.S.C. § 2417) to try to justify the imposition of tariffs on the List 3 and List 4 goods. The plain language of Section 307 of the Trade Act does not permit USTR to arbitrarily expand the imposition of tariffs to other Chinese imports that are wholly unrelated to the allegations of unfair intellectual property policies and practices that USTR originally investigated and made findings under Section 301 of the Trade Act. The Trade Act permits USTR only to delay, taper, or terminate the actions it has already taken, but does not authorize USTR to arbitrarily expand its actions without making further investigation and findings to support any additional actions taken.

4. The Defendants actions to impose tariffs the List 3 goods also violated the Administrative Procedure Act ("APA"). USTR (1) failed to provide sufficient opportunity for comment, e.g., unrealistically requiring interested parties to submit both affirmative *and* rebuttal comments *on the same day*; (2) failed to address relevant factors when making its decision, e.g., providing no analysis of how much "increased burden" would be imposed on U.S. commerce from China's retaliatory tariffs, as distinguished from China's unfair IP policies and practices that it originally investigated and made findings on; and (3) failed to articulate how the record facts supported the actions taken, e.g., despite receiving over 6,000 comments, many of which were

very opposed to the imposition of tariffs, USTR completely disregarded those comments and did not indicate to what extent, if any, those comments were considered by USTR in determining which products should be included on the List 3 tariff list. USTR's decision-making was arbitrary and pre-ordained, and was in violation of the legal standards set forth under the APA.

5. We request that the Court set aside Defendants' actions to impose tariffs on the List 3 (and List 4a) goods as *ultra vires* and otherwise contrary to law, and to order Defendants to refund (with interest) any tariffs paid by Plaintiffs pursuant to List 3 (and List 4a).

### **JURISDICTION**

6. 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**

7. Plaintiff A La Carte is a U.S. importer and distributor of seafood products, including frozen breaded oysters from China. A La Carte has made numerous entries of frozen breaded oysters that are classified under HTSUS subheading 1605.51.5000 and are subject to the additional *ad valorem* duties under List 3.

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

9. 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.

10. Ambassador Robert E. Lighthizer currently holds the position of USTR and serves as the director of the Office of the USTR. In this capacity, he made numerous decisions regarding List 3.

11. Defendant U.S. Customs & Border Protection (“CBP”) is the agency that collects duties on imports. CBP collected payments made by Plaintiffs to account for the tariffs imposed by USTR under List 3.

12. Defendant Mark A. Morgan is the Acting Commissioner of CBP. In this capacity, he oversees CBP’s collection of duties paid by Plaintiff under List 3.

### **STANDING**

13. A La Carte has standing to sue because it has been “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 4A) adversely affected and aggrieved A La Carte because it was required to pay these unlawful duties.

### **TIMELINESS OF THE ACTION**

14. 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).

15. This action contests the actions taken by Defendants that resulted in the imposition of tariffs on 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). Plaintiff's claims accrued at the earliest on September 21, 2018, when USTR published notice of List 3 in the *Federal Register*. *Id.* Plaintiff thus has timely filed this action.

### **RELEVANT LAW**

16. 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, USTR may take "appropriate" action, such as imposing tariffs on imports from the country that administered the unfair practice. *Id.* § 2411(b), (c)(1)(B).

17. 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).

18. Section 307 of the Trade Act (in pertinent 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).

### **PROCEDURAL HISTORY**

#### **I. USTR's Investigation**

19. The current U.S.-China trade was originally based on a narrow premise. On August 14, 2017, President Trump directed Ambassador Lighthizer to consider initiating a targeted investigation pursuant to Section 301(b) of the Trade Act concerning China's laws, policies, practices, and actions related to intellectual property, innovation, and technology. *Addressing China's Laws, Policies, Practices, and Actions Related to Intellectual Property, Innovation, and Technology*, 82 Fed. Reg. 39,007 (Aug. 17, 2017). According to the President, certain Chinese "laws, policies, practices, and actions" on intellectual property, innovation, and technology "may

# 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.