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April 8, 2019

The Honorable Wilbur Ross
Secretary of Commerce
Attention: Enforcement & Compliance, Room 18022
US Department of Commerce
14th Street and Constitution Avenue, NW
Washington, DC 20230

Case No. A-201-820
Total Pages: 17
2013 Suspension Agreement
OP/BAU

PUBLIC DOCUMENT

Attention: Ms. Sally Gannon, Mr. David Cordell, Ms. Jill Buckles

2013 Suspension Agreement on Fresh Tomatoes from Mexico

DEAR SECRETARY ROSS:

On behalf of Confederación de Asociaciones Agrícolas del Estado de Sinaloa, A.C., Consejo Agrícola de Baja California, A.C., Asociación Mexicana de Horticultura Protegida, A.C., Asociación de Productores de Hortalizas del Yaqui y Mayo and Sistema Producto Tomate (hereafter the **Mexican signatories**), enclosed please find the proposal of the Mexican signatories for changes to the 2013 Agreement Suspending the Antidumping Investigation on fresh tomatoes from Mexico and associated documents as presented to the Department in meetings on April 2 and April 4.

We have served a copy of this submission on the parties listed on the attached certificate of service.

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April 8, 2019

Please do not hesitate to contact the undersigned with any questions.

Respectfully submitted,

/s/ Robert S. LaRussa

Robert S. LaRussa

Counsel for Confederación de
Asociaciones Agrícolas del Estado de
Sinaloa, A.C., Consejo Agrícola de Baja
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de Horticultura Protegida, A.C.,
Asociación de Productores de
Hortalizas del Yaqui y Mayo and
Sistema Producto Tomate

U.S. Department of Commerce
Public Certificate of Service

I hereby certify that a copy of this submission is being served on April 8, 2019, via first class mail,
upon the following parties:

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/s/ Robert S. LaRussa
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REPRESENTATIVE CERTIFICATION

I, Robert S. LaRussa, with the law firm of Shearman & Sterling LLP, counsel for CAADES, CABC, AMHPAC, APHYM and SPT, certify that I have read the enclosed submission dated April 8, 2019, in connection with the 2013 Suspension Agreement on *Fresh Tomatoes from Mexico* (A-201-820). In my capacity as an adviser, counsel, preparer or reviewer of this submission, I certify that the information contained in this submission is accurate and complete to the best of my knowledge. I am aware that U.S. law (including, but not limited to, 18 U.S.C. 1001) imposes criminal sanctions on individuals who knowingly and willfully make material false statements to the U.S. Government. In addition, I am aware that, even if this submission may be withdrawn from the record of the AD/CVD proceeding, the Department may preserve this submission, including a business proprietary submission, for purposes of determining the accuracy of this certification. I certify that I am filing a copy of this signed certification with this submission to the U.S. Department of Commerce and that I will retain the original for a five-year period commencing with the filing of this document. The original will be available for inspection by U.S. Department of Commerce officials.

Signature: _____



Date: April 8, 2019

ATTACHMENT 1

Proposal of the Mexican Signatories to the US Commerce Department for Changes to the 2013 Suspension Agreement

April 2, 2019

The record of the 2013 Agreement reflects full compliance and a healthy US market. A recent report by the US Department of Agriculture finds that import prices for fresh tomatoes from Mexico are above the reference price, often significantly. Economist reports and testimony before the US International Trade Commission finds that Mexican pricing in the US market is having no impact on Florida growers and that Mexican tomatoes sell for a premium over all US producers. In this context, the Mexican signatories have developed proposals on both sides of the border focusing on enforcing the arrival condition of the first sale. This will serve to significantly strengthen the US market, especially at peak season when volumes and inventories are at their highest point and FTE faces the most pressure. Major components of this proposal include strategic price increases; restructuring adjustments under Appendix D; enhanced export management; and, enhanced enforcement by the Commerce Department and by USDA under PACA.

I. Strategic Price Increases

As the Department is aware, price increases serve only to bring more Mexican growers into the business and more volume in the US market. The following proposals are modifications of what has been proposed by FTE, which are designed to foster continued market stability:

- Eliminate the discount in the summer season. The current winter reference price for each of the four tomato categories (open field and adapted, controlled, specialty loose and specialty packed) will apply for the entire year.
- Increase the reference price for open field and adapted environment to from the summer price of 24 cents per pound and the winter price of 31 cents per pound to a year-round price of 33 cents per pound. This is an increase of more 34 percent for the summer season.
- A 30 percent premium will be added to USDA-certified specialty organic tomatoes. This will increase the price from 45 cents to 58.5 cents per pound for specialty loose, and from 59 cents to 77 cents per pound for specialty packed.

