No. 24-6160

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PRATUM FARM, LLC,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Oregon
Case No. 6:23-cv-01525
Hon. Judge Ann Aiken

APPELLANT'S OPENING BRIEF

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Pratum Farm, LLC certifies that it has no parent corporation and that no publicly held corporation owns more than ten percent of the Plaintiff-Appellant.

Date: November 17, 2024

Vantage Law, PLLC

/s/ Bruce A. Kaser
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GLOSSARY OF ACRONYMS

APA	Administrative Procedure Act
NOP	National Organic Program
NOSB	National Organic Standards Board
OFPA	Organic Foods Production Act
USDA	United States Department of Agriculture

INTRODUCTION

This is an appeal of the lower court's ruling that the plaintiff lacked standing to bring a complaint under the Administrative Procedure Act ("APA"). This case raises questions about what the USDA organic certification mark ("the seal" or "the USDA seal") will mean to consumers if a new federal regulation is allowed to stand. The regulation effectively eliminates a decades-old statutory requirement for on-site farm inspections by USDA-accredited certifiers that is a key prerequisite for use of the USDA seal as an organic food label.

The Appellant, Pratum Farm, LLC ("Pratum Farm"), is a certified organic farm operation in Oregon that is licensed to use the USDA seal by the Appellee, United States Department of Agriculture ("USDA"). Pratum Farm is making single-farm, licensed use of the seal in connection with growing and selling organic hazelnuts direct to consumers and wholesale hazelnut processor entities in the United States ("U.S."). The APA litigation arose because the USDA's new regulation enables Turkish hazelnut processors to use the seal to illegally label, as "organic," certain hazelnuts that they sell in the U.S. This is what the USDA has done:

The Organic Foods Production Act of 1990 ("OFPA" or "the OFPA") is specific in that it requires the USDA seal to only be used in connection with labeling food that comes from "certified" organic farms. As a prerequisite to

organic certification, the OFPA requires each farm to be inspected, on-site, every year by a USDA-accredited certifier. The OFPA does not allow a group of individual farms to be lumped together and certified as "one." However, the new regulation (called "the 2% rule" by Pratum Farm) does exactly that, by lumping farms into a group and eliminating single-farm organic certification, altogether. Rather than inspecting each farm, the rule calls for spot check inspections of only a few farms in the group. The "2%" means that the regulation reduces farm inspections from 100% of the farms to spot checks of roughly 2%.

Whereas single-farm organic certification is the norm in the U.S., lumping farms into a type of group certification is often the norm overseas. The 2% rule is therefore designed to give favorable treatment to large nonfarmer foreign food processor or trader entities ("aggregators"). These aggregators historically acquire crops from large groups of foreign supplier farms that are not certified as organic and are unlikely to have been visited by organic farm inspectors, of any kind, because it is impossible to do (a fact admitted by the USDA).

In the case of aggregators who are Turkish hazelnut processors, as part of skipping individual farm certification of the aggregator's supplier farms, the 2% rule grants the aggregator the first-in-line license to piggyback the USDA seal onto hazelnut kernel products sold into the supply chain. Because the seal is a certification mark, this creates a problem in that the aggregator's use of the seal

wrongly indicates to end-use consumers that *all* the aggregator's products originate from certified organic farms that were inspected, not 2%. According to OFPA certification standards, the aggregator's piggybacking is therefore illegal organic labeling that involves misuse of the USDA seal.

Certification marks are supposed to certify that products meet consistent standards. In this instance, the 2% rule causes the USDA seal to be used to certify inconsistent standards at the same time (single farm vs. group certification). This violates a specific OFPA statute that requires consistency and also violates well-established principles of trademark law (as applied to certification marks) that require the same thing. In essence, if allowed to stand, the 2% rule turns "illegal" labeling into "legal" labeling.

The resulting public deception and confusion harms the reputation and integrity of the USDA seal, with the reputational harm extending to Pratum Farm as a single-farm organic certificate holder. In addition to the deception and confusion, the rule enables Turkish aggregators to acquire licensed use of the USDA seal at practically no cost, relatively speaking, which is a factor that enables cheap imports of illegally labeled Turkish hazelnuts to suppress Pratum Farm's prices in markets that value organic integrity.

JURISDICTIONAL STATEMENT

This appeal follows the district court's order and judgment dismissing this case, entered by the district court on September 30, 2024. ER-6. The Appellant timely filed a notice of appeal on October 4, 2024. 28 U.S.C. § 2107(b)(2). ER-276.

The district court had jurisdiction under 5 U.S.C. § 702 and § 706 (the Administrative Procedure Act) and 28 U.S.C. § 1331 because the action arises under federal law. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the district court clearly erred in holding that Pratum Farm did not have standing because of a lack of evidence, when Pratum Farm presented substantial evidence showing that the new regulation creates deception and confusion that harms Pratum Farm's right to rely on the integrity of the USDA seal; and

2. Whether the district court erred in misinterpreting case law, leading to error concerning evidence that the new regulation harms organic hazelnut farm prices.

STATEMENT OF THE CASE

I. The District Court Dismissed Pratum Farm for Lack of Standing Without Reaching the Merits; the USDA did not Dispute Material Facts.

Pratum Farm commenced this action by providing the USDA with an advance draft copy of the complaint for review and comment before it was filed. ER-226. There was no response. Then, and unlike many APA cases, Pratum Farm

required the USDA to answer the factual pleadings in the complaint. ER-87-115. While the USDA did not like many of the complaint's allegations, the USDA's answer did not expressly deny material factual allegations. The answer raised several common defenses, including standing, which later became the subject of a USDA cross-motion for summary judgment. The district court found for the USDA on the standing issue, without holding a requested hearing, and dismissed the case with no prejudice to the merits of Pratum Farm's APA claim. ER-6-25.

The material facts in the case are not in dispute. The facts pled in the complaint, along with accompanying complaint exhibits, were verified and adopted by an uncontested and unrebutted declaration that was submitted to the district court under Fed. Rule Civ. Pro. Rule 56(c), as part of Pratum Farm's response to the USDA's cross-motion for summary judgment. ER-27-28. The USDA did not submit any declarations or other evidence in rebuttal that created material fact disputes.

II. The OFPA Controls Use of the Words "Organic" and "Certified" Organic in Commerce and on Labeling.

The USDA teaches the U.S. public at large that the USDA seal is "the standard" for certifying that *every* organic farm, domestic or foreign, undergoes a "rigorous" annual organic certification process. ER-49. *See also*, fn.12, *infra*. This

public representation of fact is consistent with the statutory standards set forth in the OFPA, 7 U.S.C. § 6501 *et seq.*

The OFPA exercises complete control over who can use the word "organic" in commerce and on food labeling. Except for farmers who make less than $5000 per year,[1] if a farmer wishes to use the word "organic" in connection with selling crops grown by the farmer, the OFPA requires the farmer's farmland (soil) to be "certified" organic.[2] The stated purpose of the OFPA's certification requirement is "to assure consumers that organically produced products meet a consistent standard." 7 U.S.C. § 6501(2).

In order for farmland to be certified organic, the OFPA requires annual on-site farm inspection by an accredited certifier. 7 U.S.C. § 6506(a)(5) ("the farm inspection statute"). The OFPA also specifically prohibits the use of organic labels on food (*e.g.,* the USDA seal), unless the food is "produced only on certified organic farms." 7 U.S.C. § 6506(a)(1)(A) ("the labeling statute"). Certifier accreditation is governed by 7 U.S.C. § 6514 ("the certifier accreditation statute").

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[1] A small farm exception is provided by 7 U.S.C. § 6505(d).

[2] The small farm exception provided by 7 U.S.C. § 6505(d) does not allow farmers who take advantage of the exception to use the USDA seal or refer to themselves as "certified" organic.

Among other things, the certifier accreditation statute functions to require certifiers to be independent, third-party certifiers relative to the farms they certify. They are required to go through certain USDA procedures in order to become accredited.

A. The Organic Certification System: the USDA Teaches the Public that Every Organic Farm is Rigorously Certified; and Every Organic Farm is Inspected Annually by a USDA-Accredited Certifier.

On the surface, the USDA historically publicizes that the USDA seal means this: *all* organic farms are inspected by an accredited certifier, annually, with organic farm inspections involving two essential components: (1) a paperwork inspection of farm records; and (2) an on-site inspection that involves an accredited certifier's inspector walking onto the farmland and looking at farm practices there.

