



request. The other party shall have no right to reply to the response; however, the Judge or the Judicial Officer, in their discretion, may order that a reply be filed.” In this case, the Administrator replied to MICI’s response, despite the fact that, to MICI’s knowledge, the Judge has issued no order that a reply be filed. The Administrator did not seek leave to file his reply, nor did he acknowledge the prohibition in section 1.143(d) in any way.

Fairness and judicial economy each demand that section 1.143(d) of the Uniform Rules of Practice be enforced and the Administrator’s reply be stricken. Under the Uniform Rules of Practice, section 1.136, the Administrator had 20 days after the service of the complaint to file an answer. The Administrator chose to file a motion to dismiss in lieu of an answer.<sup>1</sup> In his motion to dismiss, the Administrator chose to include one paragraph of argument. MICI filed its opposition to the motion within the 20 days allowed under the Uniform Rules of Practice. The Administrator should not now, more than 30 days after MICI filed its opposition to the motion to dismiss, be permitted to reply to MICI’s opposition. The Administrator’s reply is barred under the Uniform Rules of Practice for good reason. The Administrator was the moving party, and had a full and fair opportunity to set forth his legal arguments for dismissal in his motion. MICI should not be burdened with a constant stream of pleadings that may contain new arguments to which it must respond.

The Organic Foods Production Act calls upon the Secretary to establish an expedited administrative appeals procedure. 7 U.S.C. § 6520. Under the Uniform Rules, the parties are presumed to have adequately developed the issues in the motion and response. This administrative appeal will be neither expedited nor fair if the Administrator is permitted to

submit pleadings in complete disregard of deadlines and prohibitions under the Uniform Rules of Practice.

**B. If the Administrator’s Reply to MICI’s Opposition is Allowed in the Record, MICI Should Be Given an Opportunity to Submit a Surreply and Have it Considered By the Judge**

If the Administrator’s response to MICI’s opposition is allowed to remain in the record, MICI seeks leave to file this surreply. In comparison to the single paragraph of argument contained in his motion to dismiss, the Administrator’s reply to MICI’s opposition contains some nine pages of argument. If the Administrator’s reply will receive consideration, MICI is entitled to an opportunity to respond to the new arguments raised. MICI’s surreply is set forth below.

**C. The Accredited Status of a Certifying Agent is Not Cause to Deny it Statutory and Constitutional Rights Guaranteed to All Persons**

The Administrator variously asserts that accredited certifying agents (“ACA’s”) are agents of the Secretary because they are delegees or “subdelegees” of the Secretary, or licensees of the Secretary. However, nothing in any pleading filed by the Administrator persuasively demonstrates that accredited certifying agents are not “persons” within the meaning of the Act. Because accredited certifying agents are “persons” under the Act, the Secretary has a duty to provide an administrative appeals process to them for decisions made by the Secretary that are either (1) adverse to the certifying agent or (2) in violation of the organic certification program established under the Act. 7 U.S.C. § 6520(a).

The Administrator’s arguments that ACA’s are merely agents of the Secretary fails for several reasons. The term “agency” refers to, “[T]he fiduciary relation which results from the

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<sup>1</sup> MICI has already questioned whether a motion to dismiss on the pleadings is permissible under the Uniform Rules of Practice. See 7 C.F.R. § 1.143(b); Complainant's Opposition to Respondent's Motion to Dismiss at p. 8, fn 3.

manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.” Restatement (Second) of Agency § 1 (1957); *see also Meyer v. Holley*, 123 S. Ct. 824, 829 (2003) (noting that an agency relationship requires the manifestation of consent by both parties that one party will act on the other party’s behalf).

MICI is not in an agency relationship with USDA because USDA has no authority to certify producers and handlers under the OFPA. Identifying an analogy that corresponds in every respect with the role of accredited certifying agents is difficult. The Organic Foods Production Act (OFPA or “the Act”) established a unique public-private partnership. Under the Act, private entities have an independent role in policing organic claims. This role is not subordinate to the government’s role. The Act and regulations both make it clear that it is the ACA who must agree to the producer or handler’s organic system plan, not the Secretary. *See* 7 U.S.C. §§ 6502(13) “Organic plan” and 6513(a); 7 C.F.R § 205.201(1) (providing that an ACA must determine that a producer’s organic plan is in compliance with the National Organic Program). Thus, accredited certifying agents are not acting “on behalf” of the agency, nor are they exercising power delegated by the Secretary.

Under the Act, only ACA’s may certify that producers and handlers are following organic system plans in accordance with the Act. 7 U.S.C. §§ 6502(13) “Organic plan” and 6513(a). Contrary to the Administrator’s assertion, USDA has no “certification functions.”<sup>2</sup> The

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<sup>2</sup> USDA acknowledged the limitations on its role in the prefatory comments to the final rule, when it stated, “USDA does not perform organic certification activities under any circumstance . . .” 65 Fed. Reg. 80,548, 80,595 (2000). In the same document, USDA readily acknowledges the authority of certifying agents under the organic program, stating that, “Certifying agents grant certification, deny certification, and take enforcement action against a certified operation’s certification.” 65 Fed. Reg. 80,548, 80,610 (2000) (Comment 13).

