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August 28, 2009

## **PUBLIC VERSION**

Ms. Kim Glas, Chair  
Committee for the Implementation of Textile Agreements  
U.S. Department of Commerce  
Room H3001A  
14th Street & Constitution Avenue, N.W.  
Washington, D.C. 20230

**Re: Rebuttal Comments to Commercial Availability of Certain Cotton/Polyester  
Fleece Fabrics  
CITA Reference No. 128.2009.08.07.Fabric.ST&RforIntradeco**

Dear Chairperson:

On behalf of Intradeco Apparel, Inc. of Miami, FL, we hereby submit these Rebuttal Comments in connection with the Offer to Supply submitted by Hilos y Telas (“HyT”) in the above cited request for a finding of commercial unavailability pursuant to the provisions of Section 203(o)(4) of the Dominican Republic-Central America-United States Free Trade Agreement (“CAFTA-DR” or “the Agreement”) Implementation Act and CITA Final Procedures for implementing Section 203(o)(4) contained in CITA’s Federal Register notices of March 15, 2007 and the Modifications to Procedures of September 12, 2008 (hereinafter “Procedures”).

CITA should disregard HyT’s submission because it fails to demonstrate that HyT is able to produce the subject fabric in commercial quantities in a timely manner as required under the Agreement and CITA’s Procedures. In addition, HyT fails to provide the required detailed information as to why its proposed fabric, which differs substantially from the subject fabric is substitutable for the subject fabric. Finally, HyT cannot supply the subject fabric or its proposed fabric in commercial quantities as its claimed capacity amounts to only 3% of Intradeco’s required quantities. CITA should therefore accept the above referenced petition and place the subject fabric on Annex 3.25 of the Agreement in unrestricted quantities.

As described below, our position is based on the following:

- HyT failed to provide sufficient information to substantiate its ability to produce the subject fabric as required by CITA's Procedures.
- HyT's lack of responsiveness and conflicting responses during the due diligence process cast doubt on its ability to make the subject fabric as well as its ability to meet the stated production deadlines.
- HyT proposes to make an entirely different fabric that differs markedly from Intradeco's requirements and, as such, the different fabric proposed by HyT does not constitute an acceptable substitute for Intradeco's requirements.
- HyT's fabric is not usable by Intradeco, even in limited quantities. It is of a different gauge possessing different characteristics, and products made of the proposed substitute fabric would not match other intended coordinating products made of the specified fabric.
- HyT's alleged production capacity of 4,000<sup>1</sup> kilograms per week is less than 3% of the amount required by Intradeco. As such, the fabric is not available in commercial quantities.
- Finally, since HyT's response to Intradeco's short supply request does not contain the information required by CITA's Procedures and was received after the deadline expired, CITA should reject HyT's submission in accordance with section 6(a) of its Procedures.

#### **HyT Failed to Demonstrate Its Ability to Produce the Subject or Substitutable Fabric**

HyT's response alleges that it is able to produce the subject or substitute fabric--albeit in minute quantities. However, a fair reading of the response indicates that the opposite is true. The additional information HyT provided to CITA actually contradicts this claim and confirms Intradeco's suspicions that HyT cannot even supply small quantities of the subject fabric.

Section 6(b)(3)(iii) of the Procedures requires a respondent to provide detailed information regarding its current ability to make the subject fabric. The Procedures also require that "a respondent must demonstrate its ability to produce the subject product by providing

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<sup>1</sup> While we bracketed and redacted HyT's alleged capacity in our original request, we have not done so in this response because HyT disclosed their alleged capacity in the public version of its response.

relevant information regarding their {sic} production capability . . . including past production of similar products and/or descriptions of equipment.”<sup>2</sup> HyT failed to provide this detailed information. Instead HyT merely states that it is able to produce 4,000 kilograms per week of the subject fabric. However, this statement is incorrect as HyT admits that it cannot produce the subject fabric, but instead offers to produce a “new sample” fabric which differs significantly from the specification required of the subject fabric. Furthermore, the Procedures state that a supplier may “support its claim to be able to produce the subject product through provision of a sample meeting exactly the specifications as presented in the Request.”<sup>3</sup> HyT did not provide a sample meeting the exact specifications of the subject fabric. Thus, by HyT’s own admission it does not and cannot produce the subject fabric in any quantity.

Furthermore, HyT fails to specify, as required by section 6(b)(3) of CITA’s Procedures, whether it currently makes the fabric it describes, how much of the subject fabric it has produced in the previous two years, and, if it is not currently making the requested fabrics, why not. The only production capability requirement that HyT fulfills is to state what it believes to be its capacity to make the requested or proposed fabric. Unfortunately, the capacity - 4 ,000 kilograms per week - is minuscule in comparison to Intradeco’s demands. HyT’s comments should therefore be rejected since they do not contain the information required by CITA’s Procedures.

