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Dennis Jones, Executive  
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mrubalcaba

By \_\_\_\_\_, Deputy

Case Number:

34-2008-00000834-CU-MC-GDS

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19 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
20  
21 IN AND FOR THE COUNTY OF SACRAMENTO

22 ASOCIACION DE PRODUCTORES,  
23 EMPACADORES Y EXPORTADORES DE  
24 AGUACATE DE MICHOACÁN,  
25 A.C. ("APEAM") AND ITS MEMBER  
26 GROWERS, PACKERS AND IMPORTERS,

27 Plaintiffs  
Does 1 - 100

v.

A.G. KAWARMURA, SECRETARY OF THE  
CALIFORNIA DEPARTMENT OF FOOD AND  
AGRICULTURE; AND THE CALIFORNIA  
DEPARTMENT OF FOOD AND  
AGRICULTURE.

Defendants  
Does 1 - 100

Case No:

**BY FAX**

**COMPLAINT FOR DAMAGES  
BASED ON FAILURE TO  
DISCHARGE MANDATORY DUTY**

**[Cal. Gov. Code § 815.6; Cal. Food &  
Agric. Code § 404; Cal. Food & Agric.  
Code § 6301.1; 7 U.S.C. § 7701 - 7772,  
et seq.; 7 C.F.R. 319.56-2ff; 3 C.C.R.  
3161]**

I

**PARTIES**

- 1 Plaintiff Asociación de Productores, Empacadores y Exportadores de Aguacate de Michoacán, A.C. (“APEAM”) is an association of growers, packers and exporters of Hass avocados grown in Michoacán, Mexico.
2. APEAM, an entity created under the laws of Mexico, consists of several thousand members who reside and do business in California and Mexico.
3. Defendant California Department of Food and Agriculture (“CDFA”) is sued as an agency of the state of California.
4. Defendant A.G. KAWARMURA is the Secretary of the California Department of Food and Agriculture (“CDFA”) who is sued in his official capacity. At all times mentioned herein, defendant A.G. KAWARMURA was an employee of the defendant the California Department of Food and Agriculture and in doing the acts hereinafter described, acted within the course and scope of his employment.
5. Plaintiffs have been harmed by CDFAs’ challenged conduct and actions to it and its members’ substantial economic detriment.
6. Plaintiff APEAM and its members have incurred in excess of \$2 million in “out-of-pocket” cost and expense including, but not limited to, pre-February 2007 expenditures to promote the opening of the California market to Haas avocados from Mexico. Said expenditures include advertising and other marketing costs directly incurred by APEAM’s members and the entity itself to prepare for transport and import of its products into the California market.
7. APEAM has also incurred other costs and damages attributable to the rejection of shipments of avocados illegally diverted from commerce, fumigated or rejected by the CDFAs.
8. APEAM and its members have lost profits of at least \$4 million as well as a reduction in market share due to the unlawful inspection of trucks in transport of international commerce.
9. Plaintiffs have all suffered damages attributable to CDFAs’ challenged actions in lost sales and disruption of contracts and commercial relationships with wholesalers, retailers and avocado

1 consumers in California in an amount in excess of the jurisdictional limits of this court to be  
2 proven at trial.

## 3 II

### 4 PRELIMINARY ALLEGATIONS

#### 5 A. The Operable Facts

- 6 10. On February 1, 2007 the first commercial shipments of Haas avocados from Michoacán Mexico  
7 were allowed to enter California. After ten years of federal rulemaking and a ninety-four (94)  
8 year exclusion from the California market the growers of seventy percent (70%) of the world's  
9 avocado crop were authorized (under a detailed federal statutory and regulatory authorization) to  
10 transport fruit into California. In response CDFA implemented 1) a pattern and practice of  
11 unlawful inspections and rejected dozens of truckloads of Mexican avocados previously  
12 inspected and approved by federal officials (see, 7 CFR 319.56-2ff); and, 2) engaged in other  
13 actions intended to delay or stop the flow of commerce. *Id.*, 7 CFR 319 56-2ff, attached hereto as  
14 Exhibit "A".
- 15 11. On July 18, 2007, after six (6) months of harassment nurtured by political pressure of California  
16 avocado growers through the California Avocado Commission ("CAC"), the CDFA finally  
17 reversed its practice in response to a Third Party Complaint against it by APEAM, et al. in a  
18 federal rulemaking action filed by the CAC against the United States Department of Food and  
19 Agriculture ("USDA")<sup>1</sup> stating that "commercial produce shipments for consumption present a  
20 low-risk pathway for the introduction of armored scales." *See, California Department of Food*  
21 *and Agriculture Pest Exclusion Advisory No 17-2007* dated July 18, 2007, attached hereto as  
22 Exhibit "B".
- 23 12. Thereafter, CAC and USDA reached a settlement, and on September 5, 2007 Judge Percy  
24 Anderson of the United States District Court for the Central District of California dismissed the  
25