The USDA's public messaging that every farm is annually visited by an accredited certifier's inspector is consistent and repetitive:

> Every operation that applies for organic certification is first inspected on site by a certifying agent. These comprehensive top-to-bottom inspections differ in scope depending on the farm or facility. For example, for crops they include inspection of fields, soil conditions, crop health, approaches to management of weeds and other crop pests, water systems, storage areas and equipment.

ER-264.

> Certifying agents are accredited by the USDA and are responsible for making sure USDA organic products meet all organic standards.

ER-265.

> Organic certification requires that farmers and handlers document their processes and get inspected every year. Organic on-site inspections account for every component of the operation, including, but not limited to, seed sources, soil conditions, crop health, weed and pest management, water systems, inputs, contamination and commingling risks and prevention, and record-keeping. Tracing organic products from start to finish is part of the USDA organic promise.

ER-265-66.

> Every organic operation must be inspected each year. The inspector verifies that the operation's plan accurately reflects the operation and that the farmer is following the plan. Organic inspectors are trained to look critically at all aspects of an operation.
>
> When first arriving at an organic operation, the inspector is looking for things like buffer zones from neighboring farms to ensure that the organic integrity of crops is maintained. The inspector then visits the fields and asked *[sic]* questions about pest management, soil fertility, and other factors. They also look at storage and preparation areas to make sure everything meets the organic requirements.
>
> One of the most important responsibilities of the inspector is to examine records that document farming practices. Specifically, the inspector will audit invoices, records of material applications, organic sales, harvest, and yield. The inspector can explain the organic regulations but is not allowed to provide advice on how to farm or how to overcome identified barriers to certification. This separation between the farmer and the certifier maintains the "independent third party" nature of the transaction.

ER-121. (*Organic 101: Ensuring Organic Integrity through Inspections* (15th installment), https://www.usda.gov/media/blog/2014/02/26/organic-101-ensuring-organic-integrity-through-inspections).

The above describes the single-farm organic certification system that commonly applies to most organic farmers in the U.S. today.

B. The "Other" System ("Grower Groups"): no Farms are Rigorously Certified; and few Farms, if any, are Inspected.

The 2% rule creates an organic certification scheme that is significantly different from what the USDA describes above. ER-51-54. The rule replaces the USDA-described comprehensive "top to bottom" farm inspections by an accredited certifier who "visits the fields" with an aggregator's self-policing program for a list of farmer-suppliers in a group that purportedly involves using unaccredited aggregator employees as "internal" farm inspectors. ER-229. At the same time, ambiguous language in the 2% rule is so open-ended that no one can specifically point to rule language, not subject to different interpretations, which makes it unambiguously clear the regulation requires the aggregator's employee inspectors to visit farms. They are not required to do it under the regulation.

What it collectively means is that the 2% rule tends to shift "inspection" from on-site farm visits to an aggregator office, someplace, with few on-site or on-farm inspections of the aggregator's supplier farms, and possibly, none at all (*see* discussion about interpreting the meaning of "site," p. 15 and fn.4, *infra.*). For example, the administrative record shows that Ecocert, a prominent USDA-accredited certifier headquartered in France, indicated that aggregator internal inspectors should only do spot check visits to a representative sample of farms in the aggregator's group of supplier farms, similar to how the 2% rule conceptually

reduces the statutory requirement for accredited certifier inspections from 100% to spot checks of a few. ER-66 ("ECOCERT suggests that a representative sample of fields per member being [*sic*] visited during internal inspections."). It is apparent from Ecocert's comments in the administrative record that it is likely this is what Ecocert is doing. There is nothing in the administrative record, or any record, which indicates the USDA has instructed Ecocert or other certifiers to do something different. What it all means, collectively, is that large aggregators are acquiring crops from large pools of smallholder farmers who were never visited by anyone ("accredited certifier" or "internal inspector") to look for use of chemical fertilizers or chemical sprays on the farms.

1. The History Of The "Other" System.

The 2% rule codifies an earlier long-standing historical practice that was developed informally, at first, and eventually became commonly known as "grower group certification" (aka. "producer groups"). Prior to the 2% rule's codification of the concept in the federal regulations (*see, e.g.,* 7 C.F.R. § 205.403), the practice was mostly invisible to the public at large, except for a somewhat closeted organic fraternity that includes the USDA's National Organic Program ("NOP"); the National Organic Standards Board ("NOSB") (a federal advisory board); foreign ingredients suppliers that benefit from using the USDA seal on imported food products; certifiers who profit from issuing grower group certificates to foreign

aggregators; and lobbying organizations that protect grower group certificates for use by their agribusiness clients. ER-235.

Grower group certifications are not mentioned anywhere in OFPA statutes, nor did they appear in any federal regulations, until recent codification in the 2% rule. ER-50, 73, 113. To the extent grower group certification is mentioned to the public at large on USDA websites, or the like, detailed information about them is scant, and how they work is ambiguously explained or not explained at all.

Grower group certifications were originally created by unregulated certifiers in the 1980s (pre-OFPA) for use in underdeveloped countries. ER-76-77, 231-32. They were conceived of by well-intentioned but self-appointed, private party organic certifiers that operated overseas during an era when all organic certifiers operated outside government regulation.[3] At that time, the focus was on coffee and cocoa cooperatives that aggregated crops from large numbers of small plot farmers on the pretext that they are disadvantaged by the expense of paying for single-farm organic certification. For those farmers who were closely located in the same small town or village, the unregulated solution at the time (now antiquated) was to certify them as a "community," or the like, that involved the certifier spot checking

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[3] USDA regulation and accreditation of certifiers commenced in or about the year 2000 - approximately 10 years after Congress passed the OFPA in 1990.

some closely located village farmer plots, where all the farmers were nearby and clearly sharing the same farm practices, and the farmers themselves were likely to be cooperatively selling together into the marketplace rather than as individuals. ER-231-33.

When the OFPA came along later, the OFPA's general purpose was to bring standardization and uniformity to the organic certification practices of a growing population of unregulated organic certifiers who were using varying, self-created standards for issuing organic certificates to their clients. However, by the time of the OFPA's enactment in 1990, some pre-OFPA certifiers operating overseas had moved beyond the original village concept of group certification and were issuing the certifier's "organic crops" certificate (proprietary to the certifier) directly to foreign aggregators who were accumulating crops from large numbers of supplier farms. ER-233-34.

The idea was that each aggregator would employ its own "internal inspectors," as described above, to self-police whether its supplier farms are using synthetic fertilizers or chemical insecticides or chemical herbicides. The aggregator paid the certification cost (the certifier's charges for issuing an organic "crops" certificate directly to the aggregator). This granted the aggregator first-in-line use of the certifier's organic seal at a low price, relatively speaking, because there were no time-based charges for certifier inspectors to travel to farms or create

individual farm inspection reports. The certifier instead inspected the aggregator's "written" plan for self-policing (eventually called the "internal control system" or "ICS"). ER-228-30. It is significant that the 2% rule, when it later memorialized the "ICS" as part of a regulation, lacks a clear requirement for on-site inspections by "internal" inspectors (hence, the spot checks described by Ecocert above). The net effect is to keep both "accredited" and "internal" organic inspectors off the farms and shift everything to spreadsheet farmer lists on a computer screen.

It is admitted by the USDA in this litigation that Congress did not include the above practice when it enacted the OFPA in 1990. ER-113 ("the OFPA does not specifically mention grower groups"); ER-73 ("The current USDA organic regulations do not include specific provisions addressing the certification of grower groups."); and ER-50 ("This [the 2%] rule codifies key provisions of the 2002 and 2008 NOSB recommendations on producer group certification ....").

Therefore, the OFPA's failure to include grower group certification, in essence, created a 30-year (plus) problem that involved a clearly different certification scheme, not covered by U.S. organic statutes or written regulations, that ran in more or less hidden parallel to what the USDA was and is telling the public at large about organic certification and farm inspections – with the "other" certification system having tacit approval of the USDA during all of those years.

With the exception of an event that occurred in 2006, the grower group certification scheme was never legally challenged, until Pratum Farm did it after the 2% rule was added as an amendment to existing USDA regulations in or about early 2023.

2. The Grower Group Certification Scheme Hits a Bump in the Road in 2006.

During their historical evolution, the legality of grower group certificates came up for internal USDA review in 2006, in connection with a refusal to grant a Mexican entity a grower group certificate. This resulted in an internal appeal to the USDA's Agricultural Marketing Service ("AMS") Administrator. At that time, the AMS Administrator, who has higher level authority over the Federal Officer in charge of the USDA's National Organic Program, rendered a decision denying the Mexican entity a grower group certificate that, in part, correctly included an administrative determination that the grower group scheme is inconsistent with the OFPA. ER-235-39.

