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August 26, 2008

Mr. R. Matthew Priest, Chairman
Committee for the Implementation of Textile Agreements
U.S. Department of Commerce
Room H3001A
14th Street & Constitution Avenue, N.W.
Washington, D.C. 20230

PUBLIC VERSION

**Re: Rebuttal Comments to DR-CAFTA Short Supply Request Response by ELCatex
/File Number 82.2008.08.05.Fabric.ST&RforBadgerSportswear**

Dear Mr. Chairman:

The following rebuttal comments are being submitted in response to Comments made by ELCATEX Elasticos Centro Americanos Y Textiles, S.A. de C.V. (ELCATEX) regarding our request to add a certain fabric to Annex 3.25 of the DR-CAFTA (File number 82.2008.08.05.Fabric.ST&RforBadgerSportswear).

ELCATEX has failed to demonstrate that it is capable of producing the subject fabric in commercial quantities in a timely manner as required under the Commercial Availability provision of the DR-CAFTA and CITA's Procedures. Rather, ELCATEX has proposed to make an entirely different product that differs markedly from Badger Sportswear's (BADGER) requirements and, as such, the different fabric proposed by EXCATEX does not constitute an acceptable substitute for BADGER's requirements. More importantly, ELCATEX was not able to supply the non-conforming fabric they now assert as substitutable when requested to do so

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under normal business conditions. This brings into question the actual “availability” of this non-conforming fabric.

As part of our due diligence, we contacted ELCATEX to determine if they were able to produce the fabric described in Badger’s specifications. Representatives from Badger engaged in a direct dialogue with ELCATEX, responded to all of their technical questions and provided a sample. While ELCATEX stated it would “analyze and respond”, it never made any further communications. ELCATEX never entered into serious discussions to produce the fabric when engaged in a normal business dialogue.

ELCATEX’s failure to engage Badger under a normal business situation speaks volumes as to the “commercial” availability of the fabric they claim to be substitutable, or to produce a fabric that it asserted to be substitutable. ELCATEX made only minimal communications and never stated that it was able to meet Badger’s requirements to produce the specified fabric, nor did ELCATEX provide specific information that it believed *might* demonstrate to BADGER that a different fabric was substitutable. Presumably, they “analyzed” the fabric sample that was sent to them and, for whatever reason, determined that they were not interested in, or capable of, producing the fabric in response to BADGER’s inquiry.

The purpose of a due diligence obligation is to allow producers to demonstrate their capabilities to meet a requirement under normal business conditions. ELCATEX was provided this opportunity by BADGER, and ELCATEX by its own volition failed to respond. Without providing specific information as required by CITA procedures, a mere statement of a claim of substitutability is legally insufficient. CITA must view these actions as failing to comply with requirements for considering an objection with an offer to supply a substitutable product. Even assuming for the purpose of argument that ELCATEX provided information that, taken alone and in the best possible light, might establish substitutability, BADGER has provided information below that rebuts any such hypothetical *prima facie* case for substitutability. This information must be specific as to how the allegedly substitutable fabric demonstrates the qualities of the fabric specified by BAGDER.

ELCATEX failed to ask, when it was asked if it could produce the specified fabric that it could not produce, whether a different fabric could be substituted for the intended use. Given the differences, it might have been logical not to offer such a roughly similar but different fabric, but at least ELCATEX should be held accountable for its silence.

In its Response, ELCATEX is utterly silent on this issue. Given the history, it was imperative that ELCATEX include some explanation as to why it could not or would not attempt to produce the fabric, what variations, if any, might be substitutable, or even engage a potential

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customer for new business, on other fabrics. Without any explanation, other than a theoretical assertion that it can produce a roughly similar fabric, one must conclude that it is not able or not interested in producing the specified fabric, or demonstrating that what it might produce is substitutable. The fabric is therefore not available in a commercial quantity in a timely manner, if at all.

In its Response, ELCATEX proposes to make a fabric that differs substantially from the fabric that BADGER requires. ELCATEX acknowledges that the fabric it is offering to make is different from the required fabric and makes only a bald assertion that its fabric is substitutable for the fabric requested by Badger. CITA’s Procedures provide for Responses with an offer to supply a substitutable good. Specifically, a Response with an Offer “may provide, if relevant, the basis for the responder’s belief that other products that are supplied by the DR-CAFTA supplier in commercial quantities in a timely manner are substitutable for the product(s) that are the subject of the request for purposes of the intended use.” However, ELCATEX does not provide any information regarding the substitutability of the fabric it is suggesting is substitutable for the fabric Badger requires other than to note that the fabric will achieve the required weight. ELCATEX has not fulfilled its legal obligation to demonstrate the substitutability of the fabric it offers for the different fabric that BADGER specified. While this burden has not been satisfied by ELCATEX, BADGER provides the following information that conclusively demonstrates that ELCATEX has not offered a substitutable fabric.

