

Case Nos. A10-1596 & A10-2135

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*State of Minnesota*  
***Supreme Court***

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*Oluf Johnson and Debra Johnson,*

*Respondents,*

vs.

*Paynesville Farmers Union Cooperative Oil Company,*

*Appellant.*

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**APPELLANT'S REPLY BRIEF**

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Decision: July 25, 2011

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## INTRODUCTION

The hypothetical scenario presented by the Johnsons at the outset of their Responsive Brief is exemplary of an old legal axiom: *“If you do not have the facts, argue the law; if you do not have the law, argue the facts; if you have neither the facts nor law, ‘make something up.’”* The Johnsons have done a disservice to the appellate court system by reciting a hypothetical which is contrary to the evidence in the record and which – at a minimum – insinuates that Paynesville Co-op acted intentionally and with reckless disregard for the Johnsons’ rights. The Johnsons attempted such frivolity on a prior occasion when it brought a motion in District Court for leave to amend their Complaint to add a claim for punitive damages. In response, they and the District Court were overwhelmed with evidence of the extensive measures the Co-op takes – at the expense of both monies and labor – to avoid pesticide contamination of non-targeted land.<sup>1</sup> That motion was properly denied and the matter was not appealed.

Interestingly, Respondents never ask this Court to consider the facts of the case presently before it, instead requesting that the Court “keep [their] hypothetical in mind” as it considers the issues. Respondents’ Brief, p. 4. Instead of studying hypothetical scenarios which have no application to the specific facts of this case, and which are meant to demean Paynesville Co-op’s contributions to its customers and community, this Court’s attention should return to the facts and law which are actually before it in the instant matter.

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<sup>1</sup> Much of this evidence has already been presented to this Court. *See* Appellant’s Brief, pp. 4-6.

The primary theme of Respondents' Brief, as it pertains to analysis of the damages issue and the interpretation of the NOP regulations<sup>2</sup>, is misleading. As will be outlined in the following sections, Paynesville Co-op is not asking this Court to create new law to supplant or modify the existing NOP regulations – especially the so-called “three year rule” or “5% rule”. Paynesville Co-op is instead asking this Court to simply interpret the NOP regulations in a manner which adheres to their stated intent and in a way which promotes consistency of the regulation of organic operations.

### ARGUMENT

#### **I. THE JOHNSONS' ANALYSIS OF THE TERM “APPLIED” IN THE NOP REGULATIONS HIGHLIGHTS ITS AMBIGUITY.**

In their Brief, the Johnsons allege that the term “applied,” when used in the NOP regulations in the context of pesticide application, is done in a consistent manner, when in fact the opposite is true. Respondents' Brief, pp. 36, 40. In their attempt to argue that the term “applied” in 7 C.F.R. § 205.202(b) includes application by drift of pesticides, the Johnsons point to two other NOP regulations which use the term “application.” Respondents' Brief, p. 36 (citing 7 C.F.R. § 205.202(c) and 7 C.F.R. § 205.400(f)(1)). The Johnsons allege that, in both instances, the word “application” appears “in specific conjunction with the drifting of pesticides.” *Id.* But, in fact, only one of the two regulations referenced by the Johnsons is even arguably exemplary of this theory. That is 7 C.F.R. § 205.400(f)(1), which references any “Application, including drift, of a

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<sup>2</sup> This Reply Brief will not further discuss the trespass issue – the other primary issue on appeal – because Respondents did not raise any novel issues or arguments relating to the trespass claim.

prohibited substance . . .”. In contrast, 7 C.F.R. § 205.202(c) distinguishes unintentional “application” from a drift scenario in the phrase, “to prevent the unintended application of a prohibited substance to the crop **or** contact with a prohibited substance applied to adjoining land that is not under organic management.” 7 C.F.R. § 205.202(c) (emphasis added). Section 205.202(c) clearly separates the facts of the instant case (of “contact” with prohibited substances applied to non-organic lands) from the direct and unintended “application” of pesticides to the organic crops. Section 205.202(c) does not use the word “application” in conjunction with drift, as alleged by the Johnsons.

