

1  
2  
3 **UNITED STATES DISTRICT COURT**  
4 **FOR THE DISTRICT OF COLUMBIA**

5 **ORGANIC TRADE ASSOCIATION**

6 **Plaintiff,**

7 **v.**

8 **UNITED STATES DEPARTMENT OF**  
9 **AGRICULTURE, et al,**

10 **Defendants.**

**Civil Case No. 1:17-cv-01875-RMC**

**DECLARATION OF**  
**KYLA SMITH, ACCREDITED**  
**CERTIFIER'S ASSOCIATION, IN**  
**SUPPORT OF PLAINTIFF'S FIRST**  
**AMENDED COMPLAINT FOR**  
**DECLARATORY AND**  
**INJUNCTIVE RELIEF**

11  
12  
13  
14 Pursuant to 28 U.S.C. § 1746 I, Kyla Smith, declare:

- 15
- 16 1. I am the Board of Directors Chair of the Accredited Certifiers Association (“ACA”), a  
17 member of the Organic Trade Association. I previously submitted a declaration in this  
18 case and now supplement that statement.
  - 19 2. Following an audit, in 2010 the Inspector General of the Department of Agriculture  
20 determined the “outdoor access” requirement for organic poultry operations was  
21 inconsistently applied by federal organic certifying agents. This finding confirmed what  
22 our members had reported to the National Organic Program for many years.
  - 23 3. The necessary clarifications to the rules were continuously worked on by the National  
24 Organic Standards Board (“NOSB”) after the audit’s findings and the ACA filed  
25 comments and testified multiple times to assist the board’s deliberations on this subject.  
26 The board’s recommendations became the basis of the Organic Livestock Production  
Practices rulemaking.<sup>1</sup> (“OLPP”)

27 <sup>1</sup>*Organic Livestock and Poultry Practices*. 82 Fed. Reg. at 7042-92 (January 19, 2017).  
28

- 1 4. At the time the OLPP was published in January 2017 the Secretary said, “Based on  
2 recommendations from the Office of Inspector General and the NOSB, AMS determined  
3 that the current USDA organic regulations covering livestock care and production  
4 practices and living conditions needed additional specificity and clarity to better ensure  
5 consistent compliance by certified organic operations and to provide for more effective  
6 administration of the National Organic Program by AMS.” 82 Fed. Reg. at 7042; *see also*  
7 7044 (“rulemaking...consistent with recommendations provided by USDA's Office of  
8 Inspector General and nine separate recommendations from the NOSB.”)
- 9 5. The OLPP was a necessary clarification of the federal rules governing organic livestock  
10 production practices in order to ensure uniform, national organic standards as well as  
11 consistent compliance assessments by federally accredited certifying agents.
- 12 6. Delay or withdrawal of the OLPP harms and will continue to harm ACA members by  
13 depriving members of the clarifications contained in the final rule and the resultant  
14 inconsistent certification outcomes.
- 15 7. Delay or withdrawal of the OLPP harms ACA members because without the OLPP’s  
16 clarifications, the meaning of the word “organic” and the USDA organic seal persists in  
17 being inconsistently presented to consumers, something Congress sought to end with the  
18 passage of the Organic Foods Production Act and adoption of verification procedures that  
19 are implemented by accredited certifying agents.<sup>2</sup>
- 20 8. Accredited certifying agents (ACA members) are in the business of ensuring the efficacy  
21 of the USDA organic seal and are harmed when consumer perception and trust of the  
22 USDA seal is downgraded or diminished.
- 23 9. An example of the harm caused to the USDA’s organic seal, and consumer confusion is a  
24 recent class action filing against a certified organic egg producer and distributor. The  
25 case is based in large part on allegations of inadequate outdoor access for poultry which  
26 would have been resolved by the OLPP. (*Gibson v. Wal-Mart and Cal-Maine Foods*,  
27 3:18-cv-00134, N.D. Ca.)

---

28 <sup>2</sup> 7 U.S.C. §6505(a)(2) (USDA standards and seal; authorizing incorporation of USDA seal into organic marketing information)

- 1 10. Further delay in implementing the OLPP clarifications increases the risk of civil liability  
2 for ACA members, as the civil litigants like those in the *Gibson* case may choose to  
3 attack the certifying agents as well as the certified organic operation.
- 4 11. ACA members each must “fully comply with the terms and conditions” of the National  
5 Organic Program. *See* 7 U.S.C. §6515(f). The failure to allow the OLPP to become  
6 effective interferes with ACA members’ efforts to fulfill this statutory mission because it  
7 reinstates the very inconsistency the Inspector General determined required remediation.
- 8 12. The ACA works closely with the NOSB to develop and refine recommendations to the  
9 Secretary. One of the fifteen seats on the NOSB is held by an accredited certifying agent.  
10 The seat is currently held by an ACA member. The expertise ACA’s members provide  
11 includes guidance on the effective dates of compliance because our members must train  
12 their inspectors in the new rule’s provisions to effectuate uniform compliance.
- 13 13. In this instance the ACA formed a working group of members to vet the Notice of  
14 Proposed Rulemaking issued in April 2016 for consistency, as well as verification and  
15 inspection issues that might require adjustment. ACA members expended resources to  
16 assist the board and the USDA and to be ready to conduct inspections under the new rule.  
17 ACA members continue to expend resources in support of the OLPP.
- 18 14. The NOP has not consulted the NOSB on any of the rulemakings the Secretary has  
19 undertaken since the OLPP was published in January 2017. If the NOSB is not consulted  
20 prior to rulemaking by the Secretary, the ACA’s members are cut off from the main  
21 artery of communication to the Secretary and deprived of their opportunity to vet issues  
22 with the NOSB.
- 23 15. Under the rulemakings that involved no notice and comment to the public that are  
24 challenged in the OTA lawsuit, the ACA members are harmed by the denial of the right  
25 to directly participate in the rulemaking.
- 26 16. Similarly, when the USDA opened a rulemaking and presented four procedural options  
27 and nothing more, there was insufficient information to determine what the USDA sought  
28

1 by the rulemaking.<sup>3</sup> The proposed rulemaking did not identify any deficiencies in the  
2 OLPP or identify grounds in support of the options that could be the basis of a response.

3 17. I repeat one part of my prior declaration in this case: Withdrawing this final rule or  
4 continuing to delay its implementation harms and will continue to harm ACA and its  
5 members and could lead to profound disruption to the marketplace for certified organic  
6 products by irretrievably damaging consumer trust in the USDA organic seal.

7  
8 I declare under penalty of perjury that the foregoing is true and correct.

9 Executed this 13th day of February 2018.

10  
11 

12 \_\_\_\_\_  
13 Kyla Smith  
14 Accredited Certifiers Association

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27 <sup>3</sup> 82 Fed. Reg. 21742 (May 10, 2017).  
28