Secretary's role under the Act is solely to accredit certifying agents. 7 U.S.C. § 6514. That is, the Secretary is to determine whether applicants for certification have demonstrated sufficient expertise and willingness to comply with the requirements of the Act and regulations. 7 U.S.C. §§ 6514 and 6515. Even this power of the Secretary is not absolute, but must take into account the views expressed by a peer review panel made up of members of the public with expertise in organic farming and handling methods. 7 U.S.C. § 6516 and 7 C.F.R. § 205.509.

Furthermore, ACA's do not consent to act subject to the control of the Secretary as to particular decisions. ACA's such as MICI must exercise their own independent judgment about whether the organic system plans submitted by producers and handlers are in compliance with the requirements of the Act and regulations. While the Secretary may impose terms and conditions of the relationship, nothing in the Act gives the Secretary authority to dictate outcomes or substitute her judgment for that of the certifying agent.

The Administrator misconstrued the objections expressed by MICI in its complaint when he cited prefatory comments to the rule to the effect that ACA's will not be "responsible" for their actions or failures to act, if those actions or failure to act are at the direction of the Secretary. *Respondent's Response to Petitioner's Opposition to Respondent's Motion to Dismiss Complaint* at p. 8, fn 5; *see also* 65 Fed. Reg. 80,548, 80,610 (2000) (prefatory comments). The instant action is concerned not with MICI's potential liability, but with the threat to the integrity of the organic label and the infringement upon MICI's statutory and constitutional rights. MICI's objection is to being summarily directed by its accreditor to grant an organic certificate to a producer and to thereby authorize the producer to use its name and certifying mark, when it has not determined that the producer's operation is in compliance with the requirements of the

organic program. MICI never consented to control by the Administrator or the Secretary of its certification decisions, nor to USDA control over the use of its name.

If the reference to an ACA's not being held in violation of the OFPA and its regulations if its action or failure to act was at the direction of the USDA in the Administrator's brief was intended to be an oblique reference to vicarious liability, even an explicit waiver of sovereign immunity would not of itself suffice to demonstrate a principal/agent relationship. Vicarious liability is sometimes a consequence of an agency relationship, but it is not an element of an agency relationship. Only consent by both parties that ACA's will act on USDA's behalf and subject to USDA control would manifest an agency relationship. The OFPA is not designed to create an agency relationship. Under the OFPA, only ACA's have the authority to certify, thus they may not consent to act "on behalf" of USDA or subject to USDA control. It is the ACA who must, by law, "agree" to the operator's organic plan.

The Administrator suggests that his decision would be entitled to deference in federal court. The only situation in which the Administrator's decision would have any plausible claim to deference would be if it were the final agency decision. MICI submits that it is not, but is subject to review under the Uniform Rules of Practice. Deference is by no means warranted in this case. A federal court would have no reason to defer to the agency's interpretation (if the agency were to adopt the Administrator's interpretation) of the requirements contained in 7 U.S. Code § 6520 that all "persons" must be provided with an opportunity to appeal any decision adverse to them and any decision that is contrary to the organic program established under the Act. These statutory requirements are clear and unambiguous, and the narrow interpretation of these requirements advanced in 7 C.F.R § 205.681 and the Administrator's submissions to this forum are contrary to law. The Administrator provides no authority for the proposition that

federal courts must defer to an administrative agency's interpretation of procedural requirements contained in the statutes and the Constitution.

While courts do not defer to administrative agencies on procedural issues, it is true that on occasion courts defer to agencies on substantive issues. However, none of the indicia that might cause a court to defer to USDA are present in this case. The statute and regulations clearly acknowledge that it is the accredited certifying agents who are possessed of the requisite technical expertise to make the judgments required in evaluating organic system plans. While the plain language of the Act demonstrates that Congress was concerned that producers and handlers have recourse from unlawful decisions by ACA's, nothing in the Act or Constitution suggests that those decisions may be summarily and finally overturned by the Administrator.

The Act does expressly grant the right to seek judicial review of final decisions of the Secretary, but the Act and the Constitution require that ACA's be provided with an administrative appeals process, rather than be forced to seek vindication of their rights in federal district court in the first instance. 7 U.S.C. § 6520(b); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532 (1985). Even if ACA's had consented to act as agents of the Secretary, they would not thereby have consented to surrender their right to appeal unlawful actions of the Secretary. MICI alleges that the Administrator has acted in derogation of MICI's statutory rights and responsibilities, and in violation of MICI's constitutional rights of due process and freedom of speech and of association. The Office of Administrative Law Judges has jurisdiction over these claims.

### **CONCLUSION**

For the foregoing reasons, Complainant prays that the Respondent's Response to Petitioner's Opposition to Respondent's Motion to Dismiss Complaint be stricken. In the

alternative, Complainant prays that its motion to file a surreply be granted. Complainant urges that Respondent's motion to dismiss be denied and the matter be scheduled for a hearing as soon as possible.

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Respectfully submitted,

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