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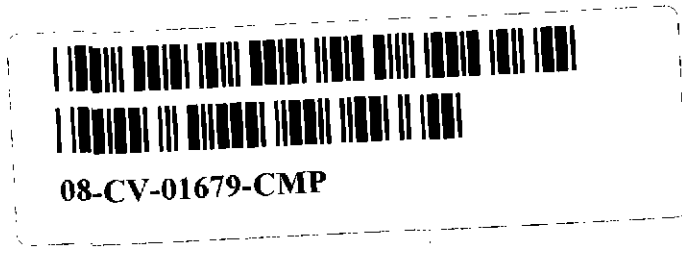
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SAMUEL R. WATKINS,

Plaintiff,

v.

THE UNITED STATES BUREAU OF
CUSTOMS AND BORDER PROTECTION,

Defendant.

No. **C08-1679** JUR

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

I. INTRODUCTION

1. This is an action brought under the Freedom of Information Act ("FOIA," or the "Act"), 5 U.S.C. § 552, as amended, to enjoin the United States Bureau of Customs and Border Protection (the "CBP") from: (a) improperly withholding agency records entirely; (b) failing to respond at all to lawful requests for agency records; (c) producing improperly redacted agency records; and (d) demanding excessive fees expressly not authorized by the CBP's own regulations as a precondition to processing requests for agency records.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF --- 1

DWT 11596410v1 0000099-072218

ORIGINAL

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II. JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552 (a)(4)(B), which vests jurisdiction over litigation arising under the Act in the District Courts of the United States. This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 in that the Complaint states a federal question.

3. Venue is proper in this district pursuant to Section 552 (a)(4)(B), as this is the judicial district in which Plaintiff Samuel R. Watkins (“Mr. Watkins”) resides.

III. THE PARTIES

4. Mr. Watkins is an individual who resides in Fall City, Washington and has his principal place of business in Seattle, Washington. Mr. Watkins has a personal and professional interest in the activities of the CBP pertaining to the detection and interdiction of counterfeit merchandise entering the United States through Ports of Entry that are under the control and direction of CBP Port Directors. As an attorney, Mr. Watkins intends to use the records sought by this Complaint to seek out and counsel trademark owners injured by the importation of counterfeit goods concerning their legal rights and remedies. In this regard, Mr. Watkins is a commercial requestor for purposes of the Act.

5. The CBP is an agency of the United States charged with responsibility for protecting the nation from threats to public health, safety, and the economy by preventing contraband goods, including counterfeit merchandise, from entering the

1 country. As is relevant to this Complaint, the Directors of the Ports of Seattle,
2 Boston, New York/Newark, Los Angeles/Long Beach, El Paso, Miami, and San
3 Francisco are employees of the CBP with responsibility for the day-to-day
4 operations of their respective Ports of Entry, including, but not limited to, the
5 creation and maintenance of the agency records to which Mr. Watkins seeks access.

6 IV. THE REQUESTED CBP AGENCY RECORDS

7 6. Section 133.21 of Title 19, Code of Federal Regulations (“C.F.R.”), is
8 a regulation duly promulgated by the CBP that is titled “Articles bearing counterfeit
9 trademarks.”

10 7. Section 133.21(b) of Title 19, C.F.R., subtitled “Seizure,” provides
11 that, “[a]ny article of domestic or foreign manufacture imported into the United
12 States bearing a counterfeit trademark shall be seized and, in the absence of the
13 written consent of the trademark owner, forfeited for violation of the customs laws.”

14 8. Section 133.21(c) of Title 19, C.F.R., subtitled “Notice to trademark
15 owner,” provides that, “[w]hen merchandise is seized under this section, [the CBP]
16 shall disclose to the owner of the trademark the following information, if available,
17 within 30 days, excluding weekends and holidays, of the date of the notice of
18 seizure: (1) The date of importation; (2) The port of entry; (3) A description of the
19 merchandise; (4) The quantity involved; (5) The name and address of the
20 manufacturer; (6) The country of origin of the merchandise; (7) The name and
21 address of the exporter; and (8) The name and address of the importer.”
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1 9. Section 133.21(d) of Title 19, C.F.R., subtitled “Samples available to
2 the trademark owner,” provides that, “[a]t any time following seizure of the
3 merchandise, Customs may provide a sample of the suspect merchandise to the
4 owner of the trademark for examination, testing, or other use in pursuit of a related
5 private civil remedy for trademark infringement.”

6 10. Each request for agency records made by Mr. Watkins, as set forth
7 more fully in the sections below, seeks only those notices to trademark owners that
8 have already been created and disclosed pursuant to 19 C.F.R. § 133.21(c) (the
9 “Notices of Seizure”) during specified periods of time, and by specified Ports of
10 Entry.

11 11. Each Notice of Seizure as requested by Mr. Watkins has already been
12 publicly disclosed by the CBP to the affected trademark owner. The very purpose
13 for publicly disclosing Notices of Seizure to affected trademark owners is to permit
14 those owners to obtain samples of the seized goods from the CBP, and to use those
15 samples in a civil lawsuit against the entities identified by the CBP in the Notices of
16 Seizure as being responsible for importing the infringing goods.

17 12. The owner of a trademark who receives a Notice of Seizure is the
18 entity most motivated and best situated to exploit the Notice of Seizure to the legal
19 and financial detriment of the exporter and importer of the counterfeit goods by
20 investigating and filing a civil lawsuit for trademark infringement against them. In
21 disclosing Notices of Seizure to affected trademark owners, the CBP has made the
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1 determination that any expected and resulting civil lawsuits, and the broad,
2 sweeping discovery they entail, targeting exporters, importers, and all manner of
3 third party witnesses alike, will not interfere with any law enforcement proceedings.

