AGRICULTURE DECISIONS

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THIS IS A COMPILATION OF DECISIONS ISSUED BY THE SECRETARY OF AGRICULTURE AND THE COURTS PERTAINING TO STATUTES ADMINISTERED BY THE UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

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The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in *AGRICULTURE DECISIONS*.

Beginning in 1989, *AGRICULTURE DECISIONS* is comprised of three Parts, each of which is published every six months. Part One is organized alphabetically by statute and contains all decisions and orders other than those pertaining to the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, which are contained in Parts Two and Three, respectively. Beginning in Volume 60, each part of *AGRICULTURE DECISIONS* has all the parties for that volume, including consent decisions, listed alphabetically in a supplemental List of Decisions Reported. The alphabetical List of Decisions Reported and the subject matter Index (from the beginning of the annual Volume) are included in a separate volume, entitled Part Four.

Consent decisions entered subsequent to December 31, 1986, are no longer published in this publication. However, a list of consent decisions is included. Beginning in Volume 62, consent decisions may be viewed in portable document (pdf) format on the OALJ website (see url below) and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

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ERRATA

The following pages are republished here as corrections of inadvertent errors in prior volumes of Agriculture Decisions. Additionally, errata are also published on the OALJ website at www.usda.gov/da/oaljdecisions/.

JACK STEPP AND WILLIAM REINHART, HPA Docket No. 94-0014, 59 Agric. Dec. 265, 269 (2000).

Page number 269 is republished in the following pages to correct footnote 2 on page 269 to add the case name *In re PMD Produce Brokerage Corp.*

ROBERT B. MCCLOY, JR., HPA Docket No. 99-0020, 61 Agric. Dec. 745 (2002).

The miscellaneous order is republished in its entirety in the following pages to correct the inadvertent deletion of the Order section and other typographical errors.

KIRBY PRODUCE COMPANY, INC. , PACA Docket No. D-98-0002, 61 Agric. Dec. 814, 816 (2002)

Page number 816 is republished in the following pages to correct the inadvertent deletion of a phrase at the top of the page.

KIRBY PRODUCE COMPANY, INC. , PACA Docket No. D-98-0002, 61 Agric. Dec. 814, 820 (2002)

Page number 820 is republished in the following pages to correct the inadvertent deletion of paragraph 2 at the top of the page.

Respondents' Reply to Motion to Lift Stay, which was required to be filed no later than April 17, 2000, was late-filed.[2]

Moreover, as I stated in *In re Jack Stepp*, 59 Agric. Dec. ___, slip op. at 3 (Apr. 26, 2000) (Order Lifting Stay), even if Respondents' Reply to Motion to Lift

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[1](....continued)
the Hearing Clerk; instead, the date a document is filed with the Hearing Clerk is the date the document reaches the Hearing Clerk), *appeal docketed sub nom. The Chimp Farm, Inc. v. United States Dep't of Agric.*, No. 00-10608-A (11th Cir. Feb. 7, 2000); *In re Severin Peterson*, 57 Agric. Dec. 1304, 1310 n.3 (1998) (Order Denying Late Appeal) (stating that neither the applicants' mailing their appeal petition to the Regional Director, National Appeals Division, nor the receipt of the applicants' appeal petition by the National Appeals Division, Eastern Regional Office, nor the National Appeals Division's delivering the applicants' appeal petition to the Office of the Judicial Officer, constitutes filing with the Hearing Clerk); *In re Gerald Funches*, 56 Agric. Dec. 517, 528 (1997) (stating that attempts to reach the Hearing Clerk do not constitute filing an answer with the Hearing Clerk); *In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504, 514 (1996) (stating that even if the respondent's answer had been received by the complainant's counsel within the time for filing the answer, the answer would not be timely because the complainant's counsel's receipt of the respondent's answer does not constitute filing with the Hearing Clerk), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997).

[2]The record indicates that Respondents' Reply to Motion to Stay was not late-filed due to any inadvertence on the part of Respondents. Nevertheless, the Rules of Practice are binding on the Judicial Officer, and I cannot deem Respondents' late-filed Reply to Motion to Lift Stay to have been timely filed. *See In re Far West Meats*, 55 Agric. Dec. 1033, 1036 n.4 (1996) (Ruling on Certified Question) (stating that the Judicial Officer and the administrative law judge are bound by the Rules of Practice); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (stating that the Judicial Officer and the administrative law judge are bound by the Rules of Practice); *In re Sequoia Orange Co.*, 41 Agric. Dec. 1062, 1064 (1982) (stating that the Judicial Officer has no authority to depart from Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted from Marketing Orders). *Cf. In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. ___, slip op. at 15-17 (Mar. 31, 2000) (Order Denying Pet. for Recons.) (stating that the administrative law judges and the Hearing Clerk are bound by the Rules of Practice and neither the administrative law judges nor the Hearing Clerk has the authority to modify the Rules of Practice); *In re Kinzua Resources, LLC*, 57 Agric. Dec. 1165, 1179-80 (1998) (stating that generally administrative law judges and the Judicial Officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding that the chief administrative law judge did not err when he modified the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990); *In re Stimson Lumber Co.*, 56 Agric. Dec. 480, 489 (1997) (stating that generally administrative law judges and the Judicial Officer are bound by the rules of practice, but they may modify the rules of practice to comply with statutory requirements, such as the deadline for agency approval or disapproval of sourcing area applications set forth in section 490(c)(3)(A) of the Forest Resources Conservation and Shortage Relief Act of 1990 (16 U.S.C. § 620b(c)(3)(A)); and holding that the chief administrative law judge did not err when he modified the Rules of Practice Governing Adjudication of Sourcing Area Applications and Formal Review of Sourcing Areas Pursuant to the Forest Resources Conservation and Shortage Relief Act of 1990).