Because the term “application” is used in differing ways throughout the NOP regulations, as it relates to pesticide drift, and because the plain language of 7 C.F.R. § 205.202(b) does not state whether the term “applied” as used therein includes the drift of chemical pesticides, the Johnsons argument has no support. There is no basis for this Court to find that the term “applied” as used in 7 C.F.R. § 205.202(b) in unambiguous and is defined to include the accidental drift of chemical pesticides.

Respondents’ Brief also discusses for the first time the stated objectives of the Organic Foods Production Act (“OFPA”) of 1990. *See* Respondents’ Brief, p. 27 (*citing* 7 U.S.C. § 6501 *et seq*). In part, Congress enacted the OFPA “to assure consumers that organically produced products meet a **consistent standard . . .**” 7 U.S.C. § 6501 (emphasis added). Paynesville Co-op is not asking this Court to enact additional provisions or policies which will conflict with or extend the federal NOP regulations, as the Johnsons argue; rather, in accordance with the stated intent of the statute, Paynesville

Co-op is merely requesting that this Court interpret the relevant NOP regulations in a way which will promote consistency in their application.

**II. RESPONDENTS' COMITY AND PREEMPTION ARGUMENTS WERE FIRST RAISED ON APPEAL AND SHOULD NOT BE CONSIDERED BY THIS COURT.**

Despite the Johnsons' predictive arguments on the subject, the issues of comity and, especially, preemption have been raised for the first time on appeal and should not be given credence by this Court. A reviewing court typically considers only those issues that the record shows were presented and considered by the trial court in deciding the matter before it. *Thompson v. Barnes*, 200 N.W.2d 921, 927 (Minn. 1972).

Interestingly, in arguing that the "first time on appeal" rule should not be enacted in this case, the Johnsons point to an exception to the rule which, if enacted, would result in mandatory dismissal of their entire claim. Specifically, the Johnsons suggest that this Court should, for the first time on appeal, consider the preemption issue because it demonstrates this Court's lack of subject matter jurisdiction over the organic certification provisions of the NOP regulations. Respondents' Brief, p. 29 n.10. Subject matter jurisdiction has been described by this Court as "not only authority to hear and determine a particular class of actions, but authority to hear and determine the particular questions the court assumes to decide." *Duenow v. Lindeman*, 27 N.W.2d 421, 425 (Minn. 1947) (quoting *Sache v. Wallace*, 112 N.W. 386, 387 (Minn. 1907)). The language of the *Cochrane* case which is relied upon by the Johnsons on this subject provides, "Because subject matter jurisdiction goes to the authority of the court to hear a particular class of actions, lack of subject matter jurisdiction may be raised at any time, including for the

first time on appeal.” *Cochrane v. Tudor Oaks Condo. Project*, 529 N.W.2d 429, 432 (Minn. Ct. App. 1995) (citing Minn. R. Civ. P. 12.08(c)). Rule 12.08(c), on which the *Cochrane* court relied, provides, “Wherever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court **shall dismiss** the action.” Minn. R. Civ. P. 12.08(c) (emphasis added).

The Johnsons’ footnoted discussion of the “first time on appeal” rule is a “suggestion” – as that term is used in Rule 12.08(c) – that this Court lacks subject matter jurisdiction. According to that rule, mandatory dismissal of the case is warranted if Respondents’ suggestion is correct.