26  
27 <sup>1</sup> Richard Shade, Scott McIntyre, and The California Avocado Commission, v Mike Johanns, Secretary of The United States Department of Agriculture, The United States Department of Agriculture, And Ronald DeHaven, Administrator of the Animal and Plant Health Inspection Service, U S District Court, Central District of California, Western Division at Los Angeles, case no CV-07-2548

1 entire action without prejudice to APEAM's subsequent action to recover its damages and obtain  
2 other appropriate relief. *See, Order*, attached hereto as Exhibit "C".

- 3 13. The Shade v. Johanns litigation, fn1, resulted in no change to the federal regulatory standards  
4 governing the transport of commercially grown Haas avocados from Mexico into California.  
5 14. Plaintiffs named herein have suffered damages attributable to the conduct of Defendants in an  
6 amount in excess of the jurisdictional limits of this court to be proven at trial.

7 **A. The Controlling Legal Framework**

8 **1. International Law**

- 9 15. The United States has accepted international obligations on the governmental use of measures  
10 such as inspections and quarantine measures to protect crops. Such measures are known as  
11 "phytosanitary" measures, which includes any measure applied by a national or state government  
12 to protect plant life or health from risks arising from the entry, establishment or spread of pests  
13 or diseases.  
14 16. The United States has entered into the Agreement on the Application of Sanitary and  
15 Phytosanitary Measures (hereinafter referred to as the "SPS Agreement") administered by the  
16 World Trade Organization (the "WTO"). Congress approved the SPS Agreement in the Uruguay  
17 Round Agreements Act, Pub. L. No. 103-465, §101(d)(2), 108 Stat. 4809 (1994), 19 U.S.C. §  
18 3511(d)(2).  
19 17. The United States, Canada and Mexico have entered into the North American Free Trade  
20 Agreement ("NAFTA") which contains a Chapter on Agriculture and Sanitary and Phytosanitary  
21 Measures. Congress has approved the NAFTA in the North American Free Trade Agreement  
22 Implementation Act of 1993, Pub L. No. 103-182, § 101, 107 Stat.2057 (1993).  
23 18. Purported SPS measures are often illegitimately used to shield domestic producers from  
24 economic competition. The SPS Agreement provides for international disciplines on the use of  
25 phytosanitary measures to avoid protectionism of the kind practiced by the CDFA.  
26 19. The SPS Agreement requires inter alia that phytosanitary measures: (1) be based on scientific  
27 principles and an appropriate risk assessment and not be maintained without sufficient scientific

1 evidence, (2) not arbitrarily or unjustifiably discriminate between WTO member countries where  
2 identical or similar conditions prevail, including between their own territory and other member  
3 countries such as Mexico; and (3) not be applied in a manner which would constitute a disguised  
4 restriction on international trade. SPS Agreement, Articles 2.2, 2.3 and 5.1.