In re: ROBERT B. McCLOY, JR.
HPA Docket No. 99-0020.
Stay Order filed July 17, 2002.

Colleen A. Carroll, for Complainant.
Respondent, Pro se.
Order issued by William G. Jenson, Judicial Officer.

On March 22, 2002, I issued a Decision and Order: (1) concluding that on September 4, 1998, Robert B. McCloy, Jr. [hereinafter Respondent], allowed the entry of a horse known as "Ebony Threat's Ms. Professor" for the purpose of showing or exhibiting the horse as entry number 654 in class number 121 at the 60th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while the horse was sore, in violation of the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831); (2) assessing Respondent a $2,200 civil penalty; and (3) disqualifying Respondent for a period of 1 year from showing, exhibiting, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173 (2002).

On April 22, 2002, Respondent filed a petition for reconsideration of the March 22, 2002, Decision and Order, which I denied. *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 228 (2002) (Order Denying Pet. for Recons.).

On July 15, 2002, Respondent filed "Respondent's Motion to Stay Order of the Judicial Officer Dated March 22, 2002" [hereinafter Motion for Stay] requesting a stay of the Order in *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173 (2002), while he pursues review of the March 22, 2002, Order in the United States Court of Appeals for the Tenth Circuit. On July 16, 2002, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Motion for Stay.

On July 16, 2002, Colleen A. Carroll, counsel for the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], informed me that Complainant does not object to Respondent's Motion for Stay.

In accordance with 5 U.S.C. § 705, Respondent's Motion for Stay is granted.

For the foregoing reasons, the following Order should be issued.

ORDER

The Order issued in *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173 (2002), is stayed pending the outcome of proceedings for judicial review. This Stay Order shall remain in effect until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: JEAN D. PHILLIPS, BRUCE PHILLIPS, AND MICKEY JOE MCCORMICK.

hearing. Its counsel, Paul T. Gentile, Esq., submitted the following letter regarding Respondent's decision not to appear.

* * *

Gentile & Dickler
Attorneys at Law
15 Maiden Lane
New York, NY 10038

March 25, 2002

James W. Hunt, A.L.J.
c/o U.S. District Courthouse
500 Pearl Street
New York, NY 10007

Re: In re: Kirby Produce Company, Inc.
PACA Docket No. D-98-0002

Dear Judge Hunt:

Late Friday afternoon, March 22, 2002, I was notified by the principals of the above named Respondent, that personal and financial considerations would prevent any further litigation of the case. Thereafter, I unsuccessfully attempted to prevent the necessity of persons traveling to New York in order to conduct the hearing. I have been informed by Mr. Paul that the Department intends to proceed with the case.

In conjunction with the hearing, I have previously supplied Mr. Paul with copies of promissory notes presented to the produce creditors of the Respondent. It is my understanding that Tennessee counsel for the Respondent, Lynn Tarpy, Esq., prepared and presented the notes to the creditor. He further informs me that no note was returned or rejected.

Regretfully, the posture of my clients prohibit my appearance at the hearings. In addition no one else will appear on behalf of the Respondent.

Thank you for the courtesies extended the Respondent and this office.

2. During the period August 1995 through April 1996, Respondent purchased, received, and accepted in interstate commerce, from 19 sellers, 204 lots of perishable agricultural commodities and failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $1,602,736.15.

3. As of March 26, 2002, $1,305,148.78 of the $1,602,736.15 that Respondent owed to 19 sellers for purchases of perishable agricultural commodities in interstate commerce remained past due and unpaid.

Conclusion of Law

The failure of Respondent, Kirby Produce Company, Inc., to make full payment promptly of its purchases of perishable agricultural commodities constitutes repeated, flagrant, and wilful violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)).

Order

Respondent's PACA license is hereby revoked.

This Order shall be published.

This Decision will become final without further proceedings thirty-five (35) days after service hereof unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

[This Decision and Order became final August 19, 2002. - Editor]

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LION RAISINS INC. v. USDA.
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Filed January 15, 2004.

(Cite as: 354 F.3d 1072).

I&G – AMAA – FOIA – Debarment – Inspection, USDA, pre and post processing required by AMAA.

Lion Raisin, Inc. (raisin handler) was required by Agriculture Marketing Agreement Act of 1937 (AMAA) to have their products inspected by a USDA inspector, once when received from producers and again when sold to customers. The USDA inspectors retained the original of the inspection certificate and gave the duplicate to the handler (handler's copy) so that handler could assure its customers of quality. Based upon an anonymous tip that Lion was falsifying the handler's copy of the certificate to the benefit of Lion, USDA conducted an investigation. The Office of Inspector General (OIG) executed a search warrant and seized the handler's copies of the certificates. A criminal investigation was instituted by the US Attorney against Lion. USDA also instituted a debarment action under 7 U.S.C. § 1621 et. seq. which suspended Lion's access to USDA inspection services – thus severally curtaining its marketing abilities. As part of its defense, Lion sought access to certain USDA documentation through Freedom of Information Act (FOIA) requests. One part of the FOIA request was denied under the "trade secrets" exemption (5 U.S.C. §552(b)(4)) and one part of the FOIA request was denied under the "law enforcement" exemption (5 U.S.C. § 552(b)(7)(A)). A third part was granted because the USDA did not justify the application of the law enforcement exemption.

United States Court of Appeals,
Ninth Circuit

Appeal from the United States District Court for the Eastern District of California; Robert E. Coyle, District Judge, Presiding. D.C. No. CV 02-5064 REC.

Before TASHIMA, THOMAS, and SILVERMAN, Circuit Judges.

TASHIMA, Circuit Judge.

