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Bumble Bee, PAFCO among seafood giants to sue over US-China trade war

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📷 The US Court of International Trade. Photograph by Ken Lund on Flickr.

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A lawsuit filed by a vinyl flooring company and its subsidiaries may now be one of the US seafood industry's best hopes for stopping the extra tariffs being imposed on their products imported from China and also recovering some of the more than \$559 million in duties already paid as part of the now 30-month-old trade war.

HMTX Industries, in Norwalk, Connecticut, and its affiliated companies were the first to file a complaint at the US Court of International Trade (CIT) in Sept. 2020 seeking to challenge the US Trade Representative's (USTR) authority to assess Section 301 duties against some \$500 billion worth of products from China as well as the procedural steps taken by USTR to implement those fees.

The lawsuit was quickly followed by similar complaints from more than 3,700 companies, including such large, recognized entities as the Ford Motor Co., Tesla, Target Corp., the Walgreen Co., and Home Depot.

Also on the list of plaintiffs, *Undercurrent News* has discovered: At least 20 seafood companies, including: the California-based tuna giant Bumble Bee Foods, a division of China's FCF; the California-based Pacific American Fish Company (PAFCO); Florida's Red Chamber Co.; Hawaii's Hilo Fish Company; the Seattle (Washington) Shrimp & Seafood Company; Sunnyvale Seafood, the California-based division of China shrimp giant Zhanjiang Guolian Aquatic Products; and Gulf Marine Products Co., a Louisiana company that reports to be the world's largest importer of crawfish.



The lawsuits mostly name the United States of America; the USTR agency; Robert Lighthizer, former head of the USTR; Customs and Border Protection (CBP); and Mark Morgan, former acting head of the CBP, as the defendants.

The many plaintiffs, late last month, responded to a CIT order and consolidated all of their suits behind the first one, filed by HMTX and its subsidiaries, which are represented by a group of attorneys in the Washington, D.C., offices of Akin Gump Strauss, Hauer & Feld.

Whatever the three-judge panel, based in New York City, decides with regard to the various arguments made by HMTX will be applied to the other cases.



The companies involved also have appointed a plaintiffs' council, including representatives from 15 other US law firms with clients involved in the case. The firms are some of the most identifiable in the country, including Hogan Lovells, Alston & Bird, Foley & Larder and Faegre Drinker Biddle & Reath.

But don't look for a fast resolution to this massive legal fight, Jessica Rifkin, a trade attorney in the Glen Burnie, Maryland, firm of Ben L. England & Associates, cautioned *Undercurrent* recently. The

CIT normally takes 12 to 18 months to handle a case, and this one has thousands of plaintiffs, she noted.

Should the CIT agreement with the arguments made by HMTX, the court would still need to make sure each additional plaintiff filed on a timely basis and otherwise qualifies to receive any damages they claim, she said.

Also, the whole matter could easily wind up in a federal appeals court, advised Rifkin, who is one of the attorneys representing Sunnyvale Seafood.

But, on a positive note, the CIT recently published its briefing schedule, setting a timetable through Nov. 2021 for the filing of motions and responses, which, Rifkin said, makes sure the case is advancing.

Other seafood companies that have filed complaints against the US government include: Dagim Tahorim Co., an importer of tilapia based in New York City; Seven Seas International, a Miami, Florida-based frozen seafood importer and exporter; Ocean Beauty Seafoods, a Seattle-based wholesaler owned by the Bristol Bay Economic Development Corp., an Alaska community development quota group; and United Seafood Enterprises, a New Jersey-based importer with offices in Hong Kong.

Trade war meter still running

To better understand the HMTX case and why it's important, go back to Aug. 2017.

That's when former president Donald Trump used his authority under sect. 301 of the Trade Act of 1974 to order an investigation by the USTR of China's practices with regard to intellectual property. USTR, in its report released in March 2018, determined that China's infractions were costing US companies as much as \$50 billion per year and ordered a 25% tariff on some 1,333 items intended to recoup the amount.

Later, in Aug. 2018, USTR published a second list of 279 items to be tariffed, accounting for a total annual trade value of about \$16bn.

Then, as the trade war escalated and China tariffed US products, the USTR in Sept. 2018 published tariff List 3, which included 6,000 items with a combined annual trade value of \$200bn, including numerous Alaskan whitefish sent to China for processing, tilapia, shrimp, red swimming crab, tuna and squid. And, in Aug. 2019, it published List 4, another big group of Chinese goods with a combined annual trade value of \$300bn.