Finally, the Johnsons’ argument that this Court, on its own motion, should consider the preemption issue relies solely on inapplicable case law. The *Ray v. Homewood Hospital* case<sup>3</sup> cited in Respondents’ Brief is much narrower than the Johnsons’ statements imply. Respondents’ Brief, p. 29 n.10. *Ray* addressed only a claim for illegality of a contractual provision and stated that such issue would only be allowed for the first time on appeal “if such illegality (a) is apparent upon undisputed facts, (b) is in clear contravention of public policy, and (c) if a decision thereon will be decisive of the entire controversy on its merits.” *Ray v. Homewood Hosp.*, 27 N.W.2d 409, 412 (Minn. 1947) (quoting *Hart v. Bell*, 23 N.W.2d 375, 378 (Minn. 1946) (a case which also considered the claim of illegality of contractual provisions)). Neither *Ray* nor *Hart* insinuate that the exception to the “first time on appeal” rule discussed therein could be applied in any other context. Thus, there is no basis on which this Court can grant the

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<sup>3</sup> This case was improperly referred to as *Ezekial v. Homewood Hospital* in Respondents’ Brief, p. 29 n.10.

Johnsons an exception to the rule. The comity and preemption issues should not be considered by this Court.

**III. THE FEDERAL COMMON LAW PRESENTED IN RESPONDENTS' BRIEF ON THE TOPIC OF PREEMPTION ALLOWS THIS COURT TO INTERPRET THE NOP REGULATIONS IN THE MANNER REQUESTED BY PAYNESVILLE CO-OP.**

Despite the potential for dismissal for lack of subject matter jurisdiction, and the requirement that the preemption issue be disregarded for being raised for the first time on appeal, due diligence requires Paynesville Co-op to reply to the substance of the Johnsons' claims that the Co-op's defenses are preempted.

On the issue of preemption, the Johnsons rely entirely on the Eighth Circuit case entitled *In re Aurora Dairy Corporation Organic Milk Marketing and Sales Practices Litigation*, 621 F.3d 781 (8th Cir. 2010). Upon close scrutiny, however, the legal analysis in *Aurora* does not support the Johnsons' arguments that the OFPA preempts Paynesville Co-op's defenses in this matter.<sup>4</sup> *Aurora* was brought by a class of plaintiffs

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<sup>4</sup> The Johnsons have also not provided legal authority for the notion that only Paynesville Co-op's defenses – and not the Johnsons' claims for damages – can be preempted. The Johnsons throughout this litigation have stipulated that the OFPA and NOP regulations govern their ability to raise and sell organic crops. Fundamentally, then, if this Court were to determine that Paynesville Co-op's defenses under the NOP regulations were preempted, it would be unfair for the Johnsons to seek damages – even under state law tort claims – which would not exist but for the certification they receive through those same regulations. Recall that the alleged damages in this matter include (1) loss of the premium for sale of organic crops as opposed to traditional crops and (2) loss of organic certification for a three-year time period pursuant to 7 C.F.R. § 205.202(b). Neither measure of damages could be realized but for the NOP regulations. Because the NOP regulations are embedded in the Johnsons' state law claims for damages, those damages claims would also be precluded in state court if preemption applied. Thus, it is Paynesville Co-op's position that if its defenses are preempted, the Johnsons' claims for

which included consumers of organic milk. *Id.* at 787. Their primary allegations were that the organic producer's milk was packaged in cartons with false representations in the form of pictures and phrases implying that the cows were kept in "idyllic conditions" contrary to reality. *Id.* at 789-790. The Federal District Court concluded that the claims against the organic producer's certifying agent, QAI, essentially alleged that QAI should have revoked the producer's organic certification as a result of these false representations. *Id.* at 795.

Importantly, *none* of the allegations in *Aurora*, even if proven true, would constitute a violation of the NOP regulations or would otherwise cause a loss of the organic farmer's certification. *Id.* at 795-796. The *Aurora* court focused primarily on the fact that the allegations relating to the product packaging were contrary to the requirements of the NOP regulations. The facts of the instant matter lie in stark contrast. The only arguments that Paynesville Co-op makes relating to certification are based on the specific certification requirements set forth in the NOP regulations; specifically the 5% tolerance level set forth in 7 C.F.R. § 205.671. This contrast renders inapplicable the different preemption principles which were analyzed in *Aurora*.