4 13. As the CBP must intend, or at least appreciate, Notices of Seizure
5 often are attached as exhibits to Complaints filed in federal district court by affected
6 trademark owners against the named importers of record. As part of the courts'
7 dockets, these Notices of Seizure are freely available to the public for inspection
8 and copying. Attached hereto as Exhibit A is one of many such Notices of Seizure
9 that Mr. Watkins has obtained from federal court dockets.
10

11 14. Given these prior public disclosures of the requested records, and the
12 public purposes for which such disclosures were intended and foreseeable, there
13 exists no legal basis for withholding these records from Mr. Watkins.

14 **V. THE CBP'S OFFICIAL POSITION – SET FORTH IN THE FEDERAL**
15 **REGISTER – IS THAT DISCLOSURE OF THE REQUESTED RECORDS IS**
16 **PERMITTED BY THE FOIA**

17 15. The Final Rule that first established the CBP's policy of issuing
18 Notices of Seizure to affected trademark owners is set forth in the Federal Register,
19 Volume 63, No. 48, at pages 11996 – 12000. A copy of this Final Rule is attached
20 hereto as Exhibit B. On page 11997, the CBP analyzed a comment it received
21 during the rulemaking process to the effect that the CBP "is bound not to disclose
22 such confidential information as the names and addresses of importers, exporters,
23 and manufacturers" under both FOIA and the Trade Secrets Act (18 U.S.C. §1905).

1 16. In response to this comment, the CBP declared, “Customs disagrees
2 with these interpretations of the cited Acts. Regarding the FOIA, its basic objective
3 is to *disclose official information, making available to the public federal agency*
4 *records (5 U.S.C. 552(a)), except to the extent that such records (or portions*
5 *thereof) are specifically exempt from disclosure (5 U.S.C. 552(b)).” (emphasis*
6 *added).*

7 17. Implicit in this response is the fact that the CBP, when it promulgated
8 its Notice of Seizure regulations, considered the information set forth in them to be,
9 *not* the confidential business information of submitters, but rather federal agency
10 records that are *not* exempt from disclosure under FOIA. This position is consistent
11 with other CBP regulations and public disclosures of the very same information in
12 other settings, as discussed in the following paragraphs.

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14 **VI. CONSISTENT WITH THE CBP’S OFFICIAL POSITION, THE**
15 **INFORMATION CONTAINED IN A NOTICE OF SEIZURE IS THE SAME**
16 **TYPE OF INFORMATION THAT IS ALREADY PUBLICLY DISCLOSED**
17 **BY THE CBP ON A ROUTINE BASIS**

18 18. A typical Notice of Seizure is little more than a one-to-two-paged
19 letter from the CBP addressed to the affected trademark owner, setting forth the
20 basic information required by 19 C.F.R. § 133.21(c).

21 19. Accordingly, a typical Notice of Seizure will contain, among other
22 things, the following information: (a) the name and address of the affected
23 trademark owner; (b) in some instances, the name of a contact person for the

1 affected trademark owner; (c) identification of, and the U.S. Patent and Trademark
2 Office (“USPTO”) registration number and corresponding CBP recordation number
3 for, the infringed trademark(s); (d) the date and port of entry of the seized shipment;
4 (e) a description of the merchandise (including the quantity seized); (f) the country
5 of origin of the goods; (g) the name and address of the exporter of the goods; and
6 (h) the name and address of the importer of the goods.

7
8 20. The CBP maintains what it calls the Intellectual Property Rights
9 e-Recordation (“IPRR”) online system. The CBP encourages the owners of
10 U.S.-registered trademarks to record their trademarks on the IPRR online system as
11 the first step in obtaining Intellectual Property Rights (“IPR”) protection from the
12 CBP. The CBP uses the information recorded by trademark owners on the IPRR
13 online system to actively monitor shipments and prevent the importation or
14 exportation of trademark infringing goods.

15 21. The IPRR online system currently contains in excess of 22,800
16 recordations (pertaining to both trademarks and copyrights) that are fully searchable
17 by the public on the CBP’s website located at iprs.cbp.gov. Attached hereto as
18 Exhibit C are a series of Internet screenshots of records maintained by the CBP on
19 its IPRR online system. As these screenshots show, the CBP makes freely available
20 to the public the following information regarding thousands of trademarks: the
21 name of the owner, the address, telephone number, and name of a contact person for
22 the trademark owner, the trademark’s USPTO registration number, the trademark’s
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1 CBP recordation number, a description of the goods subject to the trademark, and a
2 host of other information pertaining to the trademark.

3 22. When the CBP detects and seizes counterfeit goods that infringe a
4 trademark recorded on the IPRR online system, the CBP will send the affected
5 trademark owner a Notice of Seizure pursuant to 19 C.F.R. § 133.21(c).

6 23. That Notice of Seizure typically will include the following
7 information, as it appears in the IPRR online system: (a) the name and address of
8 the affected trademark owner; (b) the name of a contact person for the affected
9 trademark owner; (c) a description of the infringed trademark(s); and (d) the
10 USPTO registration number and corresponding CBP recordation number for the
11 trademark(s).
12

13 24. In addition to the IPRR online system, the CBP also maintains the
14 Automated Manifest System ("AMS"). The AMS is a computerized database
15 containing information regarding shipments of goods imported into the United
16 States on a daily basis. The AMS captures information regarding tens of thousands
17 of newly-imported shipments every day of the year.

18 25. The information contained in the AMS includes, among other things:
19 (a) the name, address, and telephone number of the shipper, or exporter, of the
20 goods; (b) the name, address, and telephone number of the consignee, or importer,
21 of the goods; (c) a description of the goods; (d) the country of origin of the goods;
22 and (e) the port and date of entry of the goods.
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1 26. All other data fields required to be captured by and contained in the
2 AMS are set forth in the Tariff Act of 1930, at 19 U.S.C. § 1431(c). This same
3 section of the law requires the CBP to publicly disclose the information contained
4 in the AMS.