II. Restructuring Adjustments under Appendix D of the 2013 Agreement

As the Department is aware, US buyers have rights under PACA to (1) expect good arrival condition, (2) reject defective product and (3) adjust for changes in condition after shipment. Indeed, it is for this reason that the Department implemented Appendix D in 2002, which establishes procedures for making adjustments to the sales prices due to certain changes in condition after shipment and applies only if the adjustment reduces the net sales price below the reference price. These procedures set out a specific set of requirements that allow US buyers to preserve their rights in the context and constraints of the suspension agreement requirements.

Eliminating these rights, as FTE has requested, would amount to amending the definitions of "breach of warranty" and "liquidated damages" under PACA. To justify this action in the agreement, the Department would have to find that adjustments under Appendix D were substantially frustrating the purposes of the agreement and having a measurable impact on the market and on the US industry. Otherwise, the Department does not have the jurisdiction under the antidumping law to require the Mexican signatories to restrict the rights of US buyers. The

Department has made no such determination, nor is there any record or market evidence that would support such a determination. And without that jurisdiction, PACA cannot enforce it. The Mexican signatories cannot enter into a suspension agreement that compels them to restrict the rights of US buyers without legal authority. Accordingly, the Mexican signatories propose the following:

- Appendix D will be restructured but will retain existing provisions on the following:
 - o Terms for rejecting all or part of a lot;
 - o Terms for partial vs unrestricted lot inspections
- No adjustments will be permitted below the reference price. Allowable expenses associated with rejected product for sales at the reference price will not be credited to the invoice for the accepted product but will be paid to the buyer by the signatory or selling agent as a sanction.
- A lot containing more than 35 percent eligible condition defects based on a USDA inspection certificate in the first sale to an unaffiliated buyer in the United States may be rejected and the signatory will pay all expenses related to the return of the defective product to Mexico as a sanction.

III. Enhanced Export Management

The Mexican signatories make the following proposals to block unintended exports of signatory-grower tomatoes by non-grower signatories. This will help Mexican growers track how much of their product is reaching the United States at any time and better manage inventory levels.

- Require growers to formally assign volumes sold in Mexico to another party in order for that party to get an export license.
- Require quarterly certifications to include volumes assigned and or received for export.
- Designate exporting fresh tomatoes to the United States under a signatory number different than one's own signatory number a violation of the suspension agreement that may result in the revocation of a signatory's export license in Mexico.

IV. Enhanced Enforcement by USDA under PACA

The 2013 Agreement requires each signatory to enter into a contract with the party responsible for the first sale of its tomatoes to an unaffiliated customer in the United States incorporating the terms of the agreement.¹ This entity, called a Selling Agent, can be an importer, agent, distributor or any other entity that facilitates the transaction between the signatory and the first unaffiliated US customers that meets the definition of "commission merchant," "dealer," or "broker" in the PACA.² The agreement sets out specific actions signatories should take to ensure that their efforts to abide by the agreement are upheld in any claims taken under PACA.³ Based on these documents, a violation of the agreement also constitutes an unfair trade practice that violates the PACA.⁴

¹ 2013 Agreement at IV.C.3.a.

² 2013 Agreement at Footnote 2.

³ 2013 Agreement at Appendix G.

⁴ 2013 Agreement at V.E.

PACA enforcement of the 2013 Agreement is, therefore, currently available under PACA's existing authority, both with respect to reparation claims⁵ and issues relating to incorrect accountings, or false or misleading statements.⁶

Indeed, PACA has already demonstrated not only its existing ability to enforce the terms of the 2013 Agreement, but also its ability to independently investigate potential agreement violations without an official complaint or allegation.⁷

To facilitate and strengthen continued PACA enforcement, the Mexican signatories make the following proposals:

- The addendum to the contract incorporating the terms of the agreement between the Mexican signatory and any and all selling agents, as defined by the agreement, will be submitted on the Commerce Department record.
- Preseason letters from the selling agent, as defined by the agreement, to the first unaffiliated customer in the United States will be submitted on the Commerce Department record.
- The quarterly certifications will be amended to cover all agreement terms and add an explicit statement that “intentional violations of the agreement are subject to additional civil penalties.” This implicates 18 USC 1001 and 734(i) of the Tariff Act. These revised certifications will be signed quarterly by:
 - Each Mexican signatory
 - Each selling agent, as defined by the agreement
- Each signatory will agree that the above-listed documentation can be provided to PACA for enforcement.

These proposals will place on the record all information necessary for the Department or counsel under Administrative Protective Orders to submit a complaint or a violation allegation with USDA under PACA for immediate investigation.