**A. Express Preemption Does not Apply to this Case.**

"A state law is expressly preempted when a federal statute states the congressional intention to preempt state law by defining the scope of preemption." *Aurora*, 621 F.3d at

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damages which rely on the organic certification process under the NOP regulations must also be considered preempted.

792 (citation omitted). The express preemption principles discussed in *Aurora* have no relevance to this case. In its brief discussion of this topic, the *Aurora* court stated:

Congress expressly preempted independent state certification laws in the OFPA. *See* 7 U.S.C. § 6507 (providing for potentially more restrictive state organic certification regulations, but only with USDA approval). Congress did *not* expressly preempt state tort claims, consumer protection statutes, or common law claims.

*Id.* at 792 (emphasis in original). Later in its opinion, the *Aurora* court recognized the “narrowness” of the express preemption provision in the OFPA. *Id.* at 794.

The OFPA’s express preemption provision has no impact on the instant matter because Paynesville Co-op is not promoting a certification scheme which would be “more restrictive” than what is provided for in the NOP regulations. Even if Paynesville Co-op’s arguments could be construed as promoting a change to the certification provisions of the NOP regulations<sup>5</sup>, the proposal by Paynesville Co-op would be *less* restrictive than the scheme set forth by the Court of Appeals in this matter. For instance, the Court of Appeals’ interpretation of the NOP regulations gives a certifying agent the discretion to refuse certification to an otherwise compliant organic producer in the case of accidental overspray – even where no violation of the 5% rule codified in 7 C.F.R. § 205.671 has been demonstrated. To the contrary, Paynesville Co-op argues that the certifying agent should not refuse certification in such an instance, and that decertification which is based solely on accidental overspray is only warranted when the

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<sup>5</sup> It bears repeating that Paynesville Co-op is not promoting *any* addition or change to the organic certification scheme under the NOP regulations and is instead merely asking this Court to interpret those regulations in a manner consistent with the stated purpose of the OFPA.

tolerance level in 7 C.F.R. § 205.671 is violated. Thus, Paynesville Co-op argues for more leniency than what is currently the law in Minnesota, because it is the Court of Appeals' decision that, if applied, would result in stricter requirements for the retention of organic certification under the NOP regulations in the case of accidental spray drift.

**B. Field Preemption is Not Applicable to the NOP Regulations.**

“Field preemption exists []where the scheme of federal regulation is []so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.[]” *Aurora*, 621 N.W.2d at 793 (quotations and citations omitted). The Eighth Circuit in *Aurora* concluded that field preemption does not apply to the NOP regulations because “the OFPA’s regulatory scheme is not ‘so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.’” *Id.* at 794.

**C. Conflict Preemption does not Bar Paynesville Co-op’s Defenses.**

Conflict preemption is also inapplicable to the instant matter. “Conflict preemption exists where a party's compliance with both federal and state law would be impossible or where state law would pose an obstacle to the accomplishment of congressional objectives.” *Aurora*, 621 F.3d at 794 (quotations and citation omitted). On this subject, the *Aurora* court focused on the fact that the plaintiffs’ claims were contrary to the requirements of the organic certification scheme in the NOP regulations and determined that it would be impossible for the certifying agent, QAI, to comply both with the NOP regulations and the proposed advertising restrictions suggested by the plaintiffs.

*Id.* at 795. The court recognized that, “[s]tate law that poses an obstacle to the establishment of the national standard should therefore be preempted.” *Id.* at 794.

Here, as mentioned *supra*, Paynesville Co-op is not suggesting that additional requirements be imposed by this Court on the certification scheme under the NOP regulations. To the contrary, Paynesville Co-op merely seeks an interpretation of the relevant provisions in a manner which would best promote a “national standard” for production of organic food products under the NOP regulations. Paynesville Co-op is not making any arguments which could be construed as an “obstacle to the establishment” of such standards. Thus, Paynesville Co-op’s defenses in this matter cannot be barred by the doctrine of conflict preemption.