5 27. There exist several commercial enterprises that obtain directly from
6 the CBP the information maintained in the AMS and resell that information to the
7 general public. These enterprises include the Journal of Commerce, which operates
8 the PIERS database, Zepol Corporation, which operates the TradeIQ database, and
9 ImportGenius.com, which operates the Import Scan database. Attached hereto as
10 Exhibit D are sample reports from the PIERS, TradeIQ, and Import Scan databases
11 showing information about individual shipments imported into the United States.
12

13 28. The information maintained by the CBP in the AMS and produced by
14 the CBP to the Journal of Commerce, Zepol Corporation, and ImportGenius.com
15 reflects the very same types of information found in a Notice of Seizure with
16 respect to the particular shipment seized by the CBP, *i.e.*, the date and port of entry
17 of the seized shipment, a description of the merchandise (including the quantity
18 seized), the country of origin of the goods, the name and address of the exporter of
19 the goods, and the name and address of the importer of the goods.
20

21 29. The operators of the PIERS, TradeIQ, and ImportGenius databases
22 explicitly advertise their services as means by which the public, including
23 businesses, can determine who is importing what goods into the United States, from

1 whom, from where, when and in what quantities.

2 30. The operators of the PIERS, TradeIQ, and ImportGenius databases
3 purchase AMS information directly from the CBP pursuant to 19 C.F.R. § 103.31(a)
4 (“Disclosure to members of the press”) and/or (c) (“Disclosure to the public”).
5 Pursuant to 19 C.F.R. § 103.31(e), Mr. Watkins could himself purchase AMS
6 information directly from the CBP for a cost of \$100.00 per day (contained on a
7 CD-ROM).

8 31. Under 19 C.F.R. § 103.31(e)(3), such a CD-ROM would be required
9 to contain, among others things, the following data elements from the AMS: foreign
10 port of lading, shipper name, shipper address, consignee name, consignee address,
11 and description of goods. In other words, the information that appears in the body
12 of a Notice of Seizure.

13 32. Significantly, 19 C.F.R. § 103.31(d) permits an importer, or
14 consignee, to request confidentiality for its name and address, as well as for the
15 name and address of the shipper, as submitted to the CBP for inclusion in the AMS.
16 Under this regulation, the CBP explicitly claims that, in order to obtain such
17 confidentiality, “[t]here is *no requirement* to provide sufficient facts to support the
18 conclusion that the disclosure of the names and addresses would likely cause
19 substantial harm to the competitive position of the importer or consignee.”
20 (emphasis added). In short, requests for confidentiality are freely and liberally
21 granted.
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1 33. Importers who truly are concerned about the confidentiality of their
2 names, addresses, and the quantity and frequency of the goods they import can
3 freely obtain grants of confidentiality from the CBP. Those who do not seek
4 confidentiality have, in effect, consented to the disclosure of that information.

5 34. In addition to information that already has been publicly disclosed as
6 part of the IPRR online system and the AMS, a Notice of Seizure also reflects the
7 fact that goods bearing a counterfeit version of a particular registered trademark
8 were seized by the CBP. This fact of seizure is not information provided to the
9 CBP by any other party, including the trademark owner, the exporter, or the
10 importer. It is information developed by the CBP in the performance of its
11 prescribed duties. By definition, this piece of information, central to a Notice of
12 Seizure, cannot be withheld as confidential business information because it was
13 never submitted to the CBP by anyone.

14 35. The CBP itself does not treat the fact of seizure as confidential
15 business information that it must withhold under the FOIA. The CBP freely makes
16 use of this agency-generated information when it issues its own press releases after
17 it seizes counterfeit goods. Attached hereto as Exhibit E are copies of such recent
18 press releases by the CBP. As these press releases show, the CBP routinely
19 discloses to the public the port and date of entry of counterfeit goods, the
20 trademark(s) infringed, the owner of the infringed trademark(s), and the country of
21 origin.
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1 **VII. THE SPECIFIC REQUESTS AT ISSUE**

2 **A. Port of Seattle**

3 36. By letter dated July 31, 2007, Mr. Watkins requested the Director,
4 Port of Seattle to produce copies of all Notices of Seizure regarding counterfeit
5 merchandise seized by the CBP at the Port of Seattle during the period January 1,
6 2005 through July, 31, 2007.

7 37. By letter dated August 7, 2007, Robert J. Klee, Acting Area Port
8 Director, Seattle, acknowledged receipt of Mr. Watkins' July 31, 2007 request.

9 38. By letter dated August 28, 2007, Mr. Klee again acknowledged
10 receipt of Mr. Watkins' request and notified Mr. Watkins that an additional 10
11 working days would be needed to "collect the requested records from field facilities
12 or other establishments that are separate from this office."

13 39. By letter dated September 10, 2007, Mr. Klee asserted that Mr.
14 Watkins had agreed to narrow the scope of his request to the "past 6 to 8 months" to
15 include "only the type of cargo and name of the trademark holder." Even though
16 Mr. Watkins had orally agreed to narrow the time period of his request as recited by
17 Mr. Klee, Mr. Watkins never agreed, orally or in writing, to a limitation on the
18 categories of information included within his request.

19 40. In his September 10, 2007 letter, Mr. Klee granted in-part and denied
20 in-part the erroneously modified request. Mr. Klee did not produce any actual
21 Notices of Seizure to Mr. Watkins. Mr. Klee did, however, provide the name and
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1 address of a single trademark holder and a description of the counterfeit articles
2 seized. Mr. Klee maintained that all other records responsive to Mr. Watkins'
3 request as erroneously modified were exempt from disclosure under 5 U.S.C.
4 § 552(b)(7)(A) because they pertained to "open and ongoing enforcement
5 proceedings." Mr. Klee did not explain how public disclosure of the withheld
6 records to Mr. Watkins would interfere with any ongoing enforcement proceedings,
7 while the same disclosures to the affected trademark holders who could initiate
8 invasive civil lawsuits against the targets of any such proceedings would not.