This appeal concerns the United States Department of Agriculture's ("USDA's") denial of three Freedom of Information Act ("FOIA") requests of appellant Lion Raisins ("Lion"). Lion, a large independent handler of California raisins, is the subject of a criminal investigation because the government suspects that Lion falsified documents related to USDA inspections of its raisins. In preparation of its defense, Lion submitted FOIA requests seeking documents related to USDA raisin inspections conducted at Lion's packing facility and the facilities of its competitors, and two internal reports related to the USDA's investigation of Lion. USDA denied Lion's requests pursuant to the "trade secrets" and "law enforcement" exemptions of FOIA. *See* 5 U.S.C. § 552(b)(4), (7)(A). After exhausting its administrative appeals, Lion brought this action to compel production of the documents pursuant to 5 U.S.C. § 552(a)(4)(B). The district court granted summary judgment to USDA. On appeal, Lion contends that the district court misapplied both the "trade secrets" and "law enforcement" exemptions. Lion also objects to the district court's reliance on *in camera* review of the government's sealed declaration as the sole factual basis for its "law enforcement" decision. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm in part, reverse in part, and remand.

BACKGROUND

The California raisin industry is highly competitive. At the time this action was commenced, raisin prices were at a 15-year low and the success or failure of contract bids hinged on price differentials of a fraction of a cent per pound. Lion is the largest independent handler of California raisins in the state. Like its competitors, Lion is governed by the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §§ 601-627, and a "marketing order" promulgated thereunder, 7 C.F.R. §§ 989.1-989.801, that regulate the sale of raisins. The marketing order requires that raisin handlers have their products inspected by USDA once

when they are received from producers, and again before they are sold to the consumer. 7 C.F.R. §§ 989.58-989.59. When conducting the required inspections, USDA inspectors periodically take samples from handlers' processing lines and assess the quality of the raisins in various categories, including weight, color, size, sugar content, and moisture. *See* 7 C.F.R. § 989.159. The inspectors note their observations on "Line Check Sheets" and assign grades to the observed raisins. The original of the Line Check Sheet is retained by USDA and a carbonless copy is left with the handler.[1] Information from the Line Check Sheets is summarized on USDA "Inspection Certificates," which raisin handlers can send to their consumers as an assurance of quality.

On February 20, 1998, the USDA received an anonymous tip that Lion was falsifying its Inspection Certificates. Acting on that tip, Agricultural Marketing Services of USDA ("AMS") initiated an investigation. The AMS investigation revealed that, on at least three occasions between March and December of 1998, Lion representatives forged the signatures of USDA inspectors or recorded false moisture readings on Inspection Certificates. On at least one occasion, Lion allegedly altered the grade assigned to its raisins on an Inspection Certificate from "C" to "B." On May 26, 1999, AMS prepared a report of its findings. On October 19, 2000, the USDA Office of the Inspector General ("OIG") served and executed a search warrant at Lion's packing plant. In the course of that search, agents seized the Lion-retained copies of Line Check Sheets of inspections performed at Lion's packing plant between 1995 and 2000.[2] OIG prepared a report of its findings. Based on the AMS investigation and the fruits of the OIG raid, USDA suspected that Lion falsified the Lion-retained copies of Line Check Sheets in

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[1]For clarity, the "original" retained by USDA will be referred to as the "USDA-retained original," and the "copy" left with Lion will be referred to as the "Lion-retained copy."

[2]USDA contends that it did not seize any Lion-retained copies of Line Check Sheets for the years 1995 and 2000, or for the months of January and February, 1998, and December, 1999.

addition to Inspection Certificates.

On January 12, 2001, USDA suspended Lion from eligibility for government contracts and filed an administrative complaint seeking to "debar" further inspections of Lion's facilities. Lion successfully challenged USDA's suspension order in the district court, and later, in the Court of Federal Claims. The debarment complaint was still pending at the time this appeal was argued. Meanwhile, the United States Attorney for the Eastern District of California initiated a criminal investigation.

On August 20, 2001, Lion submitted FOIA requests seeking copies of all USDA-retained original Line Check Sheets for inspections at its packing plant from 1991 to the present. Although its FOIA request did not so specify, Lion made clear in its briefs and at oral argument that it sought copies of the USDA-retained originals of Line Check Sheets for inspections at its own plants, not the Lion-retained copies that were seized from Lion's packing plant.[3] Lion suspected that any discrepancies between the Lion-retained copies of the Line Check Sheets and the USDA-retained originals were the result of USDA's intentional or negligent alteration of the USDA-retained originals. In a separate request, submitted on August 21, 2000, Lion sought the reports prepared by AMS and OIG related to USDA's investigation of Lion.[4] Both of Lion's requests (for the check sheets and for the investigative reports) were denied pursuant to the "law enforcement" exemption to FOIA, on the basis that releasing the documents would interfere with an ongoing criminal investigation. *See* 5 U.S.C. § 552(b)(7)(A).

In a third request, submitted on August 29, 2000, Lion sought copies of the USDA-retained originals of Line Check Sheets, from 1996 to the

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[3]Pursuant to a court order in a separate case, USDA photocopied and returned most of the Lion-retained copies of Line Check Sheets it seized from Lion's packing plant.

[4]A redacted version of the AMS report was provided to Lion pursuant to a court order in a separate case. Lion's FOIA request sought the unredacted report.

present, for six of its competitors in the California raisin packing industry: Sunmaid Raisins, National Raisin, Enoch Packing, Chooljian Bros., Del Rey Packing, and Victor Packing. Lion sought the Line Check Sheets of its competitors because it believed that USDA inspectors routinely committed fraud when filling out Line Check Sheets, and it wanted to compare the way its competitors' raisins were graded to the way its own raisins were graded. USDA withheld these Line Check Sheets pursuant to the "trade secrets" exemption of FOIA, on the basis that producing them would cause "substantial competitive harm" by allowing Lion to deduce the volume, market share, and marketing strategy of its main competitors. *See* 5 U.S.C. § 552(b)(4).