V. Enhanced Enforcement by the Department

In addition to the monitoring and enforcement activities already undertaken by the Department, the Mexican signatories propose the following:

- Establish a task force with Commerce, USDA and CBP to review agreement data and information and coordinate enforcement action.
- Require quarterly verifications, in Mexico, at border-crossing locations or through questionnaires issued by the Department, to spot check compliance. One such exercise could include, for example, the Department selecting transactions based on USDA inspection certifications for additional documentation review.

⁵ PACA Section 6.

⁶ PACA Section 2.

⁷ Tomato Specialties LLC, d/b/a The Avocado Company International, PACA Docket No. 16-0068 (Oct.18, 2017).

- Signatory quarterly meetings with the Department or more frequently during peak season, as necessary, to discuss monitoring and enforcement matters. The locations of these meetings could be in Washington DC, Mexico City or any border-crossing location to facilitate more frequent verifications.
- The Working Group will submit quarterly and annual reports on its monitoring and enforcement activities.
- The Mexican signatories are open to third-party verification of compliance.

VI. Necessary Measures to Avoid Needless Litigation

- All proper notice and comment procedures must be followed, including the timely release of all required Department memoranda.
- Parties agree on the market basis for above listed changes and the agreement is reflected in the Department's memoranda.

VII. Application of the Agreement to Downstream Sales

As the Mexican signatories have stated for over a year, FTE's request that the reference prices and the terms of the agreement be extended beyond the first sale to an unaffiliated customer in the United States appears to run afoul of US antitrust laws. First, the antidumping statute expressly provides that neither a dumping order nor a suspension agreement can be applied beyond the first sale to an unaffiliated customer in the United States. Congress has not given the Department any authority to fix prices and terms to subsequent sales downstream. Second, neither the PACA statute nor its regulations override US antitrust laws and immunize parties who fix prices from antitrust liability or to regulate such anticompetitive conduct. Absent such regulatory commitment, it would appear under case law precedent that PACA could not be used to immunize parties from antitrust liability if they fix prices in contracts for downstream sales. Those parties would face a substantial risk of being sued under US antitrust law if they engaged in or promoted such anticompetitive conduct. The Mexican signatories cannot enter into a suspension agreement compelling them to violate the US antitrust laws and exposing them to treble damage liability.

If the Department believes differently and can undertake the following, the Mexican signatories will consider the concept. The Department would need to:

- Secure a published opinion from the Department of Justice (i) extending the antitrust waiver of the antidumping statute and a dumping order and suspension agreement to downstream sales beyond the first sale to an unaffiliated customer and (ii) immunizing the Mexican signatories from antitrust liability and prosecution; and
- Take full responsibility for enforcing and defending in court a suspension agreement that applies to downstream sales beyond the first sale to an unaffiliated customer, and ensuring that the Department of Agriculture does the same under PACA.

This consolidated proposal replaces all prior proposals. Specifically, the Mexican signatory proposals to the US Commerce Department of June 1, June 29, August 15, November 5 and November 20, 2018, are withdrawn.

ATTACHMENT 2

APPENDIX D – SUSPENSION OF ANTIDUMPING INVESTIGATION – FRESH TOMATOES FROM MEXICO – PROCEDURES FOR REJECTIONS AND/OR RETURNS TO MEXICO BASED ON CERTAIN CHANGES IN CONDITION AFTER SHIPMENT

The purpose of this appendix is to explain the procedures for rejections and/or returns to Mexico of all or part of lot¹ based on certain changes in condition after shipment under PACA. With the exception of paragraph A.7.a below, which applies to all transactions, this appendix applies only to transactions at the minimum reference price that involve rejections.

As explained in Appendix A of the Agreement, the term “reference price” refers to the price FOB shipping point, i.e., US side of the US-Mexico border. The reference price includes all palletizing and cooling charges incurred prior to shipment from the shipping point, Mexican border. The actual movement or handling expenses beyond the point of entry into the United States (e.g., McAllen, Nogales, Otay Mesa) must be added to the reference price and must reflect the cost for an arm’s-length transaction.

Appendix G of the Agreement outlines specific actions that signatories should take to ensure that their efforts to abide by the Agreement are upheld in any claims taken to the U.S. Department of Agriculture under PACA.