9
10 41. Mr. Watkins thereafter, on September 27, 2007, filed an
11 administrative appeal of the denial of his request for records as set forth in Mr.
12 Klee's September 10, 2007 letter. This appeal (a copy of which is attached hereto
13 as Exhibit F) was delivered to the CBP's designated FOIA Appeals Office by the
14 United States Postal Service at 11:07 a.m. on October 1, 2007.

15 42. By letter dated October 11, 2007, the CBP's FOIA Appeals Office
16 acknowledged receipt of Mr. Watkins' administrative appeal.

17 43. By letter dated September 2, 2008, the CBP rendered a decision on
18 Mr. Watkins' administrative appeal. Twenty-one Notices of Seizure were
19 produced. Each of the Notices of Seizure, however, had been heavily redacted to
20 obscure all information required to be provided to trademark owners by 19 C.F.R.
21 § 133.21(c).

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23 44. The CBP based these redactions on 5 U.S.C. §§ 552(b)(2)

1 (“Exemption 2); 552(b)(4) (“Exemption 4); 552(b)(6) (“Exemption 6”); and
2 552(b)(7)(C) (“Exemption 7C”). Moreover, additional Notices of Seizure
3 responsive to Mr. Watkins’ request were withheld in their entireties pursuant to 5
4 U.S.C. § 552(7)(A) (“Exemption 7A”). The production of these records, as
5 redacted, and the non-production of other responsive records, constitutes a denial of
6 Mr. Watkins’ request. Accordingly, Mr. Watkins has exhausted his administrative
7 remedies with respect to this request.
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9 45. By letter dated October 5, 2007, Mr. Watkins made a second request
10 to the Director, Port of Seattle for all Notices of Seizure regarding counterfeit
11 merchandise seized by the CBP at the Port of Seattle during the period January 1,
12 2005 through December 31, 2006. As stated above, Mr. Watkins had earlier agreed
13 to exclude Notices of Seizure for this time period from his first request to the
14 Director, Port of Seattle. In light of Mr. Klee’s partial disclosure of information
15 from closed enforcement proceedings, Mr. Watkins made this second request in
16 anticipation of receiving additional information from Mr. Klee related to closed
17 cases from 2005 and 2006.

18 46. As of the date of this Complaint, November 18, 2008, Mr. Watkins
19 has yet to receive any response to his second request for records made to the
20 Director, Port of Seattle. Accordingly, Mr. Watkins has exhausted his
21 administrative remedies with respect to this second request because the CBP has
22 failed to comply with the time limit provisions of 5 U.S.C. § 552(a)(6)(A)(i).
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1 47. Pursuant to 5 U.S.C. § 552(a)(3), Mr. Watkins has a right of access to
2 the records sought by his first and second requests to the Director, Port of Seattle.
3 The CBP has no legal basis to withhold such records. The records, by definition,
4 have already been publicly disclosed to trademark owners, entities who were not
5 parties to the importation of the counterfeit goods, and thus the CBP has waived
6 reliance upon any of the exemptions to disclosure set forth in the Act.

7 48. Moreover, the CBP's reliance on Exemptions 4, 7A, and 7C is
8 unsupported by the facts, and cannot be reconciled with the very purposes of 19
9 C.F.R. § 133.21, which is designed to enable affected trademark owners to
10 immediately file and prosecute civil lawsuits against the very targets of, and take
11 discovery of all third parties implicated by, any parallel CBP enforcement action.

12 49. By promulgating and abiding by 19 C.F.R. § 133.21, the CBP has
13 already determined that the disclosure of the minimal information contained in a
14 Notice of Seizure, and any resultant civil litigation by the affected trademark
15 owners against those identified as responsible for the counterfeit goods, cannot
16 possibly interfere with its ongoing enforcement actions against those same entities.

17 50. Moreover, a Notice of Seizure cannot possibly contain "confidential
18 business information" of the importer or the exporter which can be withheld under
19 the FOIA because the CBP has already disclosed it to the affected trademark owner,
20 the entity most motivated and best situated to use that information to intentionally
21 and purposefully harm the competitive positions of the importer and exporter.
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1 **B. Port of Boston**

2 51. By letter dated October 5, 2007, Mr. Watkins requested the Director,
3 Port of Boston to produce copies of all Notices of Seizure regarding counterfeit
4 merchandise seized by the CBP at the Port of Boston during the period January 1,
5 2005 through August 31, 2007.

6 52. By letter dated October 15, 2007, Ruthan La Bay Marston, FOIA
7 Processor, writing on behalf of Matthew E. Farrell, Acting Port Director,
8 acknowledged receipt of Mr. Watkins' October 5, 2007 request.

9 53. By letter dated October 23, 2007, Mr. Farrell informed Mr. Watkins
10 that a preliminary search for responsive records indicated that the costs of
11 processing Mr. Watkins' request would exceed \$500, and that full advance payment
12 of \$500 would be required before Mr. Watkins' request would be further processed.
13 Mr. Farrell expressly cited to 6 C.F.R. § 5.11, regulations that had been
14 promulgated by the Department of Homeland Security ("DHS"), as authority for
15 calculating and demanding the \$500 advance payment.
16

17 54. Mr. Farrell also informed Mr. Watkins that, even if his request were to
18 be processed further, a "preliminary review" of the records "indicates" that the CBP
19 likely would declare them exempt from disclosure under 5 U.S.C. § 552(b)(4)
20 ("Exemption 4"). According to Mr. Farrell, the CBP considered the Notices of
21 Seizure to be "confidential business information of the submitter," *i.e.*, the exporters
22 and importers of the counterfeit goods, the disclosure of which "is likely to cause
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1 substantial harm to the competitive position of the person from whom the
2 information was obtained,” again, the counterfeiters.