- 5 20. The NAFTA provisions for phytosanitary measures are very similar to those of the SPS  
6 Agreement. The NAFTA applies to phytosanitary measures that may, directly or indirectly,  
7 affect trade between the Parties and requires that phytosanitary measures: (1) be based on  
8 scientific principles and an appropriate risk assessment and not be maintained without a  
9 scientific basis; (2) not arbitrarily or unjustifiably discriminate between its goods and like goods  
10 of another Party where identical or similar conditions prevail; and (3) not be applied with a view  
11 to, or with the effect of, creating a disguised restriction on trade between the Parties. NAFTA  
12 Article 7, Section B, para. 3, 4, and 6.
- 13 21. The CDFA inspections, fumigations and rejections of Mexican avocados were not based on  
14 scientific evidence or scientific principles and therefore, are inconsistent with the SPS  
15 Agreement and the NAFTA. In fact, the existing scientific evidence supports the policy of the  
16 United States Department of Food & Agriculture (“USDA”) Animal and Plant Health Inspection  
17 Service (“APHIS”) that armored scales found on commercial fruit do not pose a risk to domestic  
18 crops.
- 19 22. The APHIS pest risk assessment entitled “Phytosanitary Risks Associated with Armored Scales  
20 in Commercial Shipments of Fruit for Consumption to the United States” concludes that  
21 “commercially produced fruit shipped without leaves, stems, or contaminants is not a significant  
22 pathway for introduction [of armored scales] because of biological factors related to both the pest  
23 and host.”
- 24 23. The report of a scientific panel formed by APHIS and comprised of 22 participants (including  
25 regulatory and scale experts from APHIS, CDFA, Agricultural Research Service, Mexico,  
26 Argentina, University of California (Davis and Riverside), University of Florida, and Auburn  
27 University) generally agreed that the risk of introducing exotic armored scales on commercial

1 shipments of fruit imported for consumption was low. The specific issue of armored scales on  
2 avocados from Mexico was used frequently to illustrate discussions.

3 24. The CDFA actions on armored scales were not based on any risk assessment. The CDFA simply  
4 uses a list of insects identified in California and takes action on insects that are not on such a list.  
5 CDFA's failure to base actions on a risk assessment is inconsistent with the SPS Agreement, the  
6 NAFTA and United States statutes and regulations promulgated pursuant thereto.

7 25. The CDFA actions regarding imported Mexican avocados were arbitrarily and unjustifiably  
8 discriminatory. California avocado orchards are and have been for many years infested with  
9 armored scales. However, CDFA has never stopped any commercial shipment of California  
10 avocados infested with armored scales from going to a different county or state or required any  
11 such shipment to be fumigated or diverted from the channels of trade.

12 26. CDFA lacks any scientific or other justification for treating California avocados infested with  
13 armored scales in a different manner than Mexican avocados. Its actions are inconsistent with the  
14 SPS Agreement and the NAFTA.

## 15 **2. Binding Federal Statutory Law**

16 27. The Federal Plant Protection Act of 2000 ("FPPA") was signed into law on June 20, 2000 [7  
17 USC §§ 7701 – 7772 et seq. (2000)] and operated to repeal the Plant Quarantine Act of 1912. *Id.*,  
18 § 7758 (a) (b).

19 28. The FPPA provides the Secretary of the United States Department of Agriculture ("USDA")  
20 with authority to regulate the import and export of plant pests, including agricultural products  
21 carrying plant pests. *Id.*, § 7711 (a.) The FPPA also states that the Secretary of Agriculture shall  
22 ensure the phytosanitary decisions involving import and export be "consistent with applicable  
23 international agreements." *Id.*, § 7751 (e). The act grants the Secretary the discretion to  
24 determine how and when to improve regulations to impose limitations on imports "to the extent  
25 practicable" to control the risk of pests and disease dissemination. *Id.*, § 7701 (3) and § 7711 (a)  
26 (2000).

27

1           **3.     Applicable Federal Regulation**

2   29   The validly promulgated federal regulation at issue specifically authorizes and regulates the  
3       movement of Haas avocados from Mexico into all states in the United States including  
4       California. The Code of Federal Regulations at 7 CFR § 319.56-2ff, et al. provides in clear and  
5       unambiguous terms as follows:

6       *Between January 31, 2005, and January 31, 2007, the avocados<sup>2</sup> may be imported into and*  
7       *distributed in all States except California, Florida, Hawaii, Puerto Rico, and U S*  
8       *Territories. After January 31, 2007, the avocados may be imported into and distributed*  
9       *in all States, but not Puerto Rico or any U S Territory. 7 CFR § 319 56-2ff (a) (2)*

10       (Emphasis added), attached hereto as Exhibit “A”.