In reviewing any such claim, PACA will establish a “Seller” and a “Buyer.” For purposes of this Agreement, it is understood that the “Seller” is any entity that makes the first unaffiliated sale in the United States. This could be the signatory or a third party facilitating or performing the sale on behalf of the signatory. For purposes of this Agreement, it is understood that the “Buyer” is the first unaffiliated buyer taking title of the subject merchandise. To facilitate the verification of claims for changes in condition after shipment, the contract between the Seller and the Buyer must establish that all paper work be completed within 15 business days after the USDA inspection, and that claims be resolved within 15 business days after the USDA inspection, unless a PACA reparation or other claim is filed. Failure to complete this paperwork in a timely manner may constitute a violation of the Agreement. When filing quarterly certifications with the Department, signatories should report the number of lots (1) returned to Mexico and/or (2) involving rejections in transactions sold at the minimum reference price, the total quantity and value of tomatoes returned, donated or destroyed. Each quarter, the Department will sample transactions with rejections and the Mexican signatories agree to provide all required documents as listed below. Signatories can obtain from the Department’s website a copy of the suggested form for submitting the quarterly certification information. See “Quarterly Certification” at http://ia.ita.doc.gov/tomato/2013-agreement/documents/suggested_forms/.

A. Contractual Terms for Rejecting All or Part of a Lot

1. No part of a lot may be rejected for failure to meet suitable shipping conditions unless supported by an unrestricted USDA inspection.
2. If the USDA inspection indicates that the lot has: 1) over 8% soft/decay condition defects; 2) over 15% of any one condition defect; or 3) greater than 20% total condition defects, the receiver may reject the lot or may accept a portion of the lot and reject the defective tomatoes. For purposes of this Agreement, a condition defect is any defect listed in the chart in part A.5 below. When a lot of

¹ For these purposes, a lot is defined as a grouping of tomatoes in a particular shipment that is distinguishable by packing type.

tomatoes has condition defects in excess of those outlined above as documented on a USDA inspection certificate, the documented percentage of the tomatoes with condition defects are considered DEFECTIVE tomatoes.

3. No part of a lot may be rejected based on a failure to meet suitable shipping conditions if the USDA inspection certificate does not indicate one of the condition thresholds outlined above.
4. The USDA inspection must be called for no more than eight hours from the time of arrival at the destination specified by the receiver and be performed in a timely fashion thereafter. If there is more than one USDA inspection on a given lot, the inspection certificate corresponding to the first inspection is the one that will be used for making any rejections. However, if an appeal inspection is conducted which reverses the original inspection, it will supersede the first inspection, as long as the appeal inspection is requested within a reasonable amount of time not to exceed 12 hours from the first inspection.

The first receiver of the product, regardless of whether that receiver is acting as a broker for an unrelated Buyer or whether the receiver is the unrelated Buyer acting on its own right, must specify the city/metropolitan area of the destination of the product. The inspection will take place at the destination of delivery as specified prior to shipment.

No part of a lot may be rejected based on a USDA inspection at a destination which is different from the destination specified by the first receiver of the product. In the event that the first receiver does not specify the city/metropolitan area of the destination of the product, the eight-hour period within which an inspection may be requested will begin to run at such time as title to the product transfers to the unrelated purchaser, for example, upon loading of the product at the first handler's (importer's) warehouse in an FOB transaction and upon delivery of the product to the first buyer's warehouse in a delivered sale.

A person or company shall be considered a broker for an unrelated purchaser: 1) when that person or company falls within the description of types of broker operations set forth in 7 CFR 46.27; or 2) have provided a broker's memorandum of sale as set forth in 7 CFR 46.28(a). The following paragraphs apply if a broker or dealer is involved in the transaction.

A broker, unlike a dealer, does not take ownership or control of the tomatoes and title to the product does not pass to the broker but the broker arranges for delivery directly to the Seller or Buyer. Because a broker never takes ownership or control over or title to the tomatoes, the Buyer and not the broker may request an inspection, and only the Buyer is entitled to any resulting rejections. The inspection would take place at the Buyer's destination, as specified in the broker's contract with the Seller.

A Dealer is a Buyer which takes title to the tomatoes. When a dealer is involved in the sale, the destination of delivery stated in the contract is where the inspection is to take place. If the dealer does not specify the destination of delivery, the default destination of delivery is the warehouse of the Seller. With respect to a lot of tomatoes that is owned or controlled by a dealer, it is the

responsibility of the dealer to request an inspection of the tomatoes in his possession in a timely manner, if he deems it necessary. If the dealer does not request an inspection in a timely manner (i.e., within eight hours from the time of arrival at the destination specified by the dealer) and resells the tomatoes to a third party, which does request an inspection, the dealer is then responsible for all costs pertaining to the inspection and the condition or quality of the tomatoes.