3 55. The practical effect of Mr. Farrell’s letter was to require Mr. Watkins
4 to pay \$500 before the CBP even would issue a formal denial of his request, thus
5 conditioning his right to appeal upon the knowing forfeiture of a substantial sum of
6 money.

7 56. By letter dated November 26, 2007, Mr. Watkins modified the scope
8 of his request to seek only those Notices of Seizure created during the period
9 January 1, 2007 through January 31, 2007 pertaining to counterfeit goods seized at
10 the Port of Boston. Mr. Watkins modified his request in this manner to avoid the
11 practical effects of Mr. Farrell’s letter of October 23, 2007.

12 57. By letter dated December 10, 2007, Mr. Farrell stated that a search of
13 the Port of Boston files for the period January 1, 2007 through January 31, 2007
14 revealed no records responsive to Mr. Watkins’ request. Mr. Farrell further stated
15 that he “took the liberty of expanding [Mr. Watkins’] request to include the month
16 of December 2006” and found five responsive Notices of Seizure.

17 58. Mr. Farrell produced those five Notices of Seizure to Mr. Watkins.
18 Each of the Notices of Seizure had been heavily redacted to obscure all information
19 required to be provided to trademark owners by 19 C.F.R. § 133.21(c). Mr. Farrell
20 justified the redactions on the basis of Exemption 4. The production of these
21 records, as redacted, constitutes a denial of Mr. Watkins’ request as voluntarily
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1 expanded by Mr. Farrell.

2 59. Mr. Watkins thereafter, on January 4, 2008, filed an administrative
3 appeal of the denial of his request for records as set forth in Mr. Farrell's December
4 10, 2007 letter. This appeal (a copy of which is attached hereto as Exhibit G) was
5 delivered to the CBP's designated FOIA Appeals Office by the United States Postal
6 Service at 9:18 a.m. on January 9, 2008.

7 60. As of the date of this Complaint, November 18, 2008, Mr. Watkins
8 has yet to receive a decision on his administrative appeal from the CBP.
9 Accordingly, Mr. Watkins has exhausted his administrative remedies with respect to
10 *this appeal because the CBP has failed to comply with the time limit provisions of 5*
11 *U.S.C. § 552(a)(6)(A)(ii).*

12 61. Pursuant to 5 U.S.C. § 552(a)(3), Mr. Watkins has a right of access to
13 the records sought by his request to the Director, Port of Boston, as voluntarily
14 expanded. The CBP has no legal basis to withhold such records. The records, by
15 definition, have already been publicly disclosed to trademark owners and thus the
16 CBP has waived reliance upon any of the exemptions to disclosure set forth in the
17 Act. In any event, the CBP's reliance on Exemption 4 is unsupported by the facts
18 and is improper. Among other things, those involved in the illegal importation of
19 counterfeit merchandise do not have a legitimate expectation of privacy or
20 confidentiality in illegal conduct nor do they have a cognizable "competitive
21 position" that the CBP should be protecting by withholding the records.
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1 62. Moreover, the CBP has already disclosed the requested records to the
2 importers' chief competitors, *i.e.*, the legal owners of the infringed trademarks. The
3 owners of the infringed trademarks are the entities most motivated and best situated
4 to cause harm to the counterfeiters' competitive positions by suing them in federal
5 court based on the information contained in the Notices of Seizure. The CBP has
6 failed to explain how public disclosure of the requested records to Mr. Watkins
7 would cause counterfeiters substantial harm that ought to be guarded against, yet
8 the same disclosures to the counterfeiters' most direct business competitors would
9 not.

10
11 **C. Port of Los Angeles/Long Beach**

12 63. By letter dated October 5, 2007, Mr. Watkins requested the Director,
13 Port of Los Angeles/Long Beach to produce copies of all Notices of Seizure
14 regarding counterfeit merchandise seized by the CBP at the Port of Los
15 Angeles/Long Beach during the period January 1, 2005 through August 31, 2007.

16 64. By letter dated October 31, 2007, Susan Ryland, FOIA Officer, acting
17 on behalf of the Director, Port of Los Angeles/Long Beach, stated that an initial
18 search indicated that there were 2,674 records potentially responsive to Mr.
19 Watkins' request. Ms. Ryland further stated that the CBP would require an advance
20 payment of \$29,725 before it would continue to process Mr. Watkins' request. Like
21 Mr. Farrell at the Port of Boston, Ms. Ryland expressly relied upon the DHS
22 regulations at 6 C.F.R. § 5.11 in calculating the amount of the advance payment
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1 demanded.

2 65. By letter dated November 26, 2007, Mr. Watkins modified the scope
3 of his request to seek only those Notices of Seizure created during the period
4 January 1, 2007 through January 31, 2007 pertaining to counterfeit goods seized at
5 the Port of Los Angeles/Long Beach. Mr. Watkins modified his request in this
6 manner to avoid having to pay \$29,725 before having his request processed.

7 66. By letter dated November 29, 2007, Ms. Ryland stated that 155
8 records were potentially responsive to Mr. Watkins' modified request. Ms. Ryland
9 further demanded advance payment of \$1,777.86 before further processing Mr.
10 Watkins' modified request. Again, Ms. Ryland expressly relied upon the DHS
11 regulations at 6 C.F.R. § 5.11, and not the CBP's own regulations at 19 C.F.R. Part
12 103, in calculating the amount of the advance payment demanded.