11   30.   The Mexican Haas avocado regulations, 7 CFR § 319.56-2ff, sets forth numerous safeguards,  
12       procedures, inspection requirements and protocol for USDA-APHIS to undertake to ensure that  
13       imported avocados from Mexico satisfy plant safety standards. See, 7 CFR §319.56-2ff,  
14       subsections (c), (d), (e), (f), (g) and (h), Exhibit “A” hereto; Federal Register citations  
15       concerning part 319 policy statement, 61 FR 24433, May 15, 1996; 66 FR 38137, July 23, 2001;  
16       and FR 45921, August 31, 2001.

17           **4.     Binding State Law**

18   31.   California Food & Agriculture Code § 404 provides that: “The department *shall* execute the  
19       provisions of this code, except as otherwise provided, and of other laws administered by it”  
20       (California Food & Agriculture Code § 404. italics added).

21   32.   California Food & Agriculture Code § 6301.1 provides that: “The secretary shall adopt, by  
22       reference, by regulation, those federal quarantine regulations and any subsequent amendments in  
23       Parts 301 to 369, inclusive, of Title 7 of the Code of Federal Regulations” (California Food &  
24       Agriculture Code § 6301.1, italics added).

25           **5.     Applicable State Regulation**

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<sup>2</sup> “Haas” avocados from the Michoacán region of Mexico. See, 7 CFR § 319 56-2ff, Ibid at § (a) (1)

1 33. California Code of Regulations § 3161 provides that: “The Secretary of the Department of Food  
2 and Agriculture has determined that violations of federal plant quarantine regulations pose a  
3 threat to the agricultural industry of this State and hereby adopts, through reference, the  
4 regulations in the Code of Federal Regulations, Title 7, Parts 301 through 369, inclusive, and any  
5 subsequent amendments to those regulations” (3 CCR § 3161).

6 **III**

7 **PROCEDURAL STATUS**

8 34. Since the dismissal of the federal case brought by CAC settlement discussions have transpired  
9 between Plaintiffs counsel and Defendants in an effort to avoid further litigation.

10 35. The instant litigation is commenced by Plaintiffs to obtain reimbursement for damages suffered  
11 attributable to the conduct of Defendants. Although CDFA has reversed its policy since the  
12 Third Party Complaint was filed against it Plaintiffs seek damages for the monetary loss suffered  
13 from the wrongful exclusion of Mexican grown Haas avocados from the marketplace, lost  
14 profits, and reimbursement of its out-of-pocket expense.

15 36. Plaintiffs have complied with the requirements of California Government Code §§ 900 et seq.

16 37. A Government Claims Form was submitted to the Government Claims Board on January 4,  
17 2007.

18 38. Plaintiffs’ claim has not yet been acted upon by the government.

19 **IV**

20 **LEGAL CLAIMS**

21 **For A First Claim - Violation of California State Law (Violation of Cal. Food & Agric. Code §**  
22 **404 and § 6301.1, California Code of Regulations § 3161; Failure to Discharge a Mandatory**  
23 **Duty Based On Cal. Gov. Code § 815.6)**

24 39. Plaintiffs reallege by reference into this Claim the allegations of paragraphs 1 through 38 as if set  
25 forth in this Claim in full.

26 40. California Gov. Code § 815.6 provides as follows: “Where a public entity is under a mandatory  
27 duty imposed by an enactment that is designed to protect against the risk of a particular kind of



1 injury, the public entity is liable for an injury of that kind proximately caused by its failure to  
2 discharge the duty unless the public entity establishes that it exercised reasonable diligence to  
3 discharge the duty”. California Gov. Code § 815.6

4 41. California Food & Agriculture Code § 404 specifically provides that: “The department *shall*  
5 execute the provisions of this code, except as otherwise provided, and of other laws administered  
6 by it” (California Food & Agriculture Code § 404. italics added).

7 42. California Food & Agriculture Code § 6301.1 provides further that: “The secretary shall adopt,  
8 by reference, by regulation, those federal quarantine regulations and any subsequent amendments  
9 in Parts 301 to 369, inclusive, of Title 7 of the Code of Federal Regulations” (California Food &  
10 Agriculture Code § 6301.1, italics added).

