U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises

Final Statement

Specific Instance between United Food & Commercial Workers Local 770 (UFCW), Los Angeles Alliance for a New Economy (LAANE), Frente Auténtico del Trabajo (FAT) and Project on Organizing, Development, Education and Research (PODER) and Grupo Comercial Chedraui, and Bodega Latina (dba El Super) for conduct in the United States

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Executive Summary: This Final Statement concludes the Specific Instance submitted on November 12, 2015 by the United Food & Commercial Workers Local 770 (UFCW), Los Angeles Alliance for a New Economy (LAANE), Frente Auténtico del Trabajo (FAT) and Project on Organizing, Development, Education and Research (PODER) (collectively, "the submitters") alleging conduct inconsistent with Chapter V (Employment and Industrial Relations) of the Guidelines involving conduct by Bodega Latina (dba El Super), a subsidiary of Grupo Comercial Chedraui ("the company"), in its operations in the United States.

On June 15, 2016, the U.S. National Contact Point (USNCP) for the OECD Guidelines for Multinational Enterprises (the Guidelines) offered deferred mediation regarding the Specific Instance submitted by the submitters. While the USNCP finds the issues raised in this Specific Instance to be *bona fide* and deserving of further engagement between the parties, a USNCP offer of mediation services is deferred due to ongoing mediation between the parties which potentially covers the same issues raised in the Specific Instance and is with the Federal Mediation and Conciliation Service (FMCS), the same mediators used by the USNCP. In the event that the parties do not reach agreement in the current mediation, the USNCP is ready to consider an offer of mediation to the parties at that time. Parties may come back to the USNCP and request NCP mediation at which point the USNCP will determine whether the USNCP's process should be reopened. The USNCP brings this Specific Instance to a close with this Final Statement.

Recommendations: Consistent with the OECD Guidelines, in order to avoid duplication of efforts and prejudicing ongoing proceedings, the USNCP strongly encourages the parties to use the existing mediation currently underway and available to the parties to discuss issues raised in the Specific Instance.

While the confidentiality rules of the mediation mean that the USNCP cannot be fully aware of the details of the current and ongoing mediation, the scope of this mediation is such that all the issues in dispute can be covered by the mutual agreement of the parties. The USNCP recommends that both parties consider bringing international best practices such as the OECD Guidelines into the ongoing mediation by FMCS in order to identify and build a mutual, consensual resolution to the issues raised. The USNCP is available to provide information or answer questions about the OECD Guidelines should any of the parties be interested.

The Guidelines recommend that enterprises express their commitment to respect human rights through a statement of policy that is approved at the most senior level

of an enterprise. Furthermore, the OECD Principles of Corporate Governance, which are referenced in the Guidelines, note that the board of the parent entity should ensure compliance with the law and relevant standards. Therefore, the USNCP encourages both parent and subsidiary enterprises to engage in ongoing processes, as appropriate.

Furthermore, the USNCP encourages any stakeholder interested in submitting a Specific Instance to contact the USNCP at USNCP@state.gov before a potential submission of a Specific Instance, especially in cases where parties are involved in ongoing proceedings related to issues that could be raised in a Specific Instance. This allows the USNCP and party/parties to discuss the case and best prepares the USNCP to be efficient and effective in executing its good offices and advancing the OECD Guidelines.

Substance of the Specific Instance: The events reported in the Specific Instance cover a period from 2012 to the submission date. The Specific Instance alleges that the company has repeatedly violated both U.S. labor law and the OECD Guidelines chapters on employment and industrial relations by:

- Interfering, restraining, and coercing employees in the exercise of their rights;
- Threatening employees because of union activities;
- Interrogating employees about their union activities;
- Spying on workers' union activities;
- Disciplining and discharging employees because of union activities;
- Refusing to bargain in good faith with the UFCW at union-represented stores;
- Terminating key union supporters;
- Interrogating employees about their union sentiments; and
- Promulgating a "gag rule" prohibiting workers from discussing working conditions with each other.