The AMS Administrator's decision was an appealable order. The text of the AMS decision does not appear in the administrative record here because "the decision itself was lost due to file system migrations issues over time." ER-97. However, transcripts from NOSB meetings and related documents are sufficiently clear to show that the AMS Administrator determined that the OFPA requires farm

visits and inspections of every farm in an aggregator's supplier farm group (100%) by an accredited certifier, and does not allow "inspection by proxy" (or self-policing by an aggregator's "internal" inspectors). ER-140, 236.

By virtue of a series of nonbinding but mind-bending rationalizations having the attributes of conjury, the AMS decision was simply ignored by the organic fraternity described above – who eventually moved on as though nothing had happened. This primarily involved the NOSB (a federal advisory board) making recommendations that called the AMS decision "informal" without having the governmental authority to do it. This was followed over a span of approximately 15 years by occasional "interim" NOP policy memos that told certifiers (who were USDA-accredited by that time) that they should follow the advice of the NOSB in nonbinding NOSB advisory recommendations, until final rulemaking took place (among other things, the NOSB sought to bypass the AMS decision by creating a new definition for "site" that served to eliminate on-farm site visits by inspectors).[4] ER-74, 75, 140, 242-43.

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[4] The administrative record shows that, at one point, the NOSB advised the USDA/NOP to create a new definition for "site" as meaning, "The location of management activities for a production unit." This recommendation appears to address the key farm inspection problem that grower group certificates create vis-à-vis the OFPA farm inspection statute's requirement for annual "on-site"

Meanwhile, during the approximately 30 years that passed from the OFPA's enactment until final rulemaking that gave rise to the 2% rule, grower group certification mutated from the original community or village cooperative concept into a worldwide agribusiness system for large ingredients suppliers and others that is designed to take advantage of the demand for organic food in the U.S. market. The system is served by certain international certifier organizations that now operate organic certificate mills for their clients according to low cost fee schedules,[5] with little or no effective oversight, boundaries, or managed control by the USDA.

The record in this case is sufficiently clear to show that, internally, the USDA has long recognized the truth – that is, the grower group certification scheme harms the integrity of the USDA seal. For example, USDA comments in the Federal Register make it clear that those accredited certifiers who are issuing organic "crops" certificates to aggregators are hard pressed to find out anything about the aggregators' farms when the certifiers look for them:

> Often, ICS [the aggregator plan for self-policing] personnel are relatives or friends of the members and may withhold or obscure evidence of

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inspection, by shifting the definition of "site" from farmland to an aggregator's office. ER-143.

[5] *See* Bio.inspecta fee schedule. ER-203-04.

> noncompliance or fraud. In other cases, the influence of a buyer or exporter will lead members to compromise organic integrity in order to meet specific quality or volume targets.
>
> In addition to the ICS, the lack of general criteria that producer groups must meet creates challenges for certifying agents. This is most often seen as an absence of critical information about the producer group and its members. Producer groups [aggregators] often do not provide certifying agents with basic information, such as accurate maps, location of plots, acreage, and production practices and inputs. During inspection, certifying agents commonly cannot locate members, plots, boundaries, or central distribution points, making it difficult to complete basic audit techniques such as yield analysis or mass balance.
>
> The unique conditions of producer group production mentioned above, when combined with poor oversight and enforcement mechanisms at the ICS level, create an environment where loss of organic integrity and organic fraud are more likely to occur.

ER-50 (bracketed terms added).

3. Grower Group Certifications now Account for the Majority of U.S. Organic Trade; Aggregators Piggyback the USDA Seal onto Crops from Hundreds of Square Miles of Uninspected and Uncertified Farms.

As a result of the mutation described above, grower group certifications now account for a super majority of foreign organic imports – which also has overtaken U.S. organic farmers (much more than just hazelnuts) and now makes up a super majority of organic food trade in the U.S. as a whole. And rather than certify a group of small plot farmers closely located in a village or small community, as was the original intent, pre-OFPA, the USDA sets no regulatory limits as to farm group numbers (it can be thousands), how far they are spread apart from each other (it can be an entire country), or other meaningful boundaries.

For example, the administrative record shows that, instead of limiting grower group certifications to small plot farmers that are local to a village, Ecocert (the certifier discussed above) advised the USDA that there should be no size or geographical limits to grower groups. ER-66-67 ("ECOCERT is not in favor of a strict limitation or definition of the geographical proximity of a group – so long as all members of a group are located within the same country.").

The outcome is shown in public records (the USDA organic "Integrity" database) where, as one example, Ecocert issues two "crops" certificates to an aggregator called Savannah Fruits (one certificate for Ghana; another for The Ivory Coast). The Ghana certificate (NOP ID: 7887624000), which is now in public records, indicates that "Total Certified Acres" (wrongly called "certified" farmland by the USDA) are an aggregated 129,483 acres. The Ivory Coast certificate (NOP ID: 7880285879) covers an aggregated total of 373,688 acres.[6] What it means,

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[6] This information comes from recent updates to the USDA "Integrity" database. *See,* respectively:

https://organic.ams.usda.gov/integrity/CP/OPP?cid=24&nopid=7887624000&ret=Home&retName=Home; and

https://organic.ams.usda.gov/integrity/CP/OPP?cid=24&nopid=7880285879&ret=Home&retName=Home.

collectively, is that the USDA seal, which is not to be used unless crops come from "certified" farms, is used by the aggregator on all the crops the aggregator takes in from approximately 786 square miles of uncertified farms, across two countries. And it is likely these farms were sparsely inspected, if at all, by either accredited certifiers or internal inspectors.

Applicable to the Turkish hazelnut problem that gave rise to the present litigation, Ecocert is the certifier that licenses use of the USDA seal to a large Turkish hazelnut aggregator, Arslanturk (discussed further on pp. 28-29, *infra.*), who collectively aggregates Turkish hazelnut crops from 6173 "certified" acres (once again, wrongly called "certified" by the USDA).[7]

The overriding problem is that Congress wrote OFPA statutes in 1990 that designed an organic certification system that requires on-site farm inspections by

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To its credit, the USDA improved visibility of the pervasiveness of grower group schemes in the database during the last year. The acreage information was not available at the time this action commenced in October 2023.

[7] *See,* respectively:

https://organic.ams.usda.gov/integrity/CP/OPP?cid=24&nopid=7880128516&ret=Home&retName=Home; and

https://organic.ams.usda.gov/integrity/CP/OPP?cid=24&nopid=7880220073&ret=Home&retName=Home.

accredited certifiers of *every* organic farm, *every* year, but did not write statutes that allow for a very different grower group certification scheme that was created overseas. By the time the USDA created the first set of OFPA regulations, approximately 10 years after the OFPA was enacted, pre-OFPA foreign certifiers had likely been certifying aggregators under the grower group scheme for years (under the unregulated certifier's proprietary certification mark before the USDA seal existed).

At that point in time, when foreign certifiers became formally "accredited" by the USDA under the OFPA, the USDA simply grandfathered in the grower group certification scheme, outside the statutory authority of the OFPA, by grandfathering in these certifiers' existing aggregator clients. This resulted in the instant creation of a pool of foreign aggregators holding USDA organic "crops" certificates and the accompanying license to use the USDA seal under the "other" system. ER-78. Once this problem was created, the USDA tacitly allowed it to continue for decades, outside the OFPA statutes, with the only road bump being the AMS Administrator's decision in 2006. The AMS Administrator's decision should have been followed at that time. Instead, the USDA allowed things to continue and eventually become even worse than what is described here.

C. The USDA's Interpretation of the OFPA Farm Inspection Statute: 0% of the Farms in the Grower Group Certification Scheme Need to be Inspected.

Having not been challenged before, it is plain the USDA had no option in the court below but to conjure statutory authority for grower group certifications from statutes that never mentioned them in the first place. ER-50, 73,113. The byproduct was a series of implausible USDA arguments that mix conclusory and stretched interpretations of statutes and definitions; arguments that foreign farm inspections would produce "absurd results" or be "impossibly burdensome" to do; arguments that the USDA should be allowed to continue issuing grower group organic certificates because the practice has been done for a long time; and with all of it coupled to repetitive assertions that the USDA should be deferred to – even when the USDA made arguments about one statute that clearly conflicts with another.