11 43. CCR § 3161 provides that: “the Secretary of the Department of Food and Agriculture has  
12 determined that violations of federal plant quarantine regulations pose a threat to the agricultural  
13 industry of this State and hereby adopts, through reference, the regulations in the Code of  
14 Federal Regulations, Title 7, Parts 301 through 369, inclusive, and any subsequent amendments  
15 to those regulations” (3 CCR 3161).

16 44. Validly promulgated federal regulation, adopted and incorporated by the aforesaid direct  
17 reference into binding California state law, regulates the movement of Haas avocados from  
18 Mexico into California in accordance with federal law contained in the Code of Federal  
19 Regulations at 7 CFR § 319.56-2ff as adopted by the Cal. Food & Agric. Code as § 6301.1.

20 45. 7 CFR § 319.56-2ff et al. provides in clear and unambiguous terms as follows:

21 *Between January 31, 2005, and January 31, 2007, the avocados<sup>3</sup> may be imported*  
22 *into and distributed in all States except California, Florida, Hawaii, Puerto Rico, and*  
23 *U.S. Territories. After January 31, 2007, the avocados may be imported into and*  
24 *distributed in all States, but not Puerto Rico or any U.S. Territory 7 CFR § 319.56-*  
25 *2ff (a) (2).*

26  
27  

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<sup>3</sup> “Haas” avocados from the Michoacán region of Mexico See, 7 CFR § 319 56-2ff, Ibid at § (a) (1)

- 1 46. Plaintiffs allege that the above referenced statutory mandates constitute a mandatory duty  
2 pursuant to state law (Cal. Food & Agric. Code § 404 and § 6301.1) requiring Defendants to  
3 comply with and enforce the provisions of 7 CFR § 319.56-2ff and preventing Defendants from  
4 creating procedures contrary thereto.
- 5 47. The Federal Plant Protection Act of 2000 (“FPPA”) was signed into law on June 20, 2000 [7  
6 USC §§ 7701 – 7772 et seq. (2000)] and operated to repeal the Plant Quarantine Act of 1912. Id.,  
7 § 7758 (a) (b).
- 8 48. Moreover, 7 USC § 7701 (5) provides that “the smooth movement of enterable plants, plant  
9 products, biological control organisms, or other articles into, out of, or within the United States is  
10 vital to the United State's economy and should be facilitated to the extent possible”.
- 11 49. In contravention of the binding comprehensive federal regulation, adopted by specific reference  
12 into California state law, which regulates the importation of Haas avocados from Mexico into  
13 California CDFA imposed additional unauthorized restrictions to exclude Mexican avocados  
14 from California.
- 15 50. CDFA’s actions disrupted the delivery and sale of Haas avocados into California and halted  
16 truckload shipments from a contracted two thousand eight hundred (2800) truckloads during the  
17 four-month period between February 1, 2007 and July 18, 2007 to a mere trickle.
- 18 51. CDFA’s six (6) month disruption of the movement of Michoacán grown Haas avocados from  
19 Mexico into the lucrative \$350 million a year California market has caused significant economic  
20 injury to Plaintiffs.
- 21 52. CDFA's conduct as aforesaid is the actual and proximate cause of economic damages (“out of  
22 pocket” costs, lost sales and lost profits) to Plaintiffs APEAM et al., in an amount to be proven at  
23 trial in excess of the jurisdictional limits of this court.

24 **For A Second Claim – Federal Preemption (Statutory)**

- 25 53. Plaintiffs reallege by reference into this Second Claim the allegations of paragraphs 1 through 52  
26 as if set forth in this Second Claim in full.
- 27 54. CDFA's policy and practice of rejecting, fumigating and re-inspecting Haas avocados with

1 armored scales imported from Michoacán Mexico violates the federal preemption mandate  
2 contained in 7 U.S.C. § 7701, et seq., § 7712 and § 7756 et seq. (hereafter “Federal Plant  
3 Protection Act” or “FPPA”).

4 55. The Federal Plant Protection Act of 2000 (“FPPA”) was signed into law on June 20, 2000 [7  
5 U.S.C. §§ 7701 – 7772 (2000)] and it repealed the Plant Quarantine Act of 1912. See, Id., § 7758  
6 (a) (b).

