

UNITED STATES COURT OF INTERNATIONAL TRADE

APPLE INC.

Plaintiff,

v.

Court No. 21-00490

UNITED STATES OF AMERICA; OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE; KATHERINE C. TAI, U.S. TRADE REPRESENTATIVE; U.S. CUSTOMS & BORDER PROTECTION; TROY MILLER, ACTING COMMISSIONER FOR U.S. CUSTOMS AND BORDER PROTECTION,

Defendants.

COMPLAINT

Plaintiff Apple Inc. ("Apple"), by and through its attorneys, alleges and states as follows:

1. This action concerns Defendants' imposition of a third and fourth round of tariffs on products imported from the People's Republic of China and covered by so-called "List 3" and "List 4." 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); 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). It presents the same cause of action for the Plaintiff as was filed in HMTX Industries

*LLC, et al. v. United States*, Court No. 20-00177 (Complaint filed September 10, 2020; Amended Complaint filed September 21, 2020) and *In Re Section 301 Cases*, Court No. 21-cv-00052-3JP1.<sup>1</sup>

2. The Office of the United States Trade Representative (“USTR”) conducted an investigation into China’s unfair intellectual property policies and practices pursuant to Section 301 of the Trade Act of 1974 (“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 failed to issue List 3 or List 4 within that window.

3. USTR may not fall back on its “modification” authority under Section 307 of the Trade Act (19 U.S.C. § 2417) to salvage List 3 and List 4. Section 307 of the Trade Act does not permit USTR to expand the imposition of tariffs to other imports from China for reasons untethered to 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 when they promulgated the List 3 and List 4 duties in response to China’s retaliatory duties and other unrelated issues. And even if USTR deems the existing tariffs “no longer appropriate,” as it also did here, the Trade Act permits USTR only to delay, taper, or terminate—not ratchet up—the actions it has already taken.

4. The arbitrary manner in which Defendants implemented the List 3 and List 4 tariff actions also violates the Administrative Procedure Act (“APA”). USTR (1) failed to provide sufficient opportunity for comment, *e.g.*, requiring interested parties to submit affirmative *and* rebuttal comments *on the same day*; (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

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<sup>1</sup> Standard Procedure Order No. 21-01 in *In Re Section 301 Cases* contemplates that “similar actions may subsequently be filed in this court.” Pursuant to that Order, Plaintiff requests that the current case be added to the Schedule of Cases covered by *In Re Section 301 Cases*.

connect the record facts to the choices it made. Indeed, despite receiving over 6,000 comments on List 3, and almost 3,000 comments on List 4, USTR did not address how those comments shaped its final promulgation of List 3 and List 4. USTR's decision-making bears no resemblance to the standards that the APA demands.

5. 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**

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 Apple is a publicly-held company headquartered in Cupertino, California. Apple designs and markets consumer electronics and accessories. Apple has made numerous entries of articles, including batteries, personal computers, smartphone parts, smartwatches, memory modules, and accessories, classified under HTSUS subheadings that are subject to the additional *ad valorem* duties under List 3 (e.g., 4202.91.9090, 8473.30.1140, etc.) and List 4A (e.g., 8471.49.0000, 8517.62.0090, etc.).

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. 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.

10. Ambassador Robert Lighthizer formally held the position of U.S. Trade Representative and served as the director of the USTR. In these capacities, he made numerous decisions regarding List 3 and List 4. Defendant Ambassador Katherine C. Tai currently serves as USTR.

11. Defendant U.S. Customs & Border Protection ("CBP") is the agency that collects duties on imports. CBP collected payments made by Plaintiff to account for the tariffs imposed by USTR under List 3 and List 4.

12. Defendant Troy Miller is the Acting Commissioner for CBP. In this capacity, he oversees CBP's collection of duties paid by Plaintiff under List 3 and List 4. Prior to his role, Mark A. Morgan was the Acting Commissioner of CBP while List 3 and List 4 tariffs were being assessed against Plaintiff's imports.

#### **STANDING**

13. Plaintiff 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 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. The instant action contests action taken by Defendants that resulted in List 3 and List 4 and Plaintiff’s obligation to pay tariffs upon importing List 3 and List 4 items. *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); *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). Plaintiff’s claims accrued upon liquidation of its entries subject to List 3 and List 4 tariffs, at which time CBP determined those duties to be final, and thus Plaintiff has timely filed this action with respect to all such entries that were not already liquidated as of the date two years prior to this action being filed. Alternatively, Plaintiff’s claims accrued upon its deposit of List 3 and List 4 tariffs at the time of entry, and thus Plaintiff has timely filed this action with respect to all such entries filed within the previous two years of this action. Alternatively, Plaintiff’s claims accrued when USTR published its List 3 and List 4 notices in the *Federal Register*, and thus Plaintiff has timely filed this action with respect to all imports subject to List 4 tariffs for which USTR published its notice on August 20, 2019, within two years of this action being filed.

### **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

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