HyT’s failure to engage Intradeco under standard business practices speaks volumes as to the “commercial” availability of the fabric it claims to be substitutable. HyT claims that it has partnered with Parktland to expand its capacity to produce the subject or alternative fabric, but Parktland, in communications with Intradeco admitted that it could not produce the subject fabric, but could only finish it.<sup>4</sup> Thus a partnership with Parktland cannot expand HyT’s alleged limited capacity to produce the subject or proposed fabric. Furthermore, Intradeco finds it peculiar that Parktland, a factory which admitted it could not produce the subject fabric, provided a sample of the fabric to Intradeco, apparently on HyT’s behalf. However, the fabric was not even produced by HyT or Parktland. According to the specifications sheet that accompanied the sample, the fabric was knit by [\*\*\*\*\*] and finished by [\*\*\*\*\*]. As noted below, Intradeco received the sample and specification sheet, which was sent by Parktland, without

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<sup>2</sup> Procedures at 6(b)(3)(iv).

<sup>3</sup> *Id.*

<sup>4</sup> See Intradeco Request for Commercial Availability Determination at Attachment AC 3 (August 7, 2009), CITA Reference No. 128.2009.08.07.Fabric.ST&RforIntradeco (“Request”).

warning on August 21, 2009 via U.S. Postal Service. A copy of the accompanying specification sheet is provided in Attachment 1.

This information further proves that neither HyT nor Parktland can produce the subject fabrics—even in the limited quantities claimed. Therefore, we submit that the subject fabrics are not available in commercial quantities in the CAFTA-DR countries and should therefore be added to Annex 3.25 of the Agreement.

### **HyT Failed to Adequately Participate in the Due Diligence Process**

HyT’s conduct during the due diligence process raises serious concerns regarding HyT’s ability to supply the subject fabric—even in the small quantities alleged. CITA’s procedures require that a supplier in response to a due diligence inquiry “must have stated its ability to supply or not supply the subject product.”<sup>5</sup> HyT failed to clearly state whether it could or could not supply the subject fabric as it answered in the affirmative to each. HyT first indicated that it could not supply the fabric and then, inexplicably, without more information, stated that it could supply the subject fabric.

Furthermore, CITA’s Procedures require that “the response to the inquiry must contain information supporting CAFTA-DR supplier’s claim to supply the subject product . . . in commercial quantities in a timely manner.”<sup>6</sup> HyT also failed to satisfy this requirement as it provided only unsubstantiated assertions that it could produce the fabric, despite Intradeco’s repeated requests for more detailed information corroborating its capacity as required by the Procedures. For example, HyT has not provided descriptions or information regarding its equipment available to produce the subject fabric. HyT, through its lack of responsiveness regarding its capacity to produce the subject or a substitutable fabric, has left Intradeco and CITA with no choice but to conclude that it cannot produce the subject or a substitutable fabric in commercial quantities.

As noted in our request dated August 7, 2009, HyT was originally contacted on June 8, 2009, regarding its ability to supply the subject fabric. On June 19<sup>th</sup> Intradeco inquired as to HyT’s capacity. HyT did not respond. Again on June 25<sup>th</sup> Intradeco inquired as to HyT’s

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<sup>5</sup> Procedures at 6(b)(4)(i).

<sup>6</sup> *Id.*

capacity. HyT responded that it did “not have capacities for the time being.”<sup>7</sup> Four days later on June 29<sup>th</sup>, HyT again responded to Intradeco’s June 25<sup>th</sup> request for capacity this time stating “4000 kgs per week.” HyT could not or refused to explain, despite repeated requests, why it first stated that it did not have capacity and then, four days later, responded that it did.

Throughout the next four weeks Intradeco asked HyT to demonstrate that it could produce the subject fabric but again, despite repeated requests, HyT was unable or unwilling to demonstrate such. On June 29<sup>th</sup> HyT requested a sample of the subject fabric, which Intradeco sent on June 30<sup>th</sup>. On July 9<sup>th</sup>, hearing nothing from HyT, Intradeco confirmed that HyT received the sample and asked whether HyT could produce the subject fabric. HyT responded that it was analyzing the fabric and that it could produce 4,000 kilograms per week. The next day, on July 10<sup>th</sup>, Intradeco requested clarification as to why HyT originally stated it could not produce the subject fabric, but then changed its mind. HyT did not respond. On July 16<sup>th</sup>, Intradeco again requested a response and noted that it needed to move quickly. On this same day, HyT responded stating that it was pricing and would respond the next day. Intradeco did not receive any such response. On July 20<sup>th</sup>, four days after HyT committed to responding, Intradeco again requesting a response from HyT. HyT did not respond. Finally, on July 23<sup>rd</sup>, Intradeco sent an email to three individuals at HyT again requested an explanation regarding HyT’s capacity and a definitive answer as to whether HyT could produce the subject fabric upon reviewing the sample. Intradeco also voiced its confusion as to HyT’s capacity, its frustration with the delays, and requested that HyT provide the information as quickly as possible. HyT did not respond. Intradeco filed its commercial availability request on August 7, 2009, nearly two months after its first contact with HyT and three weeks since HyT promised to respond.