The Specific Instance makes reference to numerous legal actions undertaken by the submitters before the National Labor Relations Board, U.S. federal courts, and the California Labor Commissioner in an effort to enforce U.S. and California labor laws which it alleges the company has violated. The submitters provided documentation from the legal cases, including rulings against the company.

In its response to the Specific Instance, the company provided the USNCP with a detailed history of its disputes with four UFCW locals (one of which is one of the submitters of the Specific Instance).

According to the company, the current dispute is the result of difficult negotiations with the four UFCW locals for a new collective bargaining agreement (CBA). A previous CBA, which had been negotiated between the company and the unions in 2008, expired on September 27, 2013. The company stated that it bargained in good faith, meeting with the unions to bargain 21 times between September, 2013 and April, 2014 in an attempt to negotiate a new agreement. However, according to the company the parties remained far apart on critical issues. After a hiatus due to U.S. labor litigation between the parties, they returned to the bargaining table in August, 2015, facilitated by the Federal Mediation and Conciliation Service. With the concurrence of the parties, the FMCS-facilitated negotiation can cover all the issues raised in the Specific Instance. It includes the four union locals that represent El Super employees. The company states that it continues to bargain in good faith, a contention disputed by the submitters. As a result, the submitters subsequently filed additional unfair labor practice claims with the NLRB Regional Office and wage theft claims were filed with the California labor commissioner both before and after the November 2015 resumption of negotiations.

The company states that the vast majority of the unions' legal allegations have been dismissed by U.S. legal instances or withdrawn for lack of merit. It also argues that the rest have been settled or are in the process of settling. According to the company, it has complied with the terms of all settlements that the parties reached. The submitters dispute these points, stating that the company has not lived up to the terms of the settlements.

The company argues that the submission of the Specific Instance is intended as "but another tool to place pressure on the company, coinciding with the launch of the first strike against the company on November 24, 2015."

As stated above, while the USNCP finds the issues raised in this Specific Instance to be *bona fide* and deserving of further engagement between the parties, a USNCP offer of mediation services is deferred due to ongoing mediation between the parties which potentially covers the same issues raised in the Specific Instance and is with the same mediators used by the USNCP. In the event that the parties do not reach agreement in the current mediation, the USNCP is ready to consider an offer of mediation to the parties at that time. Parties may come back to the USNCP and

request NCP mediation at which point the USNCP will determine whether the USNCP's process should be reopened.

With this Final Statement, the USNCP brings this Specific Instance to a close.

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Annex 1: Details of U.S. NCP Specific Instance Process

I. Context and Background on the U.S. NCP

The OECD Guidelines for Multinational Enterprises[1] (MNEs) are voluntary recommendations for companies regarding responsible business conduct in a global context. The Guidelines are addressed to MNEs operating in or from the territories of governments adhering to the OECD's Declaration on International Investment and Multinational Enterprises, of which the Guidelines form one part. Adhering governments have committed to encouraging their MNEs to promote and implement the Guidelines in their global operations and appointing a national contact point (NCP) to assist parties in seeking a mutually satisfactory resolution to issues that may arise under the Guidelines.

As a part of its function, the USNCP addresses issues relating to implementation of the Guidelines, raised in the form of a Specific Instance, with regards to the business conduct of an MNE operating or headquartered in the United States. The office of the U.S. NCP handles such instances in accordance with its procedures[2] which are based on Guidelines.

The U.S. NCP's primary function is to assist affected parties, when appropriate, in their efforts to reach a mutually satisfactory resolution and its role is to offer mediation to facilitate the resolution of the matter and, where appropriate, make recommendations as to how the enterprise might make its business practices more consistent with the Guidelines. The U.S. NCP does not make a determination as to whether a party is acting consistently with the Guidelines, and the U.S. NCP does not have legal authority to adjudicate disputes submitted under this process.