7 56. The FPPA provides the Secretary of the United States Department of Agriculture (“USDA”)   
8 with authority to regulate the import and export of agricultural products carrying plant pests. See,   
9 Id., § 7711 (a). The FPPA also states that the Secretary of Agriculture shall ensure that   
10 phytosanitary decisions involving import and export be “consistent with applicable international   
11 agreements.” Id., § 7751 (e). The act grants the Secretary the discretion to determine how and   
12 when to impose limitations on imports “to the extent practicable” to control the risk of pests and   
13 disease dissemination. Id., § 7701 (3) and § 7711 (a) (2000).

14 57. Pursuant to federal statute and regulation the Secretary of USDA, through its agency, APHIS, is   
15 charged to evaluate and classify the actionable pests in interstate and foreign commerce. The   
16 comprehensive Federal statutory and regulatory scheme applicable herein to the trade of   
17 Mexican avocados precludes CDFA from creating additional restrictions on the items in   
18 interstate and foreign commerce.

19 58. The CDFA's conduct of disrupting the movement of Haas avocados between Mexico and   
20 California based upon its own additional standards violates the specific provisions of 7 U.S.C. §   
21 7701 et seq. and the federal regulations for Mexican avocados promulgated pursuant thereto.   
22 Armored scales are found throughout California agriculture; they are not classified as   
23 “actionable” pests under federal regulation and are by California’s own admission “minor pests”.

24 59. CDFA's conduct as aforesaid is the actual and proximate cause of economic damages (“out of   
25 pocket”, lost sales and lost profits) to Plaintiffs APEAM et al., in an amount to be proven at trial   
26 in excess of the jurisdictional limits of this court.

27

1 **For A Third Claim – Federal Preemption (Regulatory)**

2 60. Plaintiffs reallege by reference into this Third Claim the allegations of paragraphs 1 through 59  
3 above as if set forth in this Third Claim in full.

4 61. CDFA's policy and practice of requiring the reinspection, fumigation and rejection of Haas  
5 avocados from Mexico (with "armored scales") violates the validly promulgated federal  
6 regulation found at 7 C.F.R. § 319.56-2ff.

7 62. The validly promulgated federal regulation at issue specifically authorizes and regulates the  
8 movement of Haas avocados from Mexico into all states in the United States including  
9 California. The Code of Federal Regulations at 7 C.F.R. § 319.56-2ff, et al. provides in clear and  
10 unambiguous terms as follows:

11 *Between January 31, 2005, and January 31, 2007, the avocados may be imported into and*  
12 *distributed in all States except California, Florida, Hawaii, Puerto Rico, and U S*  
13 *Territories After January 31, 2007, the avocados may be imported into and distributed*  
14 *in all States, but not Puerto Rico or any U S Territory 7 C F R. § 319 56-2ff (a) (2)*  
15 (Emphasis added), attached hereto as Exhibit "A".

16 63. The Mexican Hass avocado regulations specifically set forth numerous safeguards, procedures,  
17 inspection requirements and protocol for USDA-APHIS inspectors to undertake to ensure that  
18 imported avocados from Mexico satisfy plant safety standards. See, 7 C.F.R. § 319.56-2ff,  
19 subsections (c), (d), (e), (f), (g) and (h), Exhibit "A" hereto; See also, Federal Register citations  
20 concerning § 319 policy statement, 61 FR 24433, May 15, 1996; 66 FR 38137, July 23, 2001;  
21 and FR 45921, August 31, 2001.

22 64. CDFA's actions violate clear federal law to the substantial economic detriment of the Mexican  
23 avocado industry which has strictly adhered to the federal requirements governing the export of  
24 its products into the United States, including California.

25 65. Insodoing CDFA has succumbed to political pressure and put itself "above the law". Moreover,  
26 CDFA has imposed its own restrictions on competitive international trade without even  
27 undertaking a scientific risk assessment (as required) to demonstrate the threat it implicitly found

1 that “armored scales” presented to the California avocado crop.

2 66. CDFA on information and belief ceased disruption of the Mexican avocado trade after more  
3 than six (6) months of reinspection, rejection and total disruption of the market.

4 67. CDFA’s challenged actions have caused severe disruption to the Mexican avocado industry, its  
5 representative organization APEAM’s grower, packer and exporter members in an amount in  
6 excess of the jurisdictional limits of this court.