For example, the USDA argued in the court below that the farm inspection statute, 7 U.S.C. § 6506(a)(5), does not apply to farms in grower groups because each farm in the group is not certified ("does not receive organic certification").[8] The problem is that this argument conflicts with the labeling statute in the OFPA, 7 U.S.C. § 6506(a)(1)(A), which prohibits a food processor from labeling

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[8] "Because each individual group member [farm] does not receive organic certification, they are plainly not included within the text of 7 U.S.C. § 6506(a)(5)." ER-26 (bracketed term added).

agricultural products with the USDA seal unless the product is "produced only on certified organic farms." There is no solution to this specific conflict other than the conclusion that there was never an intent to include the grower group certification scheme in the OFPA, in the first place.

Consistent with the AMS Administrator's decision in 2006, Pratum Farm alleged in the court below, and in a motion for summary judgment, that the farm inspection statute (7 U.S.C. § 6506(a)(5)) requires 100% inspection of aggregators' supplier farms. As indicated above, one USDA response was that it would produce "absurd results" or be "impossibly burdensome" to inspect and certify all these farms.[9] In other words, because on-site farm inspections are purportedly too difficult to do overseas, the USDA's solution has been to simply ignore the federal statutes that require them.

The USDA's statutory interpretation came out in bits and pieces in USDA briefs, until it eventually became clear that, contrary to what the USDA has been telling the public at large for years, the USDA implausibly interprets the farm inspection statute as not requiring any on-site (0%) certifier inspections of a foreign aggregator's supplier farms (the USDA's "0% farm inspection"

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[9] ER-86.

interpretation for grower groups).[10] Therefore, according to the USDA, the 2% rule is a new regulation that is perversely "strengthening organic enforcement" by going from no required certifier farm inspections (0%) to roughly 2%. This was a significant reveal, never disclosed to anyone before. And certainly, it is directly the opposite of what the USDA has told the public for years.

1. The USITC Proceeding: the Discovery of Turkish Hazelnut Aggregators' Grower Group "Crops" Certificates that Falsely Bear the USDA Seal.

In its order dismissing this case, the district court noted that Pratum Farm had earlier requested the United States International Trade Commission ("USITC") to investigate certain Turkish "organic" hazelnut kernel imports by Turkish hazelnut aggregators that included Arslanturk, discussed above, and others. ER-15. The investigation was based on the USDA "Integrity" database showing that certain Turkish hazelnut aggregator/processors were "certified" organic, but the

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[10] "Because the individual group members are not themselves each 'certified under this chapter,' 7 U.S.C. § 6506(a)(5), the plain text of the Act does not subject them to annual on-site inspections." ER-84-85. "The NOP [USDA]has never required each individual member [farm] that forms the producer group operation to be subject to annual on-site inspection by a certifying agent." ER-86 (bracketed term added). "Because each individual group member [farm] does not receive organic certification, they are plainly not included within the text of 7 U.S.C. § 6506(a)(5)." ER-26 (bracketed term added).

database created a mystery in that it did not show any certified organic Turkish hazelnut farms that could serve as suppler farms for the aggregators. ER-255-56.

At the time, the USDA did not require grower group certificates to be specifically identified in the database and no other information was available that explained how Turkish aggregators were taking advantage of the grower group certification scheme described above.[11] The USITC investigation revealed that Arslanturk, and other Turkish aggregators, all held grower group "crops" certificates issued by various foreign certifiers, which were eventually produced to the USITC.

The Arslanturk certificates, in particular, are a mass of confusion that serve to create the appearance of having been created for show purposes. ER-185-202. Certainly, no one can find Arslanturk's supplier farms because they are all identified by what appears to be a random number generator. ER-194-201. The USITC asked the USDA/NOP to confirm, and the USDA/NOP did confirm, that these certificates (and other aggregator certificates) were all duly issued and legitimate, despite any questions that surrounded them. ER-32. At the time, substantive USDA explanations concerning the Arslanturk certificates, in

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[11] Sometime after this litigation was commenced, the USDA "Integrity" database was apparently modified to include some grower group certificate data.

particular, were heavily redacted to the point of providing no meaningful information about why the USDA called them legitimate. ER-182-83. But apparently, the Arslanturk certificates were confirmed legitimate because the USDA does not require Arslanturk's supplier farms (0%) to be inspected or certified as organic farms pursuant to the USDA's interpretation of the OFPA farm inspection statute, 7 U.S.C. § 6506(a)(5), as discussed above.

This is significant because it alters the scope of what may or may not be called illegal when it comes to use of the USDA seal. Pratum Farm claims that Turkish aggregator use of the USDA seal under the grower group certification scheme is illegal labeling because farms are not being inspected; the USDA's 0% farm inspection interpretation, if determined to be the correct one (which it is not), makes the labeling legal because it means the 2% rule is within statutory authority.

The above difference in statutory interpretation is central to the merits of Pratum Farm's APA complaint.

SUMMARY OF THE ARGUMENT

Respectfully, the district court did not consider substantial undisputed evidence of record that demonstrates the grower group certification scheme harms the reputation of the USDA seal and, in turn, injures Pratum Farm's right to use the seal. Based on misinterpretation of case law, the district court also did not consider undisputed evidence that shows Turkish aggregators, like Arslanturk,

receive a substantial cost benefit from the grower group certification scheme, because it does away with certifier time-based charges for farm inspections of aggregator supplier farms. Both issues create standing for Pratum Farm.

STANDARD OF REVIEW

With the exception of factual determinations, the district court's determination whether a party has standing is reviewed *de novo*. *See Meland v. WEBER*, 2 F.4th 838, 843 (9th Cir. 2021) (reviewing *de novo* order granting motion to dismiss for lack of standing); *Southcentral Found. v. Alaska Native Tribal Health Consortium*, 983 F.3d 411, 416 (9th Cir. 2020) (same); *Skyline Wesleyan Church v. California Dep't of Managed Health Care*, 968 F.3d 738, 746 (9th Cir. 2020); *Gingery v. City of Glendale*, 831 F.3d 1222, 1276 (9th Cir. 2016). Underlying factual findings are reviewed for clear error. *NEI Contracting & Eng'g, Inc. v. Hanson Aggregates Pac. Sw., Inc.*, 926 F.3d 528, 531 (9th Cir. 2019).

ARGUMENT

I. The USDA Seal is a "Certification Mark."

There is no dispute that the USDA seal is a "certification mark." There is no dispute that the seal signifies and *certifies* that any food product to which it is affixed comes from "certified" organic farms that were inspected by an accredited certifier on an annual basis. There should be no dispute that affixing the USDA seal to food products that do not originate from certified organic farms (*i.e.,* the

grower group certification scheme) is deceptive, misleading, damages the integrity of the USDA seal, and damages those who rely on the integrity of the seal. This is what Pratum Farm told the court below. ER-261-66.

It is therefore plain that the issues raised by this case revolve around the reputational harm caused to the USDA seal by a new regulation that, if allowed to stand, essentially legalizes ongoing aggregator deception about foreign farm inspections that involves use of the USDA seal, *i.e.,* aggregators affix the seal to their products, and make use of everything that the seal is supposed to stand for (farm certification, farm inspections by a certifier, etc.) when, in actual fact, the USDA admits that the aggregator's food products do not come from farms that were certified because it would produce "absurd results" or be "impossibly burdensome" to inspect them. ER-86.

As discussed below, the deception and confusion enabled by the 2% rule not only violates OFPA statutes, but also violates well-established principles that govern the use of trade, service, and certification marks (collectively "trademark law"). In both cases, the OFPA statutes and principles of trademark law are designed to protect the integrity and/or validity of the USDA seal.

A. The District Court's Primary Error: Finding No Evidence of Reputational Harm.

The district court found:

> Moreover, Plaintiffs basis for injury as a licensee is speculative. Plaintiff has not pointed to evidence that the reputation of the USDA organic seal has been harmed, in turn injuring Plaintiff.

ER-24.

1. Pratum Farm's Evidence that the Reputation of the USDA Seal has been Harmed.

The following is a list of evidence submitted to the district court that shows that the reputation of the USDA seal has been or is being harmed:

> **USDA admission:**
>
> Food labeling can be confusing and misleading, which is why certified organic is an important choice for consumers.
>
> Consumers are willing to pay a premium for food that carries the USDA organic seal, or that contains organic ingredients.

ER-261.