Lion administratively appealed the denials of each of its FOIA requests within USDA. Two of Lion's appeals were denied. The third appeal received no response.[5] Lion then brought this action. Both parties moved for summary judgment. In support of its "trade secrets" withholding, USDA submitted two declarations from David Trykowski, an AMS Senior Compliance Officer. Trykowski's declarations stated that Lion could use the information contained in its competitors' Line Check Sheets to undercut its competitors' bids for raisin contracts, and they discounted the possibility that confidential information from the Line Check sheets could be redacted to eliminate the competitive harm. In support of USDA's "law enforcement" claim, an assistant United States attorney filed a declaration under seal with the district court. Based on the information in the three declarations, including its *in camera* review of the sealed declaration, the district court granted summary judgment for USDA.

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[5]The papers relating to the third appeal were lost when the USDA mail room became infected with anthrax spores. USDA's failure to respond to Lion's third FOIA appeal within the statutory 20-day period had the legal effect of denying Lion's appeal and exhausting Lion's administrative remedies. *See* 5 U.S.C. § 552(a)(6)(C).

STANDARD OF REVIEW

In reviewing summary judgment in a FOIA case, we employ a two-step test. The first step is to determine whether the district court had an adequate factual basis for its decision. *Doyle v. FBI,* 722 F.2d 554, 555 (9th Cir.1983); *Church of Scientology v. United States Dep't of the Army,* 611 F.2d 738, 742 (9th Cir.1979). Whether a particular set of documents gives the court an adequate factual basis for its decision is a question of law that the court reviews *de novo. See Wiener v. FBI,* 943 F.2d 972, 978 (9th Cir.1991); *Binion v. United States Dep't of Justice,* 695 F.2d 1189, 1193 (9th Cir.1983).

The second step is to review the district court's decision itself. We have reviewed district court determinations as to whether a FOIA exemption applies using both the "clearly erroneous" and "*de novo* " standards of review. *See TPS, Inc. v. United States Dep't of Def.,* 330 F.3d 1191, 1194 (9th Cir.2003) ("If an adequate factual basis exists, we variously use de novo review or clear error review."). Where the district court's decision turns mainly on its findings of fact, we apply the "clearly erroneous" standard. *See Assembly of Cal. v. United States Dep't of Commerce,* 968 F.2d 916, 919 (9th Cir.1992) ("[T]he case hinges on whether disclosure of the requested information would reveal anything about the agency's decisional process. This is a fact-based inquiry where deference to the district court's finding is appropriate."); *Church of Scientology,* 611 F.2d at 743. Where the parties do not dispute that the district court had an adequate factual basis for its decision, and the decision turns on the district court's interpretation of the law, we review the district court's decision *de novo. See Schiffer v. FBI,* 78 F.3d 1405, 1409 (9th Cir.1996) (" 'Although any factual conclusions that place a document within a stated exemption of FOIA are reviewed under a clearly erroneous standard, the question of whether a document fits within one of FOIA's prescribed exemptions is one of law, upon which the district court is entitled to no deference.' ") (quoting *Ethyl Corp. v. United States EPA,* 25 F.3d 1241, 1246 (4th Cir.1994)).

The district court's application of the claimed FOIA exemptions in this case was grounded in its findings of fact. With respect to the "trade secrets" exemption, the district court determined that withholding was proper based on its factual finding that Lion could use the information in its competitors' Line Check Sheets to gain an unfair competitive advantage in the raisin market. *See* 5 U.S.C. § 552(b)(4). With respect to the "law enforcement" exemption, the district court found that withholding Lion's Line Check Sheets and the investigative reports was proper because revealing the information in the withheld documents could reasonably be expected to interfere with the government's criminal investigation. *See* 5 U.S.C. § 552(b)(7)(A). Accordingly, we review the district court's decisions for clear error. *See Assembly of Cal.,* 968 F.2d at 919. Under clear error review, we reverse only if we are "left with a definite and firm conviction that the district court has erred." *Frazee v. United States Forest Serv.,* 97 F.3d 367, 370 (9th Cir.1996) (quoting *Nat'l Wildlife Fed'n v. United States Forest Serv.,* 861 F.2d 1114, 1116 (9th Cir.1988)).

ANALYSIS

FOIA gives individuals a judicially-enforceable right of access to government agency documents. 5 U.S.C. § 552.[6] The Supreme Court has interpreted the disclosure provisions of FOIA broadly, noting that the act was animated by a "philosophy of full agency disclosure." *John Doe Agency v. John Doe Corp.,* 493 U.S. 146, 152, 110 S.Ct. 471, 107 L.Ed.2d 462 (1989); *see also Dep't of the Air Force v. Rose,* 425 U.S. 352, 361, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976) ("disclosure, not secrecy, is the dominant objective of the Act"). In order to prevent disclosure of a limited class of sensitive government documents, FOIA lists nine statutory exemptions. 5 U.S.C. § 552(b)(1)-(9). Unlike the disclosure

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[6]FOIA provides, *inter alia,* that: [E]ach agency, upon any request for records which (I) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

provisions of FOIA, its statutory exemptions "must be narrowly construed." *John Doe Agency,* 493 U.S. at 152, 110 S.Ct. 471. Where the government withholds documents pursuant to one of the enumerated exemptions of FOIA, "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B).