Interestingly, the rationale of the Federal District Court in *Aurora* for denying the plaintiffs’ claims under conflict preemption would, in fact, support the dismissal of the Johnsons’ claims in this matter. The District Court in *Aurora* feared that “[a]ny claimant merely suspecting that part of a producer’s operation was in any way out of organic compliance, or motivated to interfere with a compliant certified operation, could bring lawsuits such as this.” *Aurora*, 621 F.3d at 794. Here, surprisingly, it is the Johnsons themselves who, without hard evidence to the contrary, “merely suspect[.]” that their operation was out of compliance as a result of alleged overspray. The Johnsons’ and the OCIA’s actions of decertifying fields in the absence of proof of damaging overspray “interfere[d]” with the Johnsons’ own “compliant certified operation,” resulting in this unnecessary litigation. If conflict preemption is to be applied at all, it should be in the context of dismissal of the Johnsons’ claims for damages which are allegedly the result of

their loss of organic certification, when there has been no showing of a violation of the standards set forth in the NOP regulations – i.e. the 5% rule.

**IV. THE JOHNSONS' REFERENCE TO CASE LAW IN CALIFORNIA REGARDING THE VOLATILIZATION OF PESTICIDES MERELY HIGHLIGHTS THEIR LACK OF REQUISITE EXPERT TESTIMONY ON THE SUBJECT.**

The Johnsons in their Brief point to California law in an attempt to argue that drift by volatilization can lead to the imposition of liability on a pesticide applicator – even where the spray particles themselves did not drift prior to coming to rest on the target crop. Respondents' Brief, pp. 24-25 (citing *Jacobs Farm/Del Cabo, Inc. v. W. Farm Serv., Inc.*, 190 Cal. App. 4th 1502, 119 Cal. Rptr. 3d 529 (Cal. Ct. App. 6th Dist. 2010)). In *Jacobs Farm*, unlike the instant case, the plaintiff actually presented expert testimony which supported the notion that the volatilization of the chemicals at issue was common or likely in the affected location:

**Plaintiff's experts** testified that the volatilization phenomenon has been known to scientists for years. In areas where there is frequent coastal fog, such as Wilder Ranch, volatilization is common. The experts concluded that the organophosphate residue on plaintiff's crop had been deposited there by the volatilization process and that the source of the residue was the pesticides that defendant applied to one or another of the fields near plaintiff's farm.

*Jacobs Farm/Del Cabo, Inc. v. W. Farm Serv., Inc.*, 190 Cal. App. 4th 1502, 1513-14, 119 Cal. Rptr. 3d 529, 536 (Cal. Ct. App. 6th Dist. 2010) (emphasis added). In this case, there is *no* such expert testimony from Respondents' experts that would allow a jury to determine that Paynesville Co-op is culpable for movement of pesticide due to volatilization after application of the product to the intended field. The California court

acknowledged a presumption that the Johnsons must overcome in this matter when it stated, “It may be, as a factual matter, that post application drift is not something a pesticide applicator could determine prior to or while applying a pesticide.” *Jacobs Farm*, 190 Cal. App. 4th at 1527, 119 Cal. Rptr. 3d at 547. Under such a presumption, if the miniscule presence of dicamba in the Johnsons’ soybean crops in 2007 was a result of volatilization which could not have been predicted, the entire negligence claim would have to be denied for lack of a foreseeable duty of care.<sup>6</sup>

Respondents’ reliance on *Jacobs Farm* is also misplaced because of the differences between the state pesticide laws in California and Minnesota. In California, the state pesticide statute – which was “the crux of the dispute” in *Jacobs Farm*, according to the court – is violated if spraying commences even if there is only a “reasonable possibility of damage to nontarget crops.” *Jacobs Farm*, 190 Cal. App. 4th at 1526, 119 Cal. Rptr. 3d at 546 (citing Cal. Code Regs. tit. 3, § 6614). In contrast, the Minnesota statute governing application of pesticides is only violated when actual damages are realized. Minn. Stat. § 18B.07 subd. 2 (providing that “(a) A person may not use . . . a pesticide . . . in a manner . . . (2) that . . . damages agricultural products [and] (b) A person may not apply a pesticide resulting in damage to adjacent property.”).