In summary, Intradeco contacted HyT to determine if it was able to produce the subject fabrics. Intradeco engaged in direct dialogue with HyT, answered its questions and provided a sample. While HyT frequently stated that it would analyze the sample and respond, it never communicated any further with Intradeco. HyT’s lack of meaningful communication, repeated delays, and utter lack of verifiable evidence that it could produce the subject fabrics left Intradeco with no choice, but to conclude that HyT was not seriously engaged in a standard business dialogue to supply the subject fabrics.

HyT’s conduct, during and after the due diligence process, confirms Intradeco’s suspicions that HyT is not seriously engaged in good faith discussions to supply the subject

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<sup>7</sup> Request at Attachment S4.

fabric, but is merely attempting to manipulate the short supply process. In particular, we note that [\*\*\*\*\*]. It would be unfortunate if through obstruction, delay and manipulation companies were able to hijack the commercial availability mechanism of the CAFTA-DR for their own individual gain, at the expense of legitimate trade.

Because HyT failed to adequately and faithfully participate in the due diligence process, as required by the Procedures, we respectfully request that CITA grant Intradeco's request for commercial unavailability.

#### **HyT's Proposed Fabric Is Not Substitutable For The Subject Fabric**

The specifications provided by HyT in its Offer to Supply cast doubt on its ability to actually produce the subject fabric. They vary significantly from Intradeco's requirements and therefore cannot substitute for the subject fabric. It is absolutely critical that the fabric in question meet the stated performance criteria. A fabric that cannot match the shrinkage, gauge and yarn requirements is simply unusable to Intradeco and its customer and therefore is not substitutable.

In its Response, HyT proposes to make a fabric that differs substantially from the fabric that Intradeco requires.<sup>8</sup> HyT acknowledges that the fabric it offers is different from the required fabric, and makes only a bald assertion that its fabric is nonetheless substitutable for the fabric requested by Intradeco. CITA's Procedures provide for Responses with an offer to supply a substitutable good. Specifically a Response with an Offer should provide "the basis for the CAFTA-DR supplier's rationale that the other product(s) . . . are substitutable for the subject product(s) for purposes of the intended use, supported by measurable criteria."<sup>9</sup> HyT does not

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<sup>8</sup> While Intradeco has filed commercial availability requests for two different fabrics, HyT only provided a sample and specification sheet for one fabric. We must assume that HyT is offering this one fabric as a substitute for both of Intradeco's subject fabrics.

<sup>9</sup> Procedures at 6(b)(3)(v).

provide any information or measurable criteria to support the substitutability of its proposed fabric other than to note that “it was determined that such differences are not an obstacle to fullfil {sic} que {sic} requirements of the final product.”<sup>10</sup> HyT has not satisfied its legal requirement to demonstrate that its fabric is substitutable for the subject fabric. Even though HyT has not satisfied this requirement, Intradeco provides the following information to conclusively demonstrates that HyT has not offered a substitutable fabric.

From a commercial perspective, the differences between the fabric required by Intradeco and the fabric proposed by HyT as a substitute are significant. The technical differences and shortcomings of the fabric proposed by HyT are listed below. In particular, the gauge, shrinkage, fiber content and yarn are inconsistent with the requirements of the subject fabric. These shortcomings render the proposed fabric unusable by Intradeco and its customers.

We note the gauge of the subject fabric is 21 and the gauge of HyT’s proposed fabric is [\*\*]. Intradeco promises, and delivers to its customers, garments having a soft hand and a smooth face. The proposed fabric would contain differences in fibers, yarn sizes and gauges which will be readily apparent to the customer. It is Intradeco’s experience that 21 gauge fleece has a smoother appearance, while [\*\*] gauge fleece tends to have visible wales. This is especially relevant for screen printed articles as printers require a smooth surface for optimal performance. A fabric with an uneven surface is simply unacceptable.