13 67. By letter dated December 7, 2007, Mr. Watkins responded to Ms.
14 Ryland's letter by paying the requested \$1,777.86 fee under protest, and setting
15 forth the reasons why the CBP regulations at 19 C.F.R. Part 103 should have been
16 followed in calculating the processing fee instead of the DHS regulations at 6
17 C.F.R. § 5.11. Mr. Watkins requested Ms. Ryland to re-compute the processing
18 fees using the regulations at 19 C.F.R. Part 103 and to remit any excess fees
19 collected.
20

21 68. The DHS regulations at 6 C.F.R. § 5.1(1)(2) provide in relevant part,
22 "Except to the extent a Department component has adopted separate guidance under
23

1 FOIA, the provisions of this subpart shall apply to each component of the
2 Department.” Even though the CBP is a Department component of the DHS, it has
3 “adopted separate guidance under FOIA.” The CBP’s FOIA regulations are found
4 at 19 C.F.R. Part 103 and the CBP is obligated to follow them.

5 69. The DHS regulations at 6 C.F.R. § 5.11 differ materially from the
6 CBP regulations at 19 C.F.R. Part 103. In particular, the DHS regulations permit
7 the collection of fees for time spent reviewing potentially responsive records for any
8 exempt material and for redacting the same. On the other hand, the CBP
9 regulations, at 19 C.F.R. § 103.10(a)(1) state unequivocally, “The fees prescribed in
10 this section are for search and duplication and under no circumstances is there a fee
11 for determining whether an exemption can or should be asserted, for deleting
12 exempt matter being withheld from records to be furnished, or for monitoring a
13 requester’s inspection of records made available in this manner.”

14 70. Moreover, pursuant to 19 C.F.R. § 103.10(g)(3), fees for time spent
15 by CBP personnel searching for documents are capped at \$10.00 per hour or
16 fraction thereof, and are not tied to the salary of the individual doing the searching
17 as is the case under the DHS regulations (which also set forth an effective minimum
18 fee rate of \$4.00 per quarter hour, or \$16.00 per hour).

19 71. By invoking the DHS fee regulations instead of its own fee
20 regulations, the CBP has improperly inflated the fees it demanded and collected
21 from Mr. Watkins as a precondition to processing his requests. By demanding
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23

1 improper and excessive processing fees, the CBP has, in effect, erected a severe
2 financial hurdle intended to impede and dissuade individuals, like Mr. Watkins,
3 from pursuing their requests to obtain agency records under the Act.

4 72. By letter dated December 17, 2007, Ms. Ryland acknowledged receipt
5 of Mr. Watkins' payment in the amount of \$1,777.86, which the CBP had deposited
6 four days earlier on December 13, 2007. Ms. Ryland denied, however, Mr.
7 Watkins' protest regarding the use of the DHS regulations for calculating the fee
8 charged.

9
10 73. Mr. Watkins thereafter, on January 4, 2008, filed an administrative
11 appeal of the denial of his protest of the CBP's use of the DHS fee regulations in
12 lieu of the CBP fee regulations. This appeal (a copy of which is attached hereto as
13 Exhibit H) was delivered to the CBP's designated FOIA Appeals Office by the
14 United States Postal Service at 9:12 a.m. on January 8, 2008.

15 74. On April 3, 2008, Mr. Watkins received a decision from the CBP
16 denying his administrative appeal regarding this appropriateness of the processing
17 fee charged by the CBP. Accordingly, Mr. Watkins has exhausted his
18 administrative remedies with respect to this issue.

19
20 75. On July 14, 2008, Mr. Watkins received 93 Notices of Seizure from
21 the Port of Los Angeles/Long Beach. Each of the records had been heavily
22 redacted to conceal all information regarding: (a) the name and address of the
23 affected trademark owner; (b) the name of a contact person for the affected

1 trademark owner; (c) identification of, and the USPTO registration number and
2 corresponding CBP recordation number for, the infringed trademark(s); (d) the date
3 and port of entry of the seized shipment; (e) a description of the merchandise
4 (including the quantity seized); (f) the country of origin of the goods; (g) the name
5 and address of the exporter of the goods; and (h) the name and address of the
6 importer of the goods.

7
8 76. On July 30, 2008, Mr. Watkins sent a letter to the Los Angeles-Long
9 Beach Seaport, asking it to explain the bases underlying the heavy redactions of the
10 93 Notices of Seizure it produced. On August 13, 2008, Susan Ryland, FOIA
11 Officer with the Los Angeles-Long Beach Seaport, responded by mischaracterizing
12 Mr. Watkins' request for an explanation as an impermissible request for
13 reconsideration, and on that basis refused to provide an explanation for the
14 redactions.

15 77. On August 8, 2008, Mr. Watkins filed an administrative appeal of the
16 CBP's redaction of the information contained in the 93 records produced by the
17 Port of Los Angeles/Long Beach. This appeal (a copy of which is attached hereto
18 as Exhibit I) was delivered to the CBP's designated FOIA Appeals Office by the
19 United States Postal Service at 11:38 a.m. on August 11, 2008, 2008.

20
21 78. As of the date of this Complaint, November 18, 2008, Mr. Watkins
22 has yet to receive a decision on his administrative appeal from the CBP.
23 Accordingly, Mr. Watkins has exhausted his administrative remedies with respect to

1 this appeal because the CBP has failed to comply with the time limit provisions of 5
2 U.S.C. § 552(a)(6)(A)(ii).

3 **D. Port of Newark/New York**

4 79. By letter dated October 5, 2007, Mr. Watkins requested the Director,
5 Port of Newark/New York to produce copies of all Notices of Seizure regarding
6 counterfeit merchandise seized by the CBP at the Port of Newark/New York during
7 the period January 1, 2005 through August 31, 2007.