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<sup>6</sup> Understanding that it is an issue not raised at the trial court level, Paynesville Co-op is not presenting the lack of a legal duty as a bar to the Johnsons’ negligence claims at this time. Instead, these comments are simply meant to highlight the shortcomings in the Johnsons’ reliance on outside case law from California.

Here, as discussed throughout Paynesville Co-op's briefs, there is no proof of actual damages<sup>7</sup>, and, thus, no basis for a finding of negligence *per se*.

**V. THE OCIA'S DETERMINATION TO DE-CERTIFY THE JOHNSONS' ORGANIC FIELD IS NOT ADMISSIBLE EVIDENCE AND, EVEN IF IT WAS, SUCH DETERMINATION WAS MADE UPON AN ERRONEOUS THEORY OF LAW AND SHOULD NOT BE GIVEN DEFERENCE BY THIS COURT.**

The Johnsons rely on a distinguishable case to argue that this Court should give deference to the OCIA's determination to de-certify some of the Johnsons' organic fields. Respondents' Brief, p. 43 (citing *Vicker v. Starkey*, 122 N.W.2d 169, 173 (Minn. 1963) ("Although a reviewing court might reach a contrary conclusion to that arrived at by an **administrative** body, the court cannot substitute its judgment for that of the administrative body when the finding is properly supported by evidence.") (emphasis added)). While the phrase which was reproduced in Respondents' Brief was indeed set forth by this Court in *Vicker*, the more relevant excerpt comes from the *Vicker* court's recognition of the "well-established rule" that a court *can* disturb an administrative agency's determination if the agency "proceeded upon an erroneous theory of law." *Vicker*, 122 N.W.2d at 173.

Here, Paynesville Co-op has demonstrated the error in the OCIA's decertification of the Johnsons' fields. As discussed at length in Appellant's Brief at pages 15-31,

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<sup>7</sup> As it did in its principal brief, Paynesville Co-op suggests that the only arguable harm to the Johnsons' crops was the MDA's order in 2007 to plow down a small strip of the vegetation that allegedly showed visible damage. Beyond that small portion of crops, as depicted on the MDA plat map, the Johnsons have set forth no admissible evidence of the harm for which they claim there is "zero tolerance" under Minn. Stat. § 18B.07 subd. 2(b). See Respondents' Brief, p. 25.

Respondents' arguments relating to the 5% tolerance level and the OCIA's apparent ignorance of that standard constitute a clear "erroneous theory of law." The fundamental problem with Respondents' argument is that it would require this Court to ignore 7 C.F.R. § 205.671 as if it did not exist. This fact was not lost on the district court, which recognized that under Respondents' reading of the regulations, "any" application of a prohibited substance would result in decertification, and "there would be no need for 7 C.F.R. 205.671." Add-18. The district court presumed, as this Court should, that a "superfluous regulation would not be enacted." Add-18.

Respondents for the first time cite comments to 7 C.F.R. § 205.670 and argue that the Court of Appeals decision cannot be read to create a 5% safe harbor and that a certifying agent is not *required* to conduct residue testing on any occasion. Respondents' Brief, p. 35. However, Paynesville Co-op has never argued that the 5% rule can act as a safe harbor to sell organic crops regardless of the methods otherwise used. The NOP drafters made this much clear in a comment to 7 C.F.R. § 205.671 which is reproduced in Respondents' Brief. Respondents' Brief, p. 35 (citing App-60).