5 U.S.C. § 552(a)(3)(A).

A. The "Trade Secrets" Exemption

USDA withheld the Line Check Sheets of Lion's competitors pursuant to the "trade secrets" exemption. *See* 5 U.S.C. § 552(b)(4). The "trade secrets" exemption allows government agencies to withhold documents that contain "commercial or financial information obtained from a person and privileged or confidential." *Id.* Information is "confidential" for the purposes of the "trade secrets" exemption where disclosure of that information could cause "substantial harm to the competitive position of the person from whom the information was obtained." *G.C. Micro Corp. v. Defense Logistics Agency,* 33 F.3d 1109, 1112-13 (9th Cir.1994) (citing *Nat'l Parks & Conservation Ass'n v. Morton,* 498 F.2d 765 (D.C.Cir.1974)). The government need not show that releasing the documents would cause "actual competitive harm." *G.C. Micro,* 33 F.3d at 1113. Rather, the government need only show that there is (1) actual competition in the relevant market, and (2) a likelihood of substantial competitive injury if the information were released. *Id.*

We must first determine whether the district court had an adequate factual basis for its decision. Courts can rely solely on government affidavits so long as the affiants are knowledgeable about the information sought and the affidavits are detailed enough to allow the court to make an independent assessment of the government's claim. *Church of Scientology,* 611 F.2d at 742 ("If the agency supplies a reasonably detailed affidavit describing the document and facts sufficient to establish an exemption, then the district court need look no further in determining whether an exemption applies."). District courts have discretion to order

in camera inspection of the actual documents the government wishes to withhold. 5 U.S.C. § 552(a)(4)(B). *In camera* inspection of documents is disfavored, however, where the government sustains its burden of proof by way of its testimony or affidavits. *Lewis v. IRS,* 823 F.2d 375, 378 (9th Cir.1987).

In support of its claim to the "trade secrets" exemption, USDA submitted blank Line Check Sheet forms and two declarations from Trykowski. Lion disputes Trykowski's expertise in the area of raisin marketing and competition and contends that his declaration consists of "utter legal conclusions." But according to his declaration, Trykowski's position as Senior Compliance Officer for AMS, a position that he has held for over eight years, has made him "very familiar" with the raisin marketing order that governs Lion, and put him in "almost daily contact" with raisin graders and supervisors. Trykowski's experience lends considerable weight to his testimony. More importantly, Trykowski's conclusions are supported by detailed and specific descriptions of each category of information included on the Line Check Sheets and the ways in which each category of information could be turned to Lion's competitive advantage. *See Bowen v. U.S. Food & Drug Admin.,* 925 F.2d 1225, 1227 (9th Cir.1991) (holding that affidavits that described documents withheld, the statutory exemptions claimed, and the specific reasons for the agency's withholding provided adequate factual basis for application of "trade secrets" exemption). Lion does not advocate *in camera* review of the withheld Line Check Sheets.[7] Indeed, nothing could have been gained by reviewing the withheld Line Check Sheets *in camera* because there is no dispute as to the type of information contained in the Line Check Sheets. *Cf. Harvey's Wagon Wheel, Inc. v. NLRB,* 550 F.2d 1139, 1143 (9th Cir.1976) (holding that *in camera* inspection is not required where no factual dispute exists as to the nature of the statements

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[7]USDA estimates that approximately 30,000 to 50,000 documents would be responsive to Lion's three FOIA requests. A considerable portion of those documents would consist of the Line Check Sheets of Lion's competitors.

sought). Because Trykowski's declarations identify the documents sought and the exemptions claimed, and they specify the competitive harm that USDA fears would be caused by release of the requested documents, the district court had an adequate factual basis to decide whether the "trade secrets" exemption applied.

Next we must decide whether the district court clearly erred in determining that Lion's competitors' Line Check Sheets fell within the "trade secrets" exemption to FOIA. The parties agree that there is actual competition in the relevant market. As Trykowski points out, prices for raisins are at a 15-year low and bids for raisin contracts can succeed or fail on margins of less than one cent per pound. The parties disagree, however, as to whether releasing the Line Check Sheets would cause "substantial competitive harm" to Lion's competitors.

In *G.C. Micro,* the plaintiff sought information from a government agency regarding several large defense contractors' compliance with the minority contracting provisions of the Small Business Act.[8] 33 F.3d at 1111. The documents sought for each contractor included forms showing the total dollar value of all subcontracts and the percentage of those amounts that went to minority-owned businesses. *Id.* The documents did not show the subject matter of any of the contracts, nor did they show how many subcontracts each contractor had, how the subcontracts were distributed, or to whom they were awarded. *Id.* Nonetheless, the government argued that disclosing the documents would cause competitive harm because they would "provide competitors with a roadmap of the corporations' subcontracting plans and strategies." *Id.* at 1113. We held that the "trade secrets" exemption did not apply and compelled disclosure of the documents because "[t]he data [were] made up of too many fluctuating variables for competitors to gain any advantage...." *Id.* at 1115.

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[8]*See* 15 U.S.C. § 644(g).

As in *G.C. Micro,* Lion contends that the information it seeks from the Line Check Sheets would not allow it to infer confidential information about its competitors because significant variables would be redacted.[9] USDA contends, however, that revealing even the limited information Lion seeks would allow Lion to infer critical information about its competitors' volume, market share, and marketing strategy. The district court gave credence to USDA's position and held that releasing the documents would cause substantial competitive harm.

We cannot conclude that the district court's decision was clearly erroneous. At minimum, producing the Line Check Sheets of Lion's competitors would reveal the type of raisins Lion's competitors produced at the time of the inspection at issue because the format for Line Check Sheets is distinct depending on the type of raisin inspected. Thus, unlike the documents sought in *G.C. Micro,* in which the subject matter of the government contracts was obscured, *see* 33 F.3d at 1114, the Line Check Sheets identify the exact type of raisins sold. Moreover, revealing the "sampling time" information from the Line Check Sheets would allow Lion to infer the volume of its competitors' raisin sales because raisin packers work irregular hours when they have a high volume of business. With knowledge of the hours its competitors worked, Lion could deduce whether its competitors were producing a high volume of a particular