The Arslanturk grower group certificates (appended to the complaint from the USITC proceeding): These certificates, including their various annexes (issued by French certifier, Ecocert), collectively show that Turkish aggregator/processor Arslanturk is both a "crops" and "handler" certificate holder (under the grower group scheme). ER-185-202. These certificates, which bear the USDA seal (ER-185,189), show that Arslanturk is authorized to use and affix the USDA seal to Arslanturk's hazelnut products that are sourced from approximately 1400 supplier farms (identified on the certificates by ID codes). ER-194-202. The

USDA admits that these farms are "not certified." They are largely not inspected, if at all, under the grower group certification scheme. However, as per USDA confirmation, these certificates license Arslanturk to make first-in-line use of the USDA seal on hazelnuts it exports from Turkey. Therefore, the certificates *falsely* indicate the hazelnuts come from "certified" organic farms that were inspected by an accredited certifier.

The Ekotar grower group certificate (from the USITC proceeding): The certificate bearing the USDA seal (issued by an Italian certifier, Bioagricert) shows that a Turkish aggregator, Ekotar, is a "crops" certificate holder authorized to use the USDA seal on hazelnuts and other crops, *falsely* indicating the hazelnuts come from certified organic farms that were inspected by an accredited certifier. ER-180-81.

The Ekotar "farmer list" (from the USITC proceeding): The farmer list shows that Ekotar's farmer suppliers are not inspected by anyone. ER-165-179.

The Udex grower group certificate (from the USITC proceeding): The certificate bearing the USDA seal (issued by an Argentinian certifier, Letis) shows that a Turkish aggregator, Udex, is a "crops" certificate holder authorized to use the USDA seal on hazelnuts, *falsely* indicating the hazelnuts come from certified organic farms that were inspected by an accredited certifier. ER-163-64.

The Nimeks grower group certificate (from the USITC proceeding): The certificate bearing the USDA seal (issued by an Italian certifier, CCPB) shows that a Turkish aggregator, Nimeks, is both a "crops" and "handler" certificate holder authorized to use the USDA seal on hazelnuts and a list of other crops and processed foods. The USDA seal *falsely* indicates that all of Nimeks's food products come from certified organic farms that were inspected by an accredited certifier. ER-159-162.

The Yilmaz/Ozyilmaz grower group certificate and related documents (from the USITC proceeding): Yilmaz and Ozyilmaz are side-by-side buildings owned by a Turkish family as part of the same agribusiness. ER-135-38. Ozyilmaz is the trader entity in the agribusiness; Yilmaz is the hazelnut shelling factory that aggregates hazelnuts from local farms. ER-221-24. Yilmaz was the organic grower group certificate holder that bears the USDA seal (issued by a Swiss certifier, Bio.inspecta). ER-210. While the Bio.inspecta-issued certificate does not specify the certified product, when taken in combination with the other Yilmaz documents before the district court (ER-135-38; ER-205; ER-206-209; and ER-221-24), the certificate *falsely* indicates that all of Yilmaz's hazelnuts come from certified organic farms that were inspected by an accredited certifier. Bio.inspecta internal documents submitted to the district court showed that approximately 1/3 of Yilmaz's supplier farms were inspected by "internal"

inspectors. ER-206-209. Concerning fraud, independent of the grower group certificate, other documents submitted to the district court showed that Bio.Inspecta issued a fraudulent "certificate of inspection for domestic sales" for Ozyilmaz's downstream customers that showed a sale of 161,943 kilograms of harvested organic hazelnuts between Yilmaz and Ozyilmaz that was, in fact, a sale between two side-by-side buildings. ER-205. The certificate used false addresses that did not correspond to the buildings, but instead used addresses that corresponded to car shops and a gas station in the same town. ER-220-1. The sales inspection certificate certifies that the hazelnuts were obtained in accordance with USDA organic regulations.

USDA admission in the Federal Register: The USDA's comments in the Federal Register indicate that it is commonplace that aggregator supplier farms cannot be located, let alone inspected. The USDA admits in Federal Register comments that grower group certificates "create an environment where loss of organic integrity and organic fraud are more likely to occur." ER-50.

USDA false advertising and false statements made to the public: In July 2021, the USDA published that the USDA seal ensures: "Rigorous certification of every organic farm and business" and "Annual inspection of every organic farm and business." ER-49. *See also,* p. 40, *infra*. Prior to the filing of Pratum Farm's complaint, and continuing today, the USDA teaches the public that every farm is

inspected "top to bottom" by an accredited certifier on an annual basis. ER-264. The USDA teaches the public that the certifier "visits the fields." ER-121. The USDA also teaches the public that "Organic inspectors play a vital role in ensuring organic integrity." ER-264. The 2% rule eliminates, or nearly eliminates, all of these things.

USDA false representations about the impact of the 2% rule: The USDA is falsely informing the public that the "strengthening organic enforcement" (or "SOE") provided by the 2% rule "protects organic integrity and bolsters farmer and consumer confidence in the USDA seal" when, in fact, the 2% rule eliminates, or nearly eliminates, the on-site farm inspections the USDA promises it is doing. ER-269.

Knowledge of illegality by the NOSB: Following the 2006 AMS decision described above, the NOSB knew that there were clear legal problems in going forward with grower group certificates:

> No, what I'm talking about is the public relations semi truck train wreck that could occur on this thing when it comes out in the New York Times that product selling in the United States from someone in China making over $10,000 a year is not being inspected, when a grower in Vermont making 5,000 and 1 is having to.
>
> * * *
>
> Again, the fear that seems to be driving – and you have expressed it clearly, it's fear – we are afraid of a scandal, we are afraid of a train wreck, and all that sort of thing. And if you try to over-regulate, I guarantee you people, you will cause the train wreck by overprescriptive [*sic*] – and I think we are seeing that happen.

ER-253-54.

USDA bad faith intent to deceive members of the public who rely on the USDA seal: In reaction to learning about the 2% rule from the present lawsuit, a member of the public asked the Deputy Administrator of the USDA's National Organic Program the following question:

> Jennifer, as someone who relies on organically certified food in my kitchen, I found this report from Mark Kastel's OrganicEye deeply disturbing. How can I trust any organic certified product coming from overseas? Why is the USDA National Organic Program still allowing this to happen?

The NOP's Deputy Administrator responded with a falsehood:

> When an organic product carries the USDA seal, it means that the farm that produced the organic food, and any business that processed it, followed a strict set of regulatory standards and was certified by USDA-approved organizations. It means that farms and businesses were inspected at least once a year by a qualified organic inspector.

ER-38.

The NOP's Deputy Administrator said nothing about the "other" system that does away with organic farm inspections. Nor did she repeat what the USDA told

the district court: inspection of foreign farms would produce "absurd results" or be "impossibly burdensome" to do.[12] ER-86.

Bearing in mind that Pratum Farm brought an action under the APA that is limited to a claim that a new federal regulation exceeds statutory authority, Pratum Farm submitted sufficient evidence to the district court to show the subject of the regulation (the grower group certification scheme) has been harming, is harming, or will harm the reputation of the USDA seal, contrary to what the district court determined. The regulation enables the above Turkish hazelnut processor certificates to be used for illegal labeling use of the USDA seal. These certificates, alone, should have been sufficient for the district court to understand that there is substantial evidence that the reputation of the USDA seal is being harmed. The certificates were submitted as attachments to the complaint and were not contested

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[12] Another example of USDA bad faith vis-à-vis the 2% rule is this: while the USDA was arguing in the court below that it would produce "absurd results" or be "impossibly burdensome" for accredited certifiers to inspect foreign farms (ER-86), on February 21, 2024, the NOP launched a national retailer "toolkit" that encourages large retailers to falsely advertise that each organic farm is certified and inspected yearly; and specially trained organic inspectors visit each organic farm every year. *See* https://www.ams.usda.gov/services/organic-certification/organic-basics/retailers (click on "View the USDA Organic Retailer Toolkit (pdf)." (link active as of 10/31/2024)). The announced purpose of the toolkit is "to raise consumers' awareness of, and trust in, the organic label."

by the USDA. Why the district court did not consider this evidence is unclear from the district court's order, but it was clear error to not consider it.

2. Pratum Farm's Evidence that it has the Right to Use the USDA Seal and Rely on the Seal's Integrity.

As a duly authorized licensee to use the seal, Pratum Farm has a personal interest in the integrity of the USDA seal for signifying and certifying that the seal means the food product to which it is affixed (*i.e.,* Pratum Farm's hazelnuts) comes from a certified farm that was inspected. The following evidence was before the district court showing that Pratum Farm has the right to rely on the seal's integrity and/or reputation:

Pratum Farm's single-farm organic certificate: The certificate shows that Pratum Farm has a 17 acre organic hazelnut orchard ("Jefferson orchard") and "verifies that the above named operation has been inspected annually by an ODA [Oregon Department of Agriculture] representative to verify compliance with organic standards." The certificate licenses Pratum Farm to use the USDA seal. Once again, foreign aggregator supplier farms do not have similar certificates because each farm "does not receive organic certification" as per the USDA. ER-158.