From a commercial use perspective, the differences between the fabric required by Badger and the fabric being proposed by ELCATEX as a substitute are significant. The fabric proposed by ELCATEX cannot be an acceptable substitute to Badger and its customers. It is therefore not substitutable. The technical differences and shortcomings of the fabric proposed by ELCATEX are listed in the table below:

Characteristic	Required by Badger	Proposed by ELCATEX
Fiber content (cotton) – fleece	Ring spun	Open end
Yarn size (fleece)	10/1	16/1
Gauge	20	18
Width	62-64 inches	16.25 – 30.75 (circular knit)
Torque	5 degrees	6 – 10 degrees (estimated/not verified)
Stretch	20%/30%	Unknown/not available
Pilling	Grade 4 or better	Grade 3.0 or better
Colorfastness to laundering	Grade 4 or better	Grade 3.0 or better
Colorfastness to heat	Grade 4 or better	Unknown

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Flammability	Class 1	“no problem”
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Badger provides high performance athletic gear and uniforms for schools, recreation leagues and similar organizations. The specified fabric is used for sweatshirts and sweatpants that will be screen printed and/or embroidered with team logos and the like prior to sale to the ultimate consumers. The fabric proposed is not suitable for this purpose for a variety of reasons, as described below.

Fiber, Yarn and Gauge: Badger 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 and the difference will be apparent. It is also doubtful that this combination will result in the required appearance. It is our experience that 20 gauge fleece has a smoother appearance while an 18 gauge fleece fabric tends to have visible wales. This is especially important for articles that are screen printed as printers require a smooth surface. A fabric with an uneven surface is simply unacceptable.

Width: ELCATEX is proposing a fabric with a significantly different width. Acceptance of this fabric as a substitute, among with its many other deficiencies, would require that Badger re-engineer the cutting patterns for all of the 13 different styles that are run in this fabric. Further, ELCATEX is proposing a tubular knit fabric, which tends to curl when slit. This also will present additional engineering difficulties.

Torque: "Torque" is when the wale line and the course line are not at a 90° angle after washing. Several of the styles made from this fabric by Badger have front pouch pockets. When a garment starts to twist, due to excessive torque, the pouch pocket would no longer be centered. In addition, pants having side seams made from this fabric will start to twist and the seam may end up in the front of the leg. We therefore require a maximum of 5 degrees torque. The ELCATEX proposal would exceed this, however, even ELCATEX is unclear as to the magnitude by which they would exceed this threshold.

Stretch: As stated above the subject fabric will be used in the manufacture of athletic wear. By definition, stretch is a crucial factor for these garments. ELCATEX does not provide any information in this regard. No one would buy sweatpants that did not stretch. ELCATEX is not even capable of performing this test and “has no data to offer”. How can ELCATEX even conceive that its proposed product is substitutable when it has no information regarding its ability to meet one of the key requirements of this fabric?

The fabric proposed by ELCATEX cannot be substitutable for the following additional reasons:

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Pilling: Badger's garments are sold as having a low rate of pilling (see attached catalog). ELCATEX is not able to meet the required specification.

Color Fastness Laundering: Among other things, Badger uses this fabric to color block within the same garment. For example, black blocks are sewn into white garments. Failure to meet the colorfastness test would turn these garments grey when laundered.

Color Fastness Heat: With respect to BADGER's customers [***] It is essential that garments sold to this group meet the colorfastness to heat standard. Otherwise, when screen printed garments are placed into an oven to dry the ink, the dye will come through the ink. White ink on a red garment will become pink, etc. ELCATEX does not even perform this test and "has no data to offer".

Color Fastness Crocking: Crocking relates to the rubbing off of dye from a fabric. As noted above, these fabrics are used to insert blocks of fabric into garments of different colors. Failure to meet the required standard will result in the colors rubbing off onto each other.

Taking all of these shortcomings together, it is obvious that not only is the proposed fabric not substitutable, use of the fabric would render Badger's products unmarketable and useless. Imagine a sports team jogging suit that does not stretch, where the team's colors become a mottled grey, the pouch pocket is twisted to the user's side, and where the leg seams curve around the runners' legs. Badger would not accept this fabric and neither would its customers.

In summary, ELCATEX would not and did not act to provide this fabric when a viable commercial offer was on the table. Instead, it has offered to sell an alternative fabric that is woefully inadequate from the market requirements of Badger and its customers. Therefore, the fabric in question, as required by Badger and its customers, is not available as specified, or in the form of a substitutable fabric, in commercial quantities in a timely manner in the DR-CAFTA region. CITA should therefore approve Badger's petition.

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If you have any questions or comments regarding this Rebuttal, please contact Mark Haney at mhaney@strtrade.com.

Sincerely,


C. Michael Hathaway
Attorney at Law