Acceptance of the Specific Instance is in no way an acknowledgement of or determination on the merits of the claims presented, but merely an offer to facilitate neutral, third-party mediation or conciliation to assist the parties in voluntarily, confidentially, and in good faith, reaching a cooperative resolution of their concerns. In mediation, the parties are responsible for arriving at their own solution, and the process is designed to create an environment for cooperative problem solving between the parties. Entering into such mediation or conciliation in no way implies that the parties will reach agreement. (*See, e.g.*, the Procedural Guidance for NCPs under the Guidelines, section I.C.3)

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[1] http://mneguidelines.oecd.org/text

[2] http://www.state.gov/e/eb/oecd/usncp/specificinstance/index.htm

I. Conducting The Initial Assessment

Per the Guidelines procedures, upon receiving a Specific Instance, the U.S. NCP conducts an Initial Assessment with all parties. The Initial Assessment does not determine whether the company has acted consistently with the Guidelines, but rather is a process to determine whether the issues raised are bona fide and merit further examination. Per the Guidelines procedures, the Initial Assessment is conducted based on:

- Identity of the party and its interest in the matter
- Whether the issue is material and substantiated
- Likely link between the enterprise's activities and the issue raised
- Relevance of applicable law and procedures, including court rulings
- Treatment of similar issues in other domestic or international proceedings
- Contribution of the specific issue to the purposes and effectiveness of the Guidelines

Under U.S. NCP procedures, acceptance of the Specific Instance – including a finding that the issues raised by the submitters were bona fide – does not indicate the NCP considered the company to have acted inconsistently with the Guidelines, but rather that the NCP considers it appropriate to facilitate a discussion between the parties of the issues raised. For the company's part, a decision to participate in this process does not imply any prima facie admission of conduct inconsistent with the Guidelines. Mediation or conciliation is a voluntary step, providing an opportunity for a neutral third-party to assist parties to reach their own resolution of concerns. In mediation, the parties are responsible for arriving at their own solution, and the process is designed to create an environment for cooperative problem-solving between the parties. The parties are in control of the outcome of an agreement. Participation is voluntary and no parties would be compelled to violate the law or waive their rights under the law during the NCP process. If the parties can reach an agreement through mediation or other means, the U.S. NCP would consider requests by the parties to follow up on implementation.

The U.S. NCP contributes to the resolution of issues that arise relating to implementation of the Guidelines raised in Specific Instances in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the Guidelines. The U.S. NCP works to facilitate dispute resolution in a

confidential, efficient, and timely manner with an aim toward a forward-looking, good-faith resolution and in accordance with applicable law.

The U.S. NCP believed all parties in this Specific Instance could benefit from a mediation process at the right time, under the auspices of its good offices that could create the conditions for a positive exchange of perspectives, a beneficial examination of the core issues arising under the Guidelines, and potentially a mutually agreeable solution.

II. Outcome of the Initial Assessment

Per the Guidelines, the USNCP took the following points into account when considering whether this Specific Instance merited further consideration.

a. Identity of the party and its interest in the matter

The submitters of this Specific Instance are The United Food & Commercial Workers Local 770 (UFCW), the Los Angeles Alliance for a New Economy (LAANE), the Frente Auténtico del Trabajo (FAT), and Project on Organizing, Development, Education and Research (PODER). UFCW Local 770 is one of the seven UFCW locals representing workers in Bodega Latina (El Super) stores.

Bodega Latina is a majority-owned subsidiary of Mexico-based Grupo Comercial Chedraui, a retailer with over 200 stores in Mexico. Bodega Latina owns and operates 55 El Super retail grocery stores in the United States, including 47 in California, five in Arizona, and three in Nevada. The company employs approximately 5,500 workers in its El Super stores.