5. Under this Agreement, rejections will be permitted only for condition defects. The term "condition defect" is intended to have the same definition recognized by the Specialty Crops Inspection Division of the United States Department of Agriculture, with the exception of abnormal coloring, soil spot, blossom end discoloration, and surface discoloration (silvery-white and gold fleck), and, therefore, covers the following items:

Condition Defects
1) Sunken Discolored Areas
2) Sunburn
3) Internal Discoloration
4) Freezing and Freezing Injury
5) Chilling Injury
6) Abnormally Soft and Watery Fruit
7) Cuts and Broken Skins (unhealed)
8) Soft/Decay
9) Bruises
10) Nailhead Spot
11) Skin Checks
12) Decayed/Moldy Stems
13) Waxy Blister
14) White Core
15) Shriveling
16) Discolored Seed Areas
17) Insect/Worm Injury (alive when present)

6. The Buyer has the right to decide whether to accept or reject all or a portion of a lot, but must pay the full reference price for any accepted tomatoes,
- a. No adjustments will be permitted below the reference price.
 - b. Any repack, reconditioning, donation or destruction is done at Buyer's expense.
7. The rejected tomatoes will be divided into a separate lot and treated as not having been sold.
- a. If the rejected lot has more than 35 percent eligible condition defects based on a USDA inspection certificate meeting all of the above-listed terms, the Mexican signatory will pay all expenses related to the return

of the defective tomatoes to Mexico as a sanction.

- b. If the rejected lot is less than or equal to 35 percent eligible condition defects based on a USDA inspection certificate meeting all of the above-listed terms, the Buyer may choose to have the rejected tomatoes destroyed, donated to non-profit food banks, or returned to the Seller. The rejected tomatoes may not be sold.²
 - c. In either case, the PACA-required settlement of Buyer expenses (freight and USDA inspection fees) will be paid to the Buyer by the Mexican signatory or the Seller as a sanction.
8. For any transaction involving rejected tomatoes, the Seller must obtain/maintain the following documents/information:
- Shipper name
 - Shipping manifest
 - Details of the shipper invoice, including invoice number, date, brand, tomato type, quantity (boxes), and value
 - Documentation supporting the freight expenses incurred for the original shipment
 - USDA inspection certificate
 - Documentation of return, destruction or donation
 - A statement that "No monies or other compensation was received for the destroyed or donated tomatoes"
 - Signature of a responsible official at the Buyer

B. Contractual Terms for Rejection of Full Loads for Reasons Other than Condition Defects

In cases where the Buyer rejects for any reason other than condition defects based on a USDA certificate, the Seller may sell the entire rejected lot to another Buyer (the "Final Buyer"). In that case, the price paid must be not less than the reference price plus all costs incurred (e.g., transportation, commissions, etc.) from the F.O.B. port of entry to the Final Buyer. If the Final Buyer finds that the lot contains condition defects greater than those outlined above, it shall follow the directions stated above with respect to rejection of partial loads.

C. Contractual Terms for Partial vs. Unrestricted Lot Inspections

As explained in part A.1 above, the Department will only allow rejections for condition defects if the USDA inspection is unrestricted. During the time between the call for inspection and the arrival of the USDA inspector, the Buyer might sell part of the lot and, therefore, by the time the USDA inspector arrives, that part is not available for inspection. If the USDA inspector is allowed full access to the partial lot, the Department will consider this an unrestricted partial-lot inspection. Alternatively, if the USDA inspector is not allowed full access to the partial lot, the Department will deem it a restricted inspection. No part of a lot may be rejected for failure to meet suitable shipping conditions if the USDA inspection is restricted. For purposes of this

²Tomatoes for processing must be handled in accordance with the guidelines set forth in Appendix F of the Agreement.

Agreement, when considering a rejection for failure to meet suitable shipping conditions where an unrestricted partial-lot inspection has taken place, only the portion of the lot inspected is eligible for rejection.

For example, before the USDA inspector arrives, the Buyer sells 140 boxes of 5x5s from a lot identified as 160 5x5s on the invoice. When the USDA inspector arrives, the Buyer requesting the inspection provides full access to the partial lot within its possession. The inspector finds that the partial lot of 20 5x5s has soft/decay condition defects of 25 percent and notes this on this inspection certificate. Under the Agreement, only the 20 5x5s are eligible for rejection for failure to meet suitable shipping conditions, and the 140 5x5s that the Buyer already sold will not be eligible for rejection based on the USDA inspection.

DRAFT

ATTACHMENT 3

EXAMPLE – 1600 BOXES/20 PALLETS OF ROMAS AT REFERENCE PRICE OF \$8.30 50% USDA INSPECTION CHECKSUM