Furthermore, Intradeco requires vertical and horizontal shrinkage of less than 5%. The shrinkage of HyT’s fabric is [\*\*\*\*\*] than the required shrinkage of the subject fabric. Finished garments made with HyT’s proposed fabric will misshapen due to the [\*\*\*\*\*] of vertical and horizontal shrinkage. This is a critical quality specification of the requested fabric. A shrinkage requirement outside this range cannot be accepted especially when the supplier cannot supply all of the required quantity as products made of HyT’s non-substitutable fabric would not match the alternatively sourced fabric that met Intradeco’s specified requirements.

We also note that the fiber content blend of the sample fabric is vastly different from the fiber content of the subject fabric. The subject fabric requires a fiber content of 67-73% cotton/27-33% polyester. HyT’s proposed substitute has a fiber content of approximately [\*\*]%

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<sup>10</sup> HyT Response at 3.

cotton/[\*\*]% polyester.<sup>11</sup> The tie yarn of the subject fabric is 49 to 51 denier/48 filaments (176-184 metric/48 filaments), whereas, in HyT's proposed fabric, the tie yarn is [\*\*\*\*\*]<sup>12</sup>. HyT's specifications are [\*\*\*\*\*] on the vertical torque of their proposed fabric. Since the fabric is uniquely formulated to meet customer requirements, the changes in fiber content, construction of the yarns and gauges noted above will affect hand feel, body and fullness of the finished garment, which will not be acceptable to Intradeco's customers.

Since HyT admits that it cannot produce the subject fabric and its proposed fabric is not substitutable, we respectfully request that CITA grant Intradeco's commercial unavailability request and add the subject fabric to Annex 3.25 of the Agreement.

**Limited Short Supply Not Appropriate**

Approving Intradeco's request in restricted quantities is not appropriate in this situation. As demonstrated above, the fabric that HyT offers to supply is patently different from the subject fabric, inferior for its intended purpose, and not substitutable. Furthermore, sourcing the required fabric from multiple sources would present numerous quality, technical and logistical challenges that would yield the program commercially unfeasible. The most notable and recognizable challenge that would necessarily result from use of two different fabrics from two facilities would be unacceptable level of variance in color, hand, feel, shrinkage, wash, etc. This inconsistency would inevitably lead Intradeco's customer to refuse the shipment, damaging their relationship and Intradeco's reputation.

A restricted quantity designation would essentially require Intradeco to purchase unsuitable fabric from HyT but still source from outside the region 100% of the fabric needed to meet its customer's standards.

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<sup>11</sup> Since Intradeco only received the sample on August 21, 2009, it has not been able to conduct thorough laboratory analysis of the sample fabric. However, it is clear, based solely on the limited information contained on the specification sheet that the fabrics are vastly different.

<sup>12</sup> The attached specification sheet provided to Intradeco by Parkland does not indicate whether the measurements are English or metric.

**Even If HyT's Fabric Were Substitutable, It Is Not Available in Commercial Quantities**

Assume for the purpose of discussion that HyT is able to produce the subject fabric at all. By its own admission, it is only able to produce 4,000 kilograms per week. This amounts to approximately 3% of the amount that Intradeco requires. Even if HyT were able to produce the subject fabric, it could not produce the fabric in commercial quantities.

**HyT's Response is Insufficient and Untimely**

As previously enumerated, HyT's response to the petition did not include any of the required information pertaining to its production capability. It did not provide information as to the quantity of the subject or alternative fabric that it produced in the preceding two years. HyT did not offer any information or claim that production of the subject or alternative fabric is cyclical. HyT did not provide any equipment or timeline information to support its ability to produce the alleged 4,000 kg of the subject or alternative fabric. It did not produce a sample meeting the exact specifications of the subject fabric. It did not provide measurable criteria to support its allegation that its proposed alternative fabric is substitutable for the subject fabric. Lastly, HyT did not file its response within the timeframe permitted by the Procedures.

**Conclusion**

In conclusion, HyT failed to meaningfully participate in a dialogue to supply the subject fabric when presented with a viable commercial request. Instead, it has offered to supply an alternative and inferior fabric, in woefully inadequate quantities for Intradeco's intended use and its customer's requirements. CITA should therefore approve Intradeco's request to add this fabric to Annex 3.25 of the Agreement as unavailable in the Parties in commercial quantities in a timely manner.

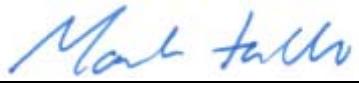
Ms. KIM GLAS  
CITA CHAIR  
AUGUST 28, 2009  
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**PUBLIC VERSION**

Thank you for your consideration of these comments. If you have any questions or require further information, please contact me at 202-216-9307 or mtallo@strtrade.com.

Respectfully submitted,

**SANDLER, TRAVIS & ROSENBERG, P.A.**

By:   
Mark Tallo

Enclosures (Confidential Version Only)