The USNCP is satisfied that the submitters are able to provide information about the Specific Instance and have an interest in the issues raised.

b. Whether the issue is material and substantiated

The submitters have provided information in the form of documents alleging repeated violations of both U.S. labor law and the OECD Guidelines on employment and industrial relations. The company has confirmed that there is a serious dispute between itself and seven UFCW locals, covering a variety of serious issues.

The USNCP per its established procedures makes no determination whether a violation of the OECD Guidelines has taken place. It is clear to the USNCP that the allegations of violation of the Guidelines are both material and substantiated.

c. Link between company's activities and issues raised

This is not in dispute.

d. Relevance of applicable law and procedures, including court rulings

Both parties submitted ample descriptions and documentation of the extensive proceedings before the U.S. National Labor Relations Board, U.S. federal courts, and the California Labor Commissioner. In processing the case, the USNCP became aware and the parties validated that the parties are involved in negotiations mediated by the Federal Mediation and Conciliation Service (FMCS), as well.

As the USNCP has noted in previous cases, the existence of parallel procedures in other venues does not, in itself, obviate the usefulness of an offer of mediation by the USNCP. The voluntary OECD Guidelines may extend beyond national law, so in some cases a company's conduct may be inconsistent with the Guidelines even where a company is in full compliance with local and national law. In such a case, the legal and administrative venues available under these laws cannot be expected to deal with the inconsistency with the Guidelines. However, in this Specific Instance, there is no suggestion that such issues are involved. In fact, much of the Specific Instance is couched in the terms of violation of U.S. law and the bulk of the evidence submitted for the Specific Instance takes the form of judicial and administrative orders providing for redress and remedy. These processes continue to date, and new cases between the two sides to the dispute continue to be filed.

The parties are currently in mediation to resolve issues raised in the Specific Instance. Even where judicial and administrative processes exist and are clearly capable of resolving disputes; there may be a legitimate role for the USNCP to play in the offering of mediation. Mediation can provide opportunities which are not readily available in confrontational legal venues for parties to reach solutions to their disputes or to remedy injustices. Mediation may also allow for a quicker and less expensive process, and even afford another alternative to parties without the means to enter into expensive legal processes. Finally, mediation holds out the

hope of establishing a dialogue between parties which may lead to improved relations in the future, something which legal processes rarely accomplish.

However, in this Specific Instance, the USNCP faces a particularly interesting dilemma. The two parties are already involved in FMCS-facilitated mediation on issues involved in this Specific Instance. While the confidentiality rules of the mediation mean that the USNCP cannot be fully aware of the details of the ongoing mediation, the scope of this mediation is such that all the issues in dispute can be covered by the mutual agreement of the parties. Further, the mediators are from the same highly respected institution (the Federal Mediation and Conciliation Service) which the USNCP itself contracts with when it offers mediation. Finally, the parties to the ongoing mediation include representation of all of the relevant labor unions, whereas only one of those unions is a party to this Specific Instance.

e. How similar issues have been, or are being treated in other domestic or international proceedings

The USNCP is not aware of similar proceedings.

f. Whether the consideration of the Specific Instance would contribute to the purposes and effectiveness of the Guidelines

As the parties are already involved in mediated negotiations under the auspices of the FMCS, and given the ongoing and effective actions of multiple instances of the U.S. and California State governments in this case, the USNCP has decided to offer deferred mediation service.

Under USNCP procedures, the acceptance or rejection of the Specific Instance – including a finding that the issues raised by the submitter were *bona fide* – does not indicate the USNCP made any determination whether the company has acted consistently with the Guidelines.

III. Role of the Interagency Working Group and the Mexican NCP

Per procedures, the U.S. NCP has also consulted and received input from its U.S. government Interagency Working Group throughout this process. The Mexican NCP was copied on the original Specific Instance submission. The USNCP consulted with the Mexican NCP throughout the process and accepted leadership of the Specific Instance on the grounds that the operations of the

company implicated in the Specific Instance take place in the United States. The Mexican NCP has been consulted and agrees with the Initial Assessment and offer of deferred mediation.