

UNITED STATES COURT OF INTERNATIONAL TRADE

RD FOODS AMERICAS, INC.

Plaintiff,

v.

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

Defendants.

COURT NO. 20-03292

COMPLAINT

Plaintiff RD Foods Americas, Inc. (“RDFA”), by and through its attorneys The Obert Law Firm, P.L.L.C., allege and state as follows:

1. This action challenges Defendants’ unlawful imposition of a third round of additional tariffs on certain imported products originating in The People’s Republic of China (“China”) pursuant to Section 301 of the Trade Act (19 U.S.C. §2411) (“Section 301”) and covered by Defendant Office of the United States Trade Representative’s (“USTR”) *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) (“List 3”).

2. Plaintiff RDFA alleges that Defendants’ implementation of the List 3 tariff action and unlawful imposition and collection of additional tariffs on products covered by List 3 violates Section 301, as Defendant USTR failed to issue its List 3 within the statutorily defined

12-month time period required by Section 304 of the Trade Act (19 U.S.C. §2414) (“Section 304”).

3. Plaintiff RDFA alleges that Defendants’ implementation of the List 3 (and subsequent List 4) tariff action and unlawful imposition and collection of additional tariffs on products covered by List 3 violates Section 307 of the Trade Act (19 U.S.C. §2417) (“Section 307”), as Section 307 does not provide Defendant USTR with authority to expand the imposition and assessment of tariffs to additional imports from China as a response to China’s retaliatory duties and other unrelated issues that are unconnected to those initially investigated by Defendant USTR under Section 301.

4. Plaintiff RDFA further alleges that Defendants’ implementation of the List 3 tariff actions and unlawful imposition and collection of additional tariffs on products covered by List 3 violates the Administrative Procedure Act (“APA”), in so much as that Defendant USTR did not: (1) provide sufficient opportunity for comment; (2) consider relevant factors when making its decision; and (3) establish a nexus between the record facts and its decisions.

5. The Court should therefore set aside Defendants’ actions as otherwise contrary to law and order Defendants to refund (with interest) any tariffs paid by Plaintiff RDFA pursuant to List 3.

JURISDICTION

6. The Court retains “exclusive” subject matter jurisdiction over this action pursuant to 28 U.S.C. §1581(i)(1)(B), which provides for “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 RDFA is a privately owned importer and wholesale distributor of canned foods. Plaintiff RDFA has made numerous entries of such products classified under headings 1604.14.30, 1604.19.10, 1604.19.25, 2005.20, 2005.99.41, 2008.30.42, 2008.4000, and 2008.70.2000 of the Harmonized Tariff Schedule of the United States (“HTSUS”), which are subject to the additional *ad valorem* tariffs under List 3.

8. Defendant United States of America (“United States” or “U.S.”) received Plaintiff RDFA’s payments of the disputed tariffs and is the statutory defendant under 5 U.S.C. §702 and 28 U.S.C. §1581(i)(1)(B).

9. Defendant USTR, an executive agency of the United States, is responsible for the investigation of foreign country trade practices under Section 301 and the implementation of necessary and appropriate responses thereto, subject to the direction of the President of the United States. Defendant USTR conducted the Section 301 investigation at issue in this action and made numerous decisions regarding List 3.

10. Ambassador Robert E. Lighthizer (“Lighthizer”) is both the current United States Trade Representative and director of Defendant USTR. In fulfilling both roles, Ambassador Lighthizer made numerous decisions regarding List 3.

11. Defendant U.S. Customs and Border Protection (“CBP”) is the agency of the United States tasked with the collection of duties and tariffs on imports. Defendant CBP

collected the payments made by Plaintiff RDFAs with respect to the List 3 tariffs imposed by Defendant USTR, which are at issue herein.

12. Defendant Mark A. Morgan (“Morgan”) is the Acting Commissioner of Defendant CBP. As Acting Commissioner of Defendant CBP, Defendant Morgan is responsible for the administration of Defendant CBP’s collection of tariffs paid by Plaintiff RDFAs under List 3.

STANDING

13. Plaintiff RDFAs has standing to commence this action because it was required to pay at time of importation of its goods into the United States the unlawful Section 301 tariffs imposed pursuant to List 3. As such, Plaintiff RDFAs is “adversely affected or aggrieved by agency action within the meaning of” the APA, which states in pertinent part “[a]ny 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.” 5 U.S.C. §702; *see* 28 U.S.C. §2631(i) .

TIMELINESS OF THE ACTION

14. Pursuant to 28 U.S.C. §1581(i)(1)(B), a plaintiff must commence an action “within two years after the cause of action first accrues.” 28 U.S.C. §2636(i).

15. The subject action contests actions taken by Defendants that resulted in List 3. Plaintiff RDFAs’s claims relating to List 3 accrued, at the earliest on September 21, 2018, when USTR published its notice of List 3 in the *Federal Register* notice entitled *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).

16. The instant action was filed within two years of the date Defendant USTR's September 21, 2018 *Federal Register* notice covering List 3.

RELEVANT LAW

17. Section 301 explicitly authorizes Defendant USTR to investigate a foreign country's trade practices. 19 U.S.C. §2411(b).

18. If Defendant USTR's investigation uncovers an "unreasonable or discriminatory" practice, Defendant USTR may take "appropriate" action, including the imposition of tariffs on imports from the country administering the unfair practice. *Id.* §2411(b), (c)(1)(B).

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

20. Pursuant to Section 307, Defendant USTR may only "modify or terminate" an action taken pursuant to Section 301 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).

RELEVANT FACTS

21. On August 14, 2017, the President of the United States directed Defendant Lighthizer to consider initiating a targeted investigation pursuant to Section 301(b) concerning China's laws, policies, practices, and actions related to intellectual property, innovation, and

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