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[9]Lion conceded in its FOIA requests that the name of the producer should be redacted. In its subsequent briefs to the district court, Lion further conceded that the buyer's name and information about the size and nature of the packaging should be redacted. Finally, in its briefs to this court, Lion abandoned its request for the inspector's name and the case codes. *See* Appellant's Opening Brief at 25 ("Lion could even care less about whether or not the inspector's name is redacted as well ... Lion does not care about the case code or the size and type of container, but simply the bare analysis of the raisins."). Thus, on appeal, Lion seeks only information from the Line Check Sheets relating to the times and dates of the inspections and the "bare bone results" of the inspections. Because the question of whether these additional redactions would be sufficient to prevent competitive harm was raised for the first time on appeal, we do not reach the issue. We do not preclude the district court from reconsidering the issue based on these, or other, additional redactions.

type of raisin at the time of a given inspection. Finally, the "remarks" column of the Line Check Sheets typically includes information, such as container size and Inspection Certificate numbers, from which the identity of the packer being inspected could be inferred. Lion could use information from the Line Check Sheets to its advantage by cutting its prices for the types of raisins its competitors pack in large volumes in order to underbid them. *See id.* at 1115; *Gulf & W. Indus. v. United States,* 615 F.2d 527, 530 (D.C.Cir.1979) (holding that information that would permit competitors to estimate and undercut bids causes "substantial competitive harm"). Therefore, the district court's application of the "trade secrets" exemption to Lion's competitors' Line Check Sheets was not clearly erroneous.

B. The "Law Enforcement" Exemption

The district court determined that the USDA-retained originals of Lion's Line Check Sheets and the AMS and OIG investigative reports fell within the "law enforcement" exemption to FOIA. *See* 5 U.S.C. § 552(b)(7)(A). The "law enforcement" exemption allows the government to withhold "records or information compiled for law enforcement purposes ... to the extent that the production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings." *Id.* In order to withhold documents pursuant to the "law enforcement" exemption, USDA "must establish that it is a law enforcement agency, that the withheld documents were investigatory records compiled for law enforcement purposes, and that disclosure of those documents would interfere with pending enforcement proceedings." *Lewis,* 823 F.2d at 379. Information need not have been originally compiled for law enforcement purposes in order to qualify for the "law enforcement" exemption, so long as it was compiled for law enforcement purposes at the time the FOIA request was made. *John Doe Agency,* 493 U.S. at 155, 110 S.Ct. 471.

The sole evidence submitted in support of USDA's claim under the "law enforcement" exemption was a declaration filed under seal by an

assistant United States attorney. After reviewing the sealed declaration *in camera,* the district court ruled in favor of USDA. The district court did not elucidate its reasoning; it stated only that "[b]ased on the information disclosed in the declaration filed under seal" the "law enforcement exemption was properly invoked in this case." USDA did not brief the "law enforcement" exemption issue on appeal, nor was it prepared to discuss it at oral argument, because its counsel had never seen the sealed document and did not know the reasons for withholding the documents.[10] Lion vehemently opposed the court's reliance on *in camera* review of the sealed declaration as the sole basis for its decision. Although Lion frames its opposition as a due process challenge, its arguments are cognizable as an attack on the factual basis for the court's decision. *See Wiener,* 943 F.2d at 978-79.

Courts are permitted to rule on summary judgment in FOIA cases solely on the basis of government affidavits describing the documents sought. *Church of Scientology,* 611 F.2d at 742. Ordinarily, the government must submit detailed public affidavits identifying the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed exemption. *Wiener,* 943 F.2d at 977. This submission is commonly referred to as a "*Vaughn*" index. *See Vaughn v. Rosen,* 484 F.2d 820, 823-25 (D.C.Cir.1973). Because the court and the plaintiff do not have the opportunity to view the documents themselves, the submission must be "detailed enough for the district court to make a *de novo* assessment of the government's claim of exemption." *Maricopa Audubon Soc'y v. United States Forest Serv.,* 108 F.3d 1089, 1092 (9th Cir.1997).

Under certain limited circumstances, we have endorsed the use of *in camera* review of government affidavits as the basis for FOIA decisions.

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[10]We find it perplexing that the government would choose to assign counsel to defend its position on appeal (both in its brief and at oral argument) who is totally unfamiliar with (and, presumably, denied access to) the facts upon which the government bases its claim to the law enforcement exemption.

In *Doyle,* the plaintiff requested all FBI documents that pertained to him, but the FBI withheld the documents pursuant to several FOIA exemptions. 722 F.2d at 555. The district court ordered the FBI to submit "public affidavits justifying, itemizing, and indexing the withheld documents." *Id.* Upon reviewing the documents, the district court determined that the submitted affidavits were too vague. The FBI then submitted more detailed affidavits for *in camera* review. *Id.* Based on its *in camera* review of the new affidavits, the district court granted summary judgment for the FBI. *Id.* We affirmed, holding that *in camera* review is justified where "the government's public description of a document and the reasons for exemption may reveal the very information that the government claims is exempt from disclosure." *Id.* at 556. We noted, however, that a district court may rely solely on *ex parte* affidavits "only in the exceptional case" and only after "the government has submitted as detailed public affidavits and testimony as possible." *Id.*

Likewise, in *Wiener,* the FBI submitted affidavits supporting its withholding of documents pursuant to various FOIA exemptions but the affidavits justified withholding only in general terms. 943 F.2d at 977. The district court ordered that a "*Vaughn* index" be composed, but that it be submitted for *in camera* review. *Id.* Pursuant to the court's order, the FBI submitted two additional affidavits and copies of the documents withheld. *Id.* Based on the materials submitted for *in camera* review the district court granted summary judgment for the FBI. *Id.* We reversed, holding that the court lacked an adequate factual basis for its decision because it failed to require that the FBI submit more detailed information in the form of public affidavits before resorting to *in camera* review. *Id.* at 979. We reasoned that the district court was deprived of the benefit of "informed advocacy" to draw its attention to the weaknesses in the withholding agency's arguments. Without notice of the facts and arguments supporting the government's position, the plaintiff had "little or no opportunity to argue for release of particular documents." *Id.* Therefore, as in *Doyle,* we held that resort to *in camera* review is appropriate only after the government has submitted as much detail in the form of public affidavits and testimony as possible. *Id.* at 979.