As of Sept. 2020, according to the Tax Foundation, US tariffs on Chinese goods totaled more than \$70bn, but the meter continues to run.

Undercurrent has kept a running tally of the tariffs the US has charged seafood imported from China. By the end of January 2021, more than \$559m has been paid. Simultaneously, the amount of seafood imported from China has declined precipitously, from 594,225 metric tons worth \$2.9bn in 2018 to 406,460t worth \$1.6bn in 2020.

Of course, that doesn't count China's retaliatory tariffs on US exported seafood or the loss of sales there.

Companies had a short period of time to request exemptions from the US tariffs, and many of the exemptions that were granted later expired without being renewed by the USTR.

One other possible measure that could be attempted to stop the painful tariffs on Chinese goods and even recover earlier paid tariffs, Rifkin advised, is to appeal to the new president Joe Biden administration to again invite exemption requests. There were a lot of complaints by companies that the previous exemption decision process was opaque and difficult to follow.

 Trade attorney Jessica Rifkin.

Lawsuits are like lottery tickets

The arguments upon which *HMTX vs. USA* and the related lawsuits are based challenge the Trump administration's authority to go beyond the initial \$50 billion initially sought in the first round of tariffs. They say USTR failed to impose tariffs within the required 12 months of a Sect. 301 investigation being started and argue also that administrative procedures were not followed.


"The Trade Act of 1974 did not confer authority on defendants to litigate a vast trade war for however long, and by whatever means, they choose," reads the 23-page complaint filed on Sept. 18 by Michael Jackson, an attorney with the Laguna Beach, California-based firm of Meeks, Sheppard, Leo and Pillsbury, on behalf of the Seattle Shrimp & Seafood Company.

In his 24-page complaint, written on behalf of Gulf Marine Products, trade attorney Adams C. Lee with the Seattle-based law firm Harris Bricken Sliwoski, criticized the Trump administration for not seeming to hear any of the witnesses or read any of the testimony presented by companies arguing against the List 3 tariffs. The administration gave companies less than a month to provide initial and rebuttal comments and limited each participant in a hearing to five minutes each.

"Despite those unrealistic deadlines and time restrictions, approximately 350 witnesses appeared at the six-day hearing, and the public submitted over 6,000 comments," Lee recounted, and USTR didn't respond to any of them.

"President Trump waited a mere 11 days to announce that he had directed USTR to 'proceed with placing additional tariffs on roughly \$200 billion of imports from China,'" he wrote.

The lawsuits filed on behalf of Gulf Marine and Seattle Shrimp & Seafood, like others, seek to ultimately eliminate List 3 and List 4 tariffs and provide for refunds as well as interest, costs and attorneys' fees. It remains to be seen

 Trade attorney Adams C. Lee.

whether the refunds would be applicable to all importers, or only those who filed complaints.

As Lee put it, the legal fees required to participate in the action are like a relatively inexpensive lottery ticket that may or may not pay off. But the payoff could be big.


It's not too late for some companies to join the lawsuit, several law firms seeking to solicit clients maintain on their websites. Because USTR published List 4 in the *Federal Register* on Aug. 20, 2019, the two-year statute of limitations for filing a List 4 lawsuit doesn't expire until Aug. 20, 2021, for example.

However, two years was up on the seafood items contained in List 3 back in Sept. 2020, Lee confirmed for *Undercurrent*.

'America will stand up to unfair trade practices...'

As the newly elected president celebrated his 100th day in office on Thursday, there was yet little evidence that he might change his tack in his dealings with China on trade. In his first speech to Congress on Wednesday, Biden continued to talk tough about China.

"In my discussions with President Xi Jinping, I told them we welcome the competition, we are not looking for conflict, but I made absolutely clear that we will defend America's interests across the board," he said. "America will stand up to unfair trade practices that undercut American workers in industries like subsidies from state-to-state owned operations and enterprises."

 A screenshot from Joe Biden's first speech to Congress on April 28, 2021.

Bob DeHaan, the National Fisheries Institute's vice president for government affairs, reportedly told viewers of a NFI webinar this month that Katherine Tai, who was recently sworn-in as the new leader of the USTR, also has expressed no intention of changing course.

"She's not in any hurry to move on liberalizing agreements or take off the tariffs," DeHaan said, adding: "They don't have a mandate to do something really big."

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