Pratum Farm's ODA invoice for organic certification: The invoice shows Pratum Farm was charged $1000 for an application fee; and an additional $695.16

for the inspector's time spent (8 hours) doing an on-site, walk-on, farm inspection along with related time charges for paperwork review, travel, and report writing. Foreign aggregators and/or aggregator supplier farms do not have these charges per farm because of the 2% rule. Whereas Pratum Farm goes through an inspection process that takes up one day's worth of time by an accredited certifier's inspector, essentially no time is spent inspecting aggregator supplier farms. ER-157.

Pratum Farm's use of the USDA seal to sell crops to local wholesaler/processors: Pratum Farm submitted detailed, verified pleadings, along with an uncontested and unrebutted declaration, which explain a high integrity organic compliance/supply chain system used locally in Oregon that is bypassed by Turkish aggregators under the grower group certification scheme. ER-28-9; ER-266-68.

Pratum Farm's use of the USDA seal for making sales at a farmer's market: Pratum Farm's complaint, verified by an uncontested and unrebutted declaration, shows principals of Pratum Farm using the USDA seal in connection with direct farmer's market sales to members of the public. The USDA seal is on the table. ER-262.

II. Certification Marks Demand "Consistent" Certification Standards Pursuant to Trademark Law; the OFPA Demands "Consistent" Certification Standards for Consumers; the USDA's 2% Rule is a Different, "Inconsistent" Standard that Harms the Integrity of the USDA Seal as a Certification Mark by Deceiving Consumers.

As discussed above, Pratum Farm holds a single-farm organic certificate for its hazelnut farmland. Pratum Farm's address is on its organic certificate, which means its farm can be found by anyone. When the USDA concedes it is hard to locate the supplier farms of an aggregator (*see* pp. 16-17, *supra.*), along with the other evidence discussed above, it is plain that the grower group certification scheme involves a very different set of certification standards that is out of control compared to single-farm certificate holders. Loss of control endangers the validity of certification marks and, in this case, endangers the validity of the USDA seal.

"A certification mark serves as a seal of approval for or a guarantee of compliance with a uniform standard." *Opticians Association of America v. Independent Opticians of America Inc.,* 734 F.Supp. 1171, 1178 (D.N.J. 1990) (citing 3 Callmann, *Unfair Competition, Trademarks & Monopolies* at § 17.18).

In a certification mark cancellation proceeding in the United States Patent and Trademark Office, the Trademark Trial and Appeal Board ("TTAB") described the control issue as follows:

> The purpose of requiring control over use of a certification mark, as with a trademark, is two-fold: to protect the value of the mark and its significance as an indication of source, and to prevent the public from being misled or deceived as to the source of the product or its genuineness. *See Midwest Plastic Fabricators, Inc. v. Underwriters Labs., Inc.,* 906 F.2d 1568, 15 U.S.P.Q.2d 1359, 1362 (Fed. Cir. 1990) ("...to protect the public from being misled"); and, generally, *McCarthy on Trademarks and Unfair Competition* §2:33 (4th ed. 2006).

Tea Board of India v. The Republic of Tea, Inc., 80 U.S.P.Q.2d 1881, 1886 (082306 USTTAB, 91118587) (TTAB 2006).

The Federal Circuit has held that the reason for requiring control over use of a certification mark is "to protect the public from being misled." *Midwest Plastic Fabricators, Inc. v. Underwriters Laboratories Inc.*, 906 F.2d 1568, 1572 (Fed. Cir. 1990). For a certification mark owner, like the USDA, the control requirement "places an affirmative obligation on the certification mark owner to monitor the activities of those who use the mark." *Id.* The risk of misleading the public may be even greater in the case of certification marks because the mark makes specific representations about the characteristics of the goods to which the mark is applied. *Id.*

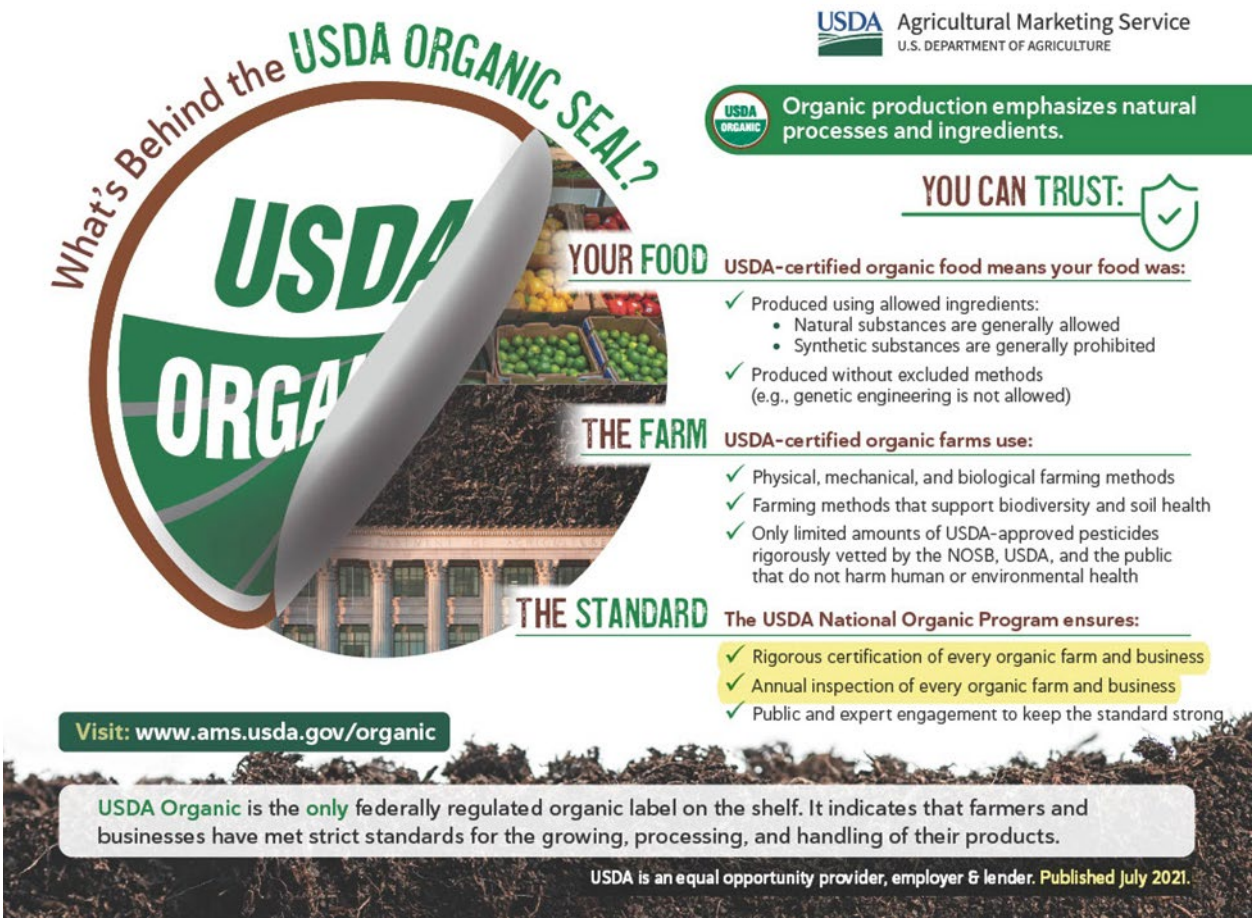
Some courts have treated certification mark standards as though the certification mark owner has a "duty of care" to consumers. *See, e.g., United States Lighting Service, Inc. v. The Llerrad Corp.*, 800 F.Supp 1513, 1516-17 (N.D. Ohio 1992). In a matter involving the Good Housekeeping seal, the California Court of Appeals explained:

> Implicit in the seal and certification is the representation respondent has taken reasonable steps to make an independent examination of the product endorsed, with some degree of expertise, and found it satisfactory. Since the very purpose of respondent's seal and certification is to induce consumers to purchase products so endorsed, it is foreseeable certain consumers will do so, relying upon respondent's representations concerning them, in some

> instances, even more than upon statements made by the retailer, manufacturer or distributor.
>
> Having voluntarily involved itself into the marketing process, having in effect loaned its reputation to promote and induce the sale of a given product ... [i]n voluntarily assuming this business relationship, we think respondent publisher has placed itself in the position where public policy imposes upon it a duty to use ordinary care in the issuance of its seal and certification of quality so that members of the consuming public are not unreasonably exposed to the risk of harm.