In this case, USDA submitted no public affidavits justifying the application of the § 552(b)(7)(A) exemption to either the Line Check Sheets or the investigative reports. Rather, the United States Attorney submitted its declaration to the court directly, under seal, *in lieu* of a public affidavit. USDA cites four cases in support of its approach, but none supports its position. *Ray v. Turner,* 587 F.2d 1187 (D.C.Cir.1978), deals only with the presumption of validity that applies when the government withholds documents under the "national security" exemption; it has no significance to this case. *Id.* at 1195. *Murphy v. FBI,* 490 F.Supp. 1138 (D.D.C.1980), permitted the use of *in camera* affidavits in order to *supplement* prior public affidavits that were too general. *Id.* at 1141. *John Doe Agency* mentioned the district court's use of *in camera* materials, but it does not condone the use of *in camera* affidavits as the sole factual basis for a district court's decision. 493 U.S. at 149-50, 110 S.Ct. 471. *Lewis* concerned *in camera* inspection of the withheld documents themselves, not the government affidavit in support of withholding. 823 F.2d at 378-79.

None of the cases cited by the government justifies the district court's reliance on *in camera* review of a sealed declaration *as a substitute for* docketed public declarations, and we decline to endorse the approach here. Requiring as detailed public disclosure as possible of the government's reasons for withholding documents under a FOIA exemption is necessary to restore, to the extent possible, a traditional adversarial proceeding by giving the party seeking the documents a meaningful opportunity to oppose the government's claim of exemption. *Wiener,* 943 F.2d at 979. The district court's reliance on *in camera* review as a substitute for public affidavits deprived both the district court and this court of the informed advocacy upon which the fairness of adversary proceedings depends.[11] Because the district court failed to require that the government submit as much information as possible in the form of public declarations before relying on *in camera* review, it lacked

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[11]As noted in footnote 10, *supra,* government counsel was also totally unprepared to assist this court with any "informed advocacy" on the law enforcement exemption.

an adequate factual basis for its decision.

We do not imply that the government must disclose facts that would undermine the very purpose of its withholding.[12] *See Lewis,* 823 F.2d at 378 (the government "need not specify its objections [to disclosure] in such detail as to compromise the secrecy of the information") (alterations in the original). Nor do we suggest that *in camera* review of materials in support of the government's claim to a FOIA exemption is never appropriate. We hold only that the district court must require the government to justify FOIA withholdings in as much detail as possible on the public record before resorting to *in camera* review. *See Doyle,* 722 F.2d at 556.

1. *The Investigative Reports*

With respect to the investigative reports prepared by AMS and OIG, we remand to the district court with instructions to require submission of detailed public declarations, testimony, or other material in support of the "law enforcement" exemption. Because Lion requested specific documents, and the USDA identified the exemptions under which it withheld each document, the USDA need only explain, publicly and in detail, how releasing each of the withheld documents would interfere with the government's ongoing criminal investigation. *See, e.g., Lewis,* 823 F.2d at 379.[13] The submission must provide as much factual support for

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[12]It is not clear, however, how USDA could sincerely argue that disclosing the reasons that justify its "law enforcement" withholding would undermine the government's criminal investigation in light of counsel's admission that USDA does not know what reasons justify the invocation of the law enforcement exemption.

[13]In *Lewis,* the government submitted detailed declarations explaining why the identification and release of certain documents would interfere with its ongoing criminal investigation. *Id.* One of the affidavits explained that:

Disclosure of the documents ... would interfere with the current Service investigation of the plaintiff by prematurely revealing the evidence developed against

(continued...)

USDA's position as possible without jeopardizing the government's legitimate law enforcement interest in withholding the documents, and it must be "detailed enough for the district court to make a *de novo* assessment of the government's claim of exemption." *Maricopa Audubon Soc'y,* 108 F.3d at 1092.

2. *Lion's Line Check Sheets*

With respect to the withholding of the USDA-retained originals of Lion's Line Check Sheets, no remand is necessary. We have reviewed the sealed declaration and we find that nothing therein justifies the application of the "law enforcement" exemption. If, as USDA contends, the USDA-retained originals of the Line Check Sheets are identical to the Lion-retained copies it left at Lion's packing plant, then no harm to the government's criminal investigation could possibly result from producing copies of the USDA-retained originals. Because Lion already has copies of the documents it seeks from USDA, USDA cannot argue that revealing the information would allow Lion premature access to the evidence upon which it intends to rely at trial. *See Dow Jones Co. v. FERC,* 219 F.R.D. 167, 173-74 (C.D.Cal.2003) (government's claim to "law enforcement" exemption for document related to its criminal investigation failed where it had previously disclosed the document to the target of the investigation). Likewise, there is no possibility that Lion could tamper

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[13](...continued)
the plaintiff; the reliance placed by the government on that evidence; the names of witnesses and potential witnesses; the scope and limits of the investigation; the identities of third parties contacted; the specific transactions being investigated; the strengths and weaknesses of the government's case; and potential impeachment material. In addition, disclosure could aid plaintiff in tampering with potential evidence and witnesses, or otherwise frustrating the government's ability to present its best case in court. *Id.* at 379 n. 5 (alteration in the original). We held that the public affidavit gave the plaintiff a fair opportunity to respond to the government's arguments in support of the "law enforcement" exemption and provided an adequate factual basis for the court's decision. *Id.* at 379.

with or falsify the authentic USDA-retained originals of Lion's Line Check Sheets because Lion seeks only copies of the USDA-retained originals. USDA would continue to retain the original version of the USDA-retained originals. The government suggests that releasing Lion's Line Check Sheets would give Lion an opportunity to forge or falsify those copies in an attempt to cast doubt on the authenticity of the USDA-retained originals. Such a speculative and farfetched concern, which appears not to implicate any sources, techniques, methods, or other confidential law enforcement concern, is not a legitimate basis on which to invoke the law enforcement exemption. Were we to take it seriously, the government's argument would justify withholding of virtually *any* document by *any* government agency on the ground that the recipient might tamper with the disclosed copy. We thus conclude that the district court clearly erred in applying the "law enforcement" exemption to the USDA-retained originals of Lion's Line Check Sheets.