7 **For A Fourth Claim – Gross Negligence**

8 68. Plaintiffs reallege by reference into this Fourth Claim the allegations of paragraphs 1 through 67  
9 above as if set forth in this Fourth Claim in full.

10 69. California Food & Agriculture Code § 6301.1 provides for the adoption by the State of  
11 California of Parts 301 to 369, inclusive, of Title 7 of the Code of Federal Regulations.

12 70. California Food & Agriculture Code § 6301.1 sets forth a mandatory duty that Defendant CDFA  
13 adopt 7 CFR 319.56-2ff. See, also Cal. Food & Agric. Code § 404.

14 71. CDFA has a duty of due care to foreseeable avocado importers to implement policy in  
15 compliance with federal and state law.

16 72. Defendants breached that duty by failing to conduct any risk assessment or to collect and analyze  
17 evidence upon which to justify its unilateral violation of state and federal law designed to  
18 regulate the marketplace.

19 73. The negligent breach of applicable laws as aforesaid, by CDFA’s negligent and reckless conduct  
20 gives rise to a cause of action for injury resulting in economic damage to Plaintiffs as authorized  
21 under Cal. Gov. Code § 815.6.

22 74. Defendant CDFA’s failure to use reasonable diligence to discharge its mandatory duty as  
23 required by the provisions of Cal. Food & Agric. Code § 404 and § 6301.1, proximately caused  
24 foreseeable economic damage (“out of pocket” costs, lost sales and lost profits) to be inflicted  
25 upon Plaintiffs APEAM et al., in an amount to be proven at trial in excess of the jurisdictional  
26 limits of this court.

1 **For A Fifth Claim – Violation of Commerce Clause Article I, § 8**

- 2 75. Plaintiffs reallege by reference into this Fifth Claim the allegations of paragraphs 1 through 74  
3 above as if set forth in this Fifth Claim in full.
- 4 76. Defendant's practice of disrupting and inspecting truckloads of Haas avocados from Mexico is  
5 expressly preempted by federal law and regulation under 7 U.S.C. § 7701 et seq. and 7 C.F.R. §  
6 319.56-2ff.
- 7 77. Aforesaid practice of CDFA officials interferes with the movement of Haas avocados between  
8 Michoacán, Mexico and California and constitutes an unconstitutional impact by CDFA on  
9 foreign commerce which has been preempted by an act of Congress.

10 **For A Sixth Claim – Declaratory Relief**

- 11 78. Plaintiffs reallege by reference into this Sixth Claim the allegations of paragraphs 1 through 77  
12 above as if set forth in this Sixth Claim in full.
- 13 79. Plaintiffs hereby allege that an actual controversy has arisen and presently exists regarding  
14 whether the CDFA may legally conduct routine inspections of specified international commerce  
15 which commerce has been previously inspected at border crossings by responsible federal  
16 authorities under duty to regulate the movement of such commerce, Haas avocados from  
17 Michoacán Mexico, to the point of its final destination in commerce.

18  
19 **PRAYER FOR RELIEF**

20  
21 WHEREFORE, Plaintiffs pray that this Honorable Court grant the following relief:

- 22 1. Issue a declaratory judgment that defendant CDFA's actions violate federal statutes and regulations  
23 and the Supremacy Clause of the United States Constitution;
- 24 2. Assume jurisdiction of this case;
- 25 3. Award general and special damages to Plaintiffs in an amount to fairly compensate them for  
26 economic injuries attributable to the conduct of the Defendants;
- 27 4. Award to Plaintiffs its costs;

- 1 5. Award to Plaintiffs its reasonable attorneys' fees; and,  
2 6. Award such further relief that the Court shall determine appropriate and in accordance with law.

3  
4 Dated: January 10, 2008

5  
6 Respectfully Submitted,


7  
8 LAW OFFICES OF DALE E. McNIEL

9 Dale E. McNiel

10  
11 ELLIS, COLEMAN, POIRIER, LAVOIE, & STEINHEIMER LLP

12 Mark E. Ellis

13  
14 LAW OFFICES OF RICHARD H. HART, JR.

15  
16 

17 Richard H. Hart, Jr.