Hanberry v. Hearst Corporation, 276 Cal.App.2d 680, 684; 81 Cal. Rptr. 519, 522 (Cal. Ct. App. 1969).

As discussed in the statement of the case above, one key OFPA standard ("THE STANDARD" below) is the farm inspection statute, which requires "annual on-site inspection by the certifying agent of each farm." 7 U.S.C. § 6506(a)(5).



ER-49. (https://www.ams.usda.gov/publications/content/whats-behind-organic-seal-organic-labels-explained ("View the Behind the USDA Organic Seal Fact Sheet (pdf)" (published July 2021))) (yellow highlighting added).

Pratum Farm explained to the district court in Pratum Farm's motion for summary judgment that the 2% rule is outside statutory authority because it shifts farm inspections from accredited certifiers (required by 7 U.S.C. § 6506(a)(5)) to unaccredited "internal" inspectors. ER-122. Pratum Farm also explained that the rule is written in such a way that there is no requirement for farm inspections by internal inspectors, either. ER-123-25. Therefore, the 2% rule means the USDA

has written a regulation that creates inconsistent organic standards, first, in violation of an OFPA statute that states the purpose of the OFPA is to create consistent standards, 7 U.S.C. § 6501(2); and second, the USDA is not properly controlling the USDA seal in violation of the requirements of trademark law. Both things jeopardize the integrity and validity of the USDA seal.

Pratum Farm's standing in this case meets the factors required by the Supreme Court (injury, causation, and redress) in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) and many other cases. Pratum Farm has an established right in that it is licensed to use the USDA seal; Pratum Farm's license means that its right includes the right to benefit from the seal's integrity ("goodwill" or "reputation"); and illegal rulemaking by the USDA is damaging the seal's integrity by misleading the public about farm certification and farm inspections, as described above, which damages Pratum Farm's right to benefit from using the seal.

This is a form of injury caused by USDA rulemaking, in violation of the APA. The injury will be redressed if the 2% rule is declared outside statutory authority, which should put a practical end to the grower group certification scheme as a means for misusing the USDA seal.

A. The USDA Misled the District Court.

1. The USDA's Standing Argument In The District Court.

As the moving party on the issue of standing, the USDA's grounds for Pratum Farm's lack of standing is covered in about four pages of USDA briefing that involved a combination of arguments about competition and third party fraud. ER-79-83.

2. The District Court Misunderstood that Fraud Relates to USDA-Approved Turkish Aggregator Misuse of the USDA Seal.

The USDA made a key misrepresentation by wrongly telling the district court that "to the extent Plaintiff alleges that it is being placed at a competitive disadvantage, Plaintiff attributes that disadvantage not to the challenged regulation, but to a failure on the part of its competitors to follow the law or a failure on the part of the USDA to adequately enforce it." ER-80. The district court adopted the misrepresentation in its opinion and order. ER-23.

The missing piece left out by the USDA was Pratum Farm's threshold contention about injury "that USDA/NOP administration of the OFPA was the root cause of these problems." ER-257. The misrepresentation was: Turkish aggregators were not failing to follow USDA policy as it related to grower group certificates. In fact, they were following the USDA's tacitly-approved policy (now expressly codified in the 2% rule) that allows the "other" scheme. This is why the

Turkish aggregators all held organic "crops" certificates that the USDA called legitimate. Therefore, the primary fraud problem lies with the USDA's creation of an allegedly illegal regulation that serves to legalize false advertising use of the USDA seal by Turkish aggregators. Concerning the USDA's lack of enforcement argument, there are no violations to enforce, because everything is legal, according to the USDA's statutory interpretation.

Respectfully, before reaching any conclusions about Pratum Farm's standing, the district court should have analyzed standing based on an assumption that Pratum Farm's interpretation of the OFPA's farm inspection statute was the correct one, as stated in Pratum Farm's motion for summary judgment, along with the resulting problems it creates.

If it is assumed Pratum Farm's interpretation of the OFPA's farm inspection statute is correct, then the standing analysis involves determining who has a right to complain about the 2% rule exceeding statutory authority. If Pratum Farm is correct, then Turkish aggregators are falsely labeling their products with the USDA seal. The next question is: who is harmed by the false labeling? No one will disagree that false labeling involving the USDA seal harms consumers who want to buy organic food. However, it also harms those, like Pratum Farm, who rely on legitimate use of the label. If Pratum Farm does not have the right to complain here, then no one does.

Pratum Farm's theories of injury concerning the problems the 2% rule creates for the integrity of the USDA seal were stated in the complaint, along with a substantial amount of evidence that was submitted with the complaint, described above. This included, in significant part, an assertion in the complaint that the "2% Rule destroys the integrity and 'goodwill' of the USDA seal – which harms the Plaintiff as an authorized user of the seal." ER-261. Among other things, Pratum Farm's verified complaint (once again, not rebutted by the USDA by declaration or any other kind of evidence) states:

> For the USDA organic seal to function properly as a certification mark, the quality or characteristics of goods or services provided under the mark must be consistent. In other words, the quality of "certified organic" or the characteristics of "certified organic" must be consistent.

ER-263.

> However, the 2% Rule is not part of a shared global control system – the rule is a separate and different system that has long been applied in other countries. This means that the quality or characteristics of "certified organic" are not globally consistent – but are different for agricultural products that originate from U.S. farmers versus agricultural products that originate from overseas. That difference degrades and damages the integrity of the USDA seal and those who rely on it to "keep customers coming back" as licensees authorized to use the seal. The USDA has largely hidden these differences from the U.S. public.

ER-263-64.

Some say the grower group certification scheme is a strong and reliable system that is necessary to give small plot foreign farmers access to organic

markets in the U.S. Others say the scheme is more likely a recipe for fraud. Who is right or wrong on that particular score does not matter. What matters is that the USDA seal "certifies" something different from what the grower group scheme does. It is still false advertising, regardless of how good or bad the grower group scheme is, in actual practice, because use of the seal in connection with the scheme makes it impossible for the public to understand that there are differences, and denies the public the opportunity to make an informed choice based on those differences. The district court should have understood that the Turkish aggregator certificates that were submitted to the court represent the first critical step in the supply chain that is causing the public to be deceived into believing that organic hazelnut kernels from Turkey come from certified organic farms that are inspected. One certification mark (the USDA seal) cannot be used to certify two inconsistent standards at the same time.

III. In the Alternative, Standing Exists When an Illegal Regulation Allows Turkish Aggregators to Sell a Fungible Good (Organic Hazelnuts) at a Lower Price.

As discussed above, Pratum Farm pays for the certifier's time-based charges for on-site farm inspection. ER-157. Arslanturk's farmer-suppliers come from approximately 1400 farmer ID codes identified on Arslanturk's organic certificates; but no one paid for time-based charges for on-site farm inspections of the farms. Not paying for farm inspections gives Arslanturk and other Turkish

aggregator/processors significantly lower average costs, relatively speaking, to acquire their license right to use the seal. This, in part, was a factor described in submissions made to the district court, which contributed to Pratum Farm's farm prices dropping from $1.75 to $1.20 per pound in one year. ER-30-33.

If Arslanturk is required to have its suppler farmers inspected by an accredited third-party certifier, according to the statutory requirements of the OFPA, then Arslanturk's cost for the license to use the USDA seal would rise on a per pound basis ($.21 per pound was the example provided to the district court). This economic harm was explained to the district court as follows:

> In Turkey, Turkish hazelnut processors use the "outgrower model" to acquire their licenses to use the USDA organic seal with no, or practically no, incremental increase in cost of goods sold. *See* Kaser Dec. ¶¶ 8-26.
>
> In large operations, grower group certifications create the following situation: a Turkish processor's cost of producing one pound of organic hazelnut kernels for sale and export is about the same as the cost of producing one pound of conventional kernels. The reason this is true is relatively simple to explain.
>
> Arslanturk is one example of a Turkish processor that holds organic grower group certificates and purchases hazelnuts from combined lists of approximately 1,400 farmers. See Kaser Dec. ¶¶ 16-17 and 25. If it cost $1,000 to send an accredited certifier to visit each farmer (the certifier's time-based fee for travel to and time spent on the farm), the result would be $1,400,000 added to overall certification costs. See Kaser Dec. ¶¶ 22-26. On the face of things, it appears to be cost prohibitive for each one of the 1,400 farmers to individually pay $1,000 against "small plot" farmer income, if the farmers are the ones paying. The grower group solution, originally devised, is to simply do away with certifier visits to farms and, consequently, the $1,400,000 in inspection cost disappears.