8 80. By letter dated October 28, 2007, Edward P. Nagle, Director, Office
9 of Fines Penalties and Forfeitures for the Newark/New York Area, stated that an
10 initial search indicated that there were approximately 1,000 records potentially
11 responsive to Mr. Watkins' request. Mr. Nagle further stated that the CBP would
12 require an advance payment of \$15,000 before it would continue to process Mr.
13 Watkins' request. Like Mr. Farrell at the Port of Boston and Ms. Ryland at the Port
14 of Los Angeles/Long Beach, Mr. Nagle expressly cited to the DHS regulations at 6
15 C.F.R. § 5.11 as authority for calculating this \$15,000 processing fee.

16 81. By letter dated November 26, 2007, Mr. Watkins modified the scope
17 of his request to seek only those Notices of Seizure created during the period
18 January 1, 2007 through January 31, 2007 pertaining to counterfeit goods seized at
19 the Port of Newark/New York. Mr. Watkins modified his request in this manner to
20 avoid having to pay \$15,000 before having his request processed.

21 82. By letter dated December 14, 2007, Mr. Nagle stated that an initial
22
23

1 search indicated that there were 55 records potentially responsive to Mr. Watkins'
2 modified request. Mr. Nagle further demanded an advance payment of \$1,100
3 before further processing Mr. Watkins' modified request. Again, Mr. Nagle
4 expressly relied upon the DHS regulations at 6 C.F.R. § 5.11, and not the CBP's
5 own regulations at 19 C.F.R. Part 103, in calculating the amount of the advance
6 payment demanded.

7
8 83. By letter dated January 9, 2008, Mr. Watkins responded to Mr.
9 Nagle's letter by paying the requested \$1,100 fee under protest, and setting forth the
10 reasons why the CBP regulations at 19 C.F.R. Part 103 should have been followed
11 in establishing the processing fee instead of the DHS regulations at 6 C.F.R. § 5.11.
12 Mr. Watkins requested Mr. Nagle to re-compute the processing fees using the
13 regulations at 19 C.F.R. Part 103 and to remit any excess fees collected.

14 84. On May 13, 2008, Mr. Watkins received 62 Notices of Seizure from
15 the Port of Newark/New York. Each of the records had been heavily redacted to
16 conceal all information regarding: (a) the name and address of the affected
17 trademark owner; (b) the name of a contact person for the affected trademark
18 owner; (c) identification of, and the USPTO registration number and corresponding
19 CBP recordation number for, the infringed trademark(s); (d) the date and port of
20 entry of the seized shipment; (e) a description of the merchandise (including the
21 quantity seized); (f) the country of origin of the goods; (g) the name and address of
22 the exporter of the goods; and (h) the name and address of the importer of the
23

1 goods.

2 85. The correspondence accompanying these 62 records did not expressly
3 mention Mr. Watkins' protest of the CBP's reliance upon the DHS regulations to
4 compute the processing fee and not the CBP's own regulations at 19 C.F.R. Part
5 103. The fees as actually set forth in the correspondence make it clear, however,
6 that the CBP continued to rely on the inapplicable DHS regulations in charging Mr.
7 Watkins for the records produced.

8 86. On July 30, 2008, Mr. Watkins sent a letter to the Port of
9 Newark/New York, asking it to explain the bases underlying the heavy redactions
10 of the 62 Notices of Seizure it produced. On August 18, 2008, Edward Nagle,
11 FOIA Officer with the Port of Newark/New York, responded by mischaracterizing
12 Mr. Watkins' request for an explanation as an impermissible request for
13 reconsideration, and on that basis refused to provide an explanation for the
14 redactions.
15

16 87. On August 8, 2008, Mr. Watkins filed an administrative appeal of the
17 CBP's redaction of the information contained in the 62 records produced by the
18 Port of Newark/New York and the imposition of excessive fees under the
19 inapplicable DHS regulations. This appeal (a copy of which is attached hereto as
20 Exhibit J) was delivered to the CBP's designated FOIA Appeals Office by the
21 United States Postal Service at 11:38 a.m. on August 11, 2008.
22

23 88. As of the date of this Complaint, November 18, 2008, Mr. Watkins

1 has yet to receive a decision on his administrative appeal from the CBP.

2 Accordingly, Mr. Watkins has exhausted his administrative remedies with respect to
3 this appeal because the CBP has failed to comply with the time limit provisions of 5
4 U.S.C. § 552(a)(6)(A)(ii).

5 **E. Port of El Paso**

6 89. By letter dated October 5, 2007, Mr. Watkins requested the Director,
7 Port of El Paso to produce copies of all Notices of Seizure regarding counterfeit
8 merchandise seized by the CBP at the Port of El Paso during the period January 1,
9 2005 through August 31, 2007.

10 90. On February 4, 2008, Mr. Watkins received a letter from Reene S.
11 Spence, Mission Support Specialist/FOIA Officer, El Paso Field, stating that her
12 office had received Mr. Watkins' October 5, 2007 request on February 1, 2008.
13 The letter from Ms. Spence further stated that Mr. Watkins' request had been
14 forwarded to "the FOIA Division" of the CBP in Washington, D.C. for processing.
15

16 91. As of the date of this Complaint, November 18, 2008, Mr. Watkins has
17 received no other response to his October 5, 2007 request. Mr. Watkins has
18 exhausted his administrative remedies because the CBP has failed to comply with
19 the time limit provisions of 5 U.S.C. § 552(a)(6)(A)(i).

20 92. Pursuant to 5 U.S.C. § 552(a)(3), Mr. Watkins has a right of access to
21 the records requested, and the CBP has no legal basis for withholding the right of
22 access to them.
23

1 **F. Port of Miami**

2 93. By letter dated October 5, 2007, Mr. Watkins requested the Director,
3 Port of Miami to produce copies of all Notices of Seizure regarding counterfeit
4 merchandise seized by the CBP at the Port of Miami during the period January 1,
5 2005 through August 31, 2007.