Additionally, the comments to Section 205.670 cited by Respondents support Paynesville Co-op's interpretation of the 5% rule and state the requirement for residue testing in the case of accidental drift to ensure compliance with the tolerance level. The comment relied upon by the Johnsons provides, in part, "Certifying agents do not have to conduct residue tests if they do not have reason to believe testing is necessary." SA-330. This statement by the NOP drafters means that the reverse is also true; that is, if the certifying agent *has* reason to believe residue testing is necessary such testing must be

conducted. Without question, a certifying agent such as OCIA would have reason to believe that testing is necessary if – as was the case in the instant matter – one of its organic producers notifies it of potential accidental pesticide drift from a neighboring farm. The act of residue testing upon the suspicion of pesticide drift would be helpful to the organic farmer and would eliminate a situation where the certifying agent de-certifies a field based on a “gut feeling” or simply because he or she was having a bad day. In other words, if the organic producer otherwise has complied with the NOP regulations and an accidental drift event occurs, the certifying agent can – and apparently should – conduct residue testing to determine whether the tolerance levels provided for in 7 C.F.R. § 205.671 have been violated. Because no such residue testing was done in this case, the OCIA’s determination to place the Johnsons’ organic fields into three-year transition periods was (1) not “properly supported by evidence” and (2) is a decision based “upon an erroneous theory of law.” As a result of these errors, this Court has no duty under *Vicker* to give deference to the OCIA’s determinations.

*Vicker* is also distinguishable on the facts. Contrary to this case, *Vicker* dealt with a state administrative agency, the Department of Economic Security, which denied the petitioner unemployment benefits. *Vicker*, 122 N.W.2d at 170. The OCIA is not such an administrative agency whose decisions are binding upon courts. Instead it – along with many other organic certifying agents – is a private entity which provides its services to organic producers under contract. The Johnsons have provided no authority which would establish that the OCIA is an “administrative agency” whose decision are to be given deference under common law principles.

**VI. NO EVIDENCE EXISTS OF PHYSICAL IMPAIRMENT TO RESPONDENT OLUF JOHNSON IN RELATION TO THE RELEVANT EVENTS IN 2007.**

Much of Respondents' Brief is dedicated to an attempt to persuade this Court that evidence of nuisance damages exist which would defeat the trial court's summary judgment order on that claim. One of the Johnsons' arguments is that their enjoyment of their property has been negatively affected because Respondent Oluf Johnson feels detrimental physical effects when exposed to pesticides. Respondents' Brief, p. 45. A careful review of the record in this case regarding physical symptoms of pesticide exposure instead reveals that *no* evidence exists of such complaints by Oluf Johnson with respect to the one incident now on appeal; the alleged pesticide drift on June 15, 2007.

The only evidence in the trial court record relating to Appellant Oluf Johnson's alleged physical symptoms relates to just two alleged incidents; one in June, 2006 and another in July, 2008. Regarding the June, 2006 allegations, Mr. Johnson claimed to have suffered "an instant headache and cotton mouth" as a result of Paynesville Co-op "spraying actually a fair distance away." SA-176. Regarding the July, 2008 allegations, Mr. Johnson testified as follows: "I was out in the field and smelling chemical, and then, also, I guess the effects of cotton mouth, enlarging of the throat, and an instant headache. And I don't want to be in that environment; so, you know, I have to leave." SA-187. The Johnsons provided no medical evidence of such symptoms or proof of any medical condition related to pesticide exposure – by means of medical records or testimony of a

medical expert or otherwise.<sup>8</sup> Nevertheless, the Johnsons have provided no evidence of any harmful physical effects as a result of the alleged June 15, 2007 pesticide drift and such complaints should not be considered by this Court in determining whether to uphold the trial court's dismissal of the nuisance cause of action.