However, a certifier still needs to be paid something for issuing a grower group certificate to the processor member of the group, as the "certificate holder." This involves the certifier's time cost in mostly reviewing the processor's organic certification paperwork - that may include an inspection of a processor's facility, etc., but at a processor cost of thousands, not tens of thousands.

Arslanturk reported an approximate annual export of 3,000 metric tons of organic hazelnut kernels from Turkey, which equates to 6,600,000 pounds. *See* Kaser Dec. ¶ 25. In terms of cost per pound of hazelnut kernels sold, if Arslanturk pays $10,000 to the certifier for the grower group certificate, the certification cost equates to 15% of one cent ($0.0015) in added cost per pound of kernels sold ($10,000 divided by 6,660,000). If Arslanturk also is not paying significantly higher farm prices to the 1,400 farmers (there is evidence that this is what is happening *(see, e.g.,* Complaint at ECF 1-1, page 27 of 33 (PF0000027)), it explains why Turkish "organic "hazelnut kernel imports are coming into the U.S. at prices that are not significantly higher than conventional prices.

The question is: how does this harm Pratum Farm? In the above example, the direct economic result of the USDA's interpretation of the farm inspection statute is that $1,400,000 in certification costs disappear. If the USDA properly interpreted the statute, that total cost would come back into play, because each one of Arslanturk's 1,400 farms would need to be visited by a certifier and someone would have to pay for it. If Arslanturk, as the agribusiness member of the grower group member [*sic*] pays for it, Arslanturk's incremental cost per pound of kernels sold (attributable to farm inspection cost) increases from $.0015 per kernel pound to about $.21 ($1,400,000 divided by 6,600,000).

When hazelnuts are trading in the U.S. in the $3 to $4 range *(See* Kaser Dec. ¶ 11), adding 21 cents to Arslanturk's cost is not prohibitive (on a percentage basis it is 7% of the kernel price at $3; 5.25% if the kernel price rises to $4). Paying certification costs on an individual basis may not be affordable for small plot farmers in a group, but it *is* affordable for the agribusiness processor in the group, if the processor wants to sell "organic," along with the added benefit of having every farm inspected by a certifier. As it is, the processor acquires use of the seal for nothing, relatively speaking, along with no certifier farm inspections.

The 21 cents per pound in the above example is significant because it has an elevating effect on the prices Oregon organic hazelnut processors can negotiate with their buyers when competing against Turkish imports;

> and will likely result in beneficial farm prices for Pratum Farm, and others. This issue is sufficient to create a second basis for standing.

ER-46-48.

To summarize the above, under the 2% rule, Turkish processors pay practically nothing to use the USDA seal, and practically none of their supplier farms are inspected. For high volume Turkish operations, organic certification costs move closer to the cost of the ink used to print the USDA seal on the product sold than the cost of farm inspections.

A. The District Court Misapplied the Case Law in Finding Lack of Standing.

The district court's opinion and order did not make any factual determinations about and declined to analyze the above. However, respectfully, it is clear that the district court's opinion and order lifts whole passages from a USDA brief that misapplied the case law as it relates to the above. ER-83.

Already, LLC v. Nike, Inc., 568 U.S. 85, 99 (2013), cited by the district court from the USDA brief, primarily involves the doctrine of "voluntary cessation," which is much different and not relevant to standing in the context of harm caused by a federal regulation that exceeds the authority of a federal statute. If the USDA volunteered to end the practice of issuing organic certificates to aggregators under the grower group certification scheme, because the USDA recognized that the practice is illegal under the OFPA, then the district court could lose jurisdiction

over Pratum Farm's APA claim under the doctrine because there is nothing left to complain about. *Already, LLC* is not relevant here.

Cases like *KERM, Inc. v. FCC*, 353 F.3d 57, 60 (D.C. Cir. 2004) and *PSSI Glob. Servs., L.L.C.*, *v. FCC,* 983 F.3d 1, 11-12 (D.C. Cir. 2020) cited by the district court from the USDA's brief are similarly distinguishable. *KERM* has similarities to the doctrine of voluntary cessation in that the alleged wrongs had occurred in the past and were corrected. The plaintiff lost standing because there were no continuing wrongs or, in other words, nothing was left to complain about. 353 F.3d at 60. Here, the alleged wrongs are continuing.

PSSI did not involve a situation where a party was challenging a new federal regulation on the basis of the regulation exceeding the authority of a federal statute. The case related to an FCC order that involved the FCC's reallocation of broadcasting spectrum licenses. The USDA brief took a quote from *PSSI* out of context ("claims that the favorable regulatory treatment of a competitor has caused a skewed playing field") and used it to suggest that any APA complaint that alleges "skewed playing fields," or the like, is insufficient to confer standing. That is not what the *PSSI* court held – the *PSSI* court was speaking to the need to have something more than bare assertions. The *PSSI* court indicated that it had previously found standing exists when the "something more" involves a regulatory order that allows competitors to sell a fungible good at a lower price. 983 F.3d at

11. That is precisely what the 2% rule does for Turkish aggregator/processors, as described above.

More than one part of the district court's opinion and order lifted USDA briefing verbatim. The district court has the discretion to do it, but, respectfully, it leads to error if the underlying briefing has inaccuracies.

IV. APA Standing – The "Zone Of Interest."

In false advertising cases brought under the Lanham Act, the Supreme Court has made it clear that plaintiffs have Article III standing for suffering reputational harm caused by false advertising. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133 (2014). In at least one case, *U.S. Structural Plywood Integrity Coal. V. PFS Corp.*, 524 F.Supp.3d 1320, 1336-1337 (S.D. Florida 2021), a district court held that certification mark licensees (plywood manufacturers whose products were certified as safe for construction use by the defendant certification mark owner) may bring an action against the certification mark owner, under the Lanham Act, for wrongly certifying certain foreign plywood products were safe for construction use, when they were not. The USDA is essentially doing the same thing here (allowing the USDA seal to be wrongly used to certify that food comes from inspected organic foreign farms when it does not). Therefore, but for sovereign immunity, the USDA is violating the false advertising prong of the Lanham Act, which normally imposes liability on private

parties for false or misleading representations of fact in commercial advertising that misrepresent the characteristics or qualities of goods sold in commerce. 15 U.S.C. § 1125(a)(1)(B).

However, this is not a Lanham Act case, it is a case brought under the APA, with the complaint invoking federal question jurisdiction under APA statute, 5 U.S.C. § 702. The statute states, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by federal agency action within the meaning of a relevant federal statute, is entitled to judicial review thereof."

In APA cases, the Supreme Court tells us that, in addition to Article III standing requirements, a party suing under the APA must assert an interest that is "arguably within the zone of interests to be protected or regulated by the statute" that is violated. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak et al.*, 567 U.S. 209, 224-225 (2012). The Supreme Court's use of the word "arguably" means the test "is not meant to be especially demanding" and "the benefit of any doubt goes to the plaintiff." *Id.* at 225.

Pratum Farm passes the test because, as a licensed beneficiary of what the USDA seal is supposed to mean (*i.e.,* farm inspections required by statute; a labeling statute that prohibits "organic" labeling unless food comes from "certified" organic farms that were inspected, etc.), Pratum Farm's APA claim arguably falls within the zone of interest protected by the OFPA.

CONCLUSION

Pratum Farm respectfully asks this Court to reverse the lower court on the issue of standing and remand for a decision on whether the 2% rule exceeds the statutory authority of the OFPA.

Date: November 17, 2024

Vantage Law, PLLC

/s/ Bruce A. Kaser
Bruce A. Kaser

Attorney for Appellant, Pratum Farm, LLC

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

Instructions for this form: http://www.ca9.uscourts.gov/forms/form17instructions.pdf

9th Cir. Case Number(s): 24-6120

The undersigned attorney or self-represented party states the following:

[X] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

[ ] I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Signature s/Bruce A. Kaser **Date** November 17, 2024
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I am the attorney or self-represented party.

This brief contains 11,930 words, including **184** words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

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