6 94. As of the date of this Complaint, November 18, 2008, Mr. Watkins
7 has received no response to his October 5, 2007 request. Mr. Watkins has
8 exhausted his administrative remedies because the CBP has failed to comply with
9 the time limit provisions of 5 U.S.C. § 552(a)(6)(A)(i).

10 95. Pursuant to 5 U.S.C. § 552(a)(3), Mr. Watkins has a right of access to
11 the records requested, and the CBP has no legal basis for withholding the right of
12 access to them.

13
14 **G. Port of San Francisco**

15 96. By letter dated October 5, 2007, Mr. Watkins requested the Director,
16 Port of San Francisco to produce copies of all Notices of Seizure regarding
17 counterfeit merchandise seized by the CBP at the Port of San Francisco during the
18 period January 1, 2005 through August 31, 2007.

19 97. As of the date of this Complaint, November 18, 2008, Mr. Watkins
20 has received no response to his October 5, 2007 request. Mr. Watkins has
21 exhausted his administrative remedies because the CBP has failed to comply with
22 the time limit provisions of 5 U.S.C. § 552(a)(6)(A)(i).

1 98. Pursuant to 5 U.S.C. § 552(a)(3), Mr. Watkins has a right of access to
2 the records requested, and the CBP has no legal basis for withholding the right of
3 access to them.

4 **VIII. FIRST CLAIM FOR RELIEF**
5 **(IMPROPER WITHHOLDING OF RECORDS IN VIOLATION OF 5 U.S.C.**
6 **§§ 552(A)(3)(A) AND 552(A)(4)(B))**

7 99. Plaintiff repeats and incorporates by reference the allegations
8 contained in paragraphs 1-98.

9 100. CBP is an “agency” within the meaning of 5 U.S.C. § 552(f)(1).

10 101. Plaintiff properly requested disclosure of records within the custody
11 and control of CBP.

12 102. Plaintiff is entitled by law to access to the records under FOIA unless
13 the records fall within an exemption of the Act.

14 103. CBP has withheld the requested records, and has failed to justify its
15 withholding under any exemption to the Act or under another law.

16 104. Therefore, CBP has violated FOIA by refusing to release agency
17 records to the public as specifically requested by Plaintiff. 5 U.S.C. §§
18 552(a)(3)(A) and 552(a)(4)(B).

19 **IX. SECOND CLAIM FOR RELIEF**
20 **(FAILURE TO TIMELY RESPOND TO REQUESTS FOR RECORDS**
21 **WITHIN STATUTORY PERIODS ESTABLISHED BY 5 U.S.C. §**
22 **552(A)(6)(A).)**

23 105. Plaintiff repeats and incorporates by reference the allegations
contained in paragraphs 1-104.

1 106. CBP is an “agency” within the meaning of 5 U.S.C. § 552(f)(1).

2 107. Plaintiff properly requested disclosure of records within the custody
3 and control of CBP.

4 108. CBP failed to respond to many of Plaintiffs’ requests as required by
5 the Act.

6 109. Therefore, CBP violated the Act by failing to provide Plaintiff with an
7 initial determination whether it will comply with many of Plaintiff’s requests.
8

9 **X. THIRD CLAIM FOR RELIEF**
10 **(COLLECTION OF EXCESSIVE PROCESSING FEES NOT AUTHORIZED**
11 **BY CBP REGULATIONS PROMULGATED PURSUANT TO 5 U.S.C. §**
12 **552(a)(4)(A)(i))**

11 110. Plaintiff repeats and incorporates by reference the allegations
12 contained in paragraphs 1-109.

13 111. CBP is an “agency” within the meaning of 5 U.S.C. § 552(f)(1).

14 112. Pursuant to 5 U.S.C. § 552(a)(4)(A)(i), CBP promulgated regulations
15 at 19 C.F.R. Part 103 specifying the schedule of fees applicable to the processing of
16 requests under the Act.
17

18 113. The fee regulations at 19 C.F.R. Part 103 remain in full force and
19 effect and CBP is required to follow them.

20 114. CBP failed to follow its own regulations and in doing so assessed
21 excessive processing fees against Plaintiff.

22 **XI. PRAYER FOR RELIEF**

23 **WHEREFORE,** Plaintiff prays this Court:

- 1 1. To take jurisdiction of this cause;
- 2 2. To declare that CBP violated the Freedom of Information Act by
- 3 failing to respond to Plaintiff's FOIA requests within the time periods specified by
- 4 the Act;
- 5 3. To declare that CBP violated the Freedom of Information Act by
- 6 refusing to disclose identifiable records that are required to be disclosed on public
- 7 request, and that are not subject to withholding under any exemption to FOIA;
- 8 4. To order the CBP to promptly produce the records requested by Mr.
- 9 Watkins in full and un-redacted form.
- 10 5. To declare that Notices of Seizure that have already been disclosed to
- 11 trademark owners are not subject to withholding under any exemption contained in
- 12 the FOIA.
- 13 6. To declare that the CBP is obligated to follow its own regulations, and
- 14 not those of the DHS, in processing requests for records under the FOIA, including
- 15 but not limited to Notices of Seizure, now and in the future.
- 16 7. To order the CBP to calculate any processing fees due from Mr.
- 17 Watkins in response to his requests for records, including but not limited to Notices
- 18 of Seizure, now and in the future, according to the agency's own regulations at 19
- 19 C.F.R. Part 103.
- 20 8. To award Mr. Watkins his reasonable costs of litigation, including
- 21 attorneys' fees; and
- 22
- 23

1 9. To grant such other and further relief as the Court may deem just and
2 equitable.

3
4 DATED this 18th day of November, 2008.

5 Davis Wright Tremaine LLP
6 Attorneys for Samuel R. Watkins

7 By 

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