**VII. THE ALLEGED DRIFT INCIDENTS WHICH PRE-DATE 2007 AND ARE DISCUSSED IN THE JOHNSONS' BRIEF ARE NOT RELEVANT TO THE ISSUE OF WHETHER A PRIMA FASCIE CASE FOR DAMAGES EXISTS.**

Despite the fact that the only claim for damages which has been pled and which is now on appeal is the June 15, 2007 incident, Respondents' Brief includes allegations of several other incidents in which the Johnsons claim to have suffered monetary or other damage at the hands of Paynesville Co-op. *See, e.g.*, Respondents' Brief, pp. 8-12. Because none of the other incidents are the basis for damage claims in the instant case, their presentation to this Court should be disregarded. As they did with their hypothetical, the Johnsons are unfairly attempting to paint Paynesville Co-op as a corporate machine which has no concern for individual's rights; as opposed to the reality that Paynesville Co-op is a regional service provider which takes pride in caring for its customers and expends great effort to minimize the risk of pesticide drift. Paynesville Co-op thus takes the position that this Court cannot consider the allegations beyond the June 15, 2007 incident when making its determination of whether to uphold the dismissal of the claims for damages relating to that incident.

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<sup>8</sup> This lack of evidence of physical harm was the basis for the trial court's dismissal of the battery cause of action; a dismissal which was not challenged by the Johnsons on appeal.

Even if they were to be considered or proven true, the Johnsons exaggerate the impact of the other alleged incidents on their farming practices. The Johnsons fail to provide any evidence to support their allegations that the other incidents caused a disruption to their organic farming practices. The Johnsons' exaggeration of the impact of the incidents on their ability to raise organic crops is a result of their improper interpretation of the NOP regulations. More specifically, there is no evidence that any of the alleged incidents required the Johnsons' fields to be taken out of organic production or put into transition. Thus, none of the alleged changes to their crop rotation schedule or other farming plans were the result of any action by Paynesville Co-op. Without such evidence, there is no proof of any harm under the nuisance theory of recovery – whether for monetary or other types of damages.

**VIII. THE JOHNSONS DID NOT PROPERLY PETITION THIS COURT FOR REVIEW OF THE TRIAL COURT'S VACATION OF THE ORDER FOR TEMPORARY INJUNCTION.**

The Johnsons in their Brief argue that the Order for Temporary Injunction, which was entered by the trial court on August 6, 2009, should be reinstated. But this is a claim for relief that this Court cannot rule upon because the review of this issue was not petitioned for by the Johnsons. Despite the fact that the Johnsons included the appeal of this issue in their Notice of Appeal to the Court of Appeals, that court failed to make a ruling on the subject, instead reversing only the dismissal of the Johnsons' claim for permanent injunctive relief. *Johnson v. Paynesville Farmers Union Co-op. Oil Co.*, 802 N.W.2d 383, 392 (Minn. Ct. App. 2011), review granted (Oct. 18, 2011) (“And we reverse the denial of the Johnsons' motion to amend their complaint and of their request

for a permanent injunction because both denials were based on the same mistaken legal conclusions.”). The Court of Appeals was silent on the question of whether the Order for Temporary Injunction should be reinstated, effectively upholding the vacation of that order by the trial court. Paynesville Co-op, in its Petition for Review to this Court, did not include the issue of the temporary injunction. Thus, the issue is no longer on appeal and this Court should refrain from taking any action on it.

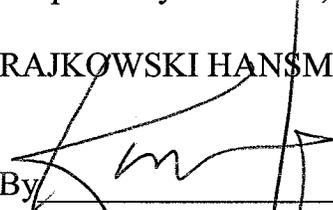
### CONCLUSION

For the reasons set forth above and in Appellant’s Brief, Paynesville Co-op again respectfully requests that the Court of Appeals’ decision in this matter be reversed and that the trial court’s dismissal of all claims be affirmed.

Dated this 30<sup>th</sup> day of December, 2011.

Respectfully submitted,

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