CONCLUSION

We affirm summary judgment for USDA with respect to Lion's request for copies of its competitors' Line Check Sheets. We reverse summary judgment for USDA with respect to Lion's request for copies of the AMS and OIG investigative reports. On remand, the district court should require USDA to submit detailed public declarations, testimony, or other material in support of its invocation of the "law enforcement" exemption and afford Lion an opportunity to advocate for the release of the reports. With respect to Lion's request for copies of the USDA-retained originals of its own Line Check Sheets, we reverse summary judgment for USDA, grant summary judgment for Lion, and order that the documents be produced forthwith. Each party shall bear its own costs on appeal.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings.

JOSEPH S. COCHRAN v. USDA.
No. 03-2522.
Filed February 24, 2004.

(Cite as:359 F.3d 263).

AMAA – Diary Act – Advertisements, generic – Assessments – Private speech – Government speech – First amendment – DPSA – NDPB – NDPRB

Small commercial dairy farmer utilizing "traditional" dairy practices objected to the mandatory assessment of 15 cents per 100 pounds of fluid milk which was used to pay the generic advertisement program as being a violation of his First amendment rights of free speech (or not to speak). The objectionable text of the advertisement was conceived and sponsored by the National Dairy Promotion Board (NDPB) as a part of the USDA Marketing Orders known as Dairy Act 7 U.S.C. § 608c. The board was constituted as a part of the Dairy Act. In the area of Constitutional law related to Private speech – Government Speech, the court refined the distinction between *Wileman* and *United Foods*. Court found that in all material respects the Government's role in the Dairy Promotion program "Got milk?" was the same as the Beef Promotion program "Beef –It's what's for dinner." The lower court had incorrectly applied the three-part test in *Wileman*. In *Wileman,* the economic autonomy of the fruit tree growers was otherwise restricted by a broader collective arrangement set forth in the marketing orders which displaced many aspects of independent business activity. In Wileman, the regulations compelling funding for speech (advertisement) was ancillary to a broader collective enterprise that otherwise restricts the individual's market autonomy and it was therefore considered to be a "economic regulation" which enjoys a "strong presumption of validity" when facing a First Amendment test. In *United Foods*, the one cent per pound assessment on mushrooms mandated the support of the growers contrary to First Amendment principals in which persons who objected to the speech (advertisement) but who nevertheless must remain as members of the group by law or necessity under the Mushroom Act. 7 U.S.C. § 6101. The court found that the Dairy Act is a stand alone law amongst a patchwork of laws (i.e. Price supports for non-fluid milk products, 7 U.S.C. § 1446, Permissive co-operatives under Capper-Volstead Act, 7 U.S.C. § 291, Harmonized Tariff Schedule (import quotas), 19 U.S.C. § 1202) which all relate to the Milk industry that was not part of any federal dairy regulatory scheme. The court also distinguished the *Central Hudson* test which governed the restriction of commercial speech as opposed to governing the compelling of speech.

United States Court of Appeals,

Third Circuit

Before SLOVITER, RENDELL and ALDISERT, Circuit Judges.

OPINION OF THE COURT

ALDISERT, Circuit Judge.

The American public is very familiar with the "Got Milk? ®" ads on television and in the print media.

This appeal requires us to decide whether a federal statute may compel a small dairy farm in Pennsylvania to help pay for the white-mustache milk advertisements and other dairy promotions. Implicated here are general First Amendment precepts that protect the right to refrain from speaking and the right to refrain from association, and the specific issue of whether the government may compel individuals to fund speech with which they disagree.

Joseph and Brenda Cochran are independent small-scale dairy farmers. They are not members of any dairy manufacturing or marketing cooperative. They alone determine how much milk to produce, how to sell and market it and to whom it will be sold.

The Dairy Promotion Stabilization Act of 1983, 7 U.S.C. § 4501 *et seq* . ("Dairy Promotion Act," "Dairy Act," or "Act"), provides for the creation of the Dairy Promotion Program and authorizes the Secretary of the Department of Agriculture ("Secretary") to issue an order creating the National Dairy Promotion and Research Board ("Dairy Board") to administer the program. To finance the promotional projects and the Dairy Board's administration of them, the Dairy Act and implementing order require every milk producer in the United States to pay mandatory

assessments of 15 cents per hundredweight of milk sold.[1] *Id.* § 4504(g); 7 C.F.R. § 1150.152. Neither the Dairy Act nor the order permits dissenting milk producers to withhold contributions for advertising or promotional projects to which they object.

...

The rate of assessment for milk ... prescribed by the order shall be 15 cents per hundredweight of milk for commercial use or the equivalent thereof, as determined by the Secretary.

7 U.S.C. § 4504(g).

The Cochrans object to paying these assessments and filed an action in the United States District Court for the Middle District of Pennsylvania seeking a declaration that the Dairy Act violates their First Amendment rights of free speech and association.

The Cochrans operate a small commercial dairy farm with approximately 150 cows on about 200 acres of land in Tioga County, north-central Pennsylvania. In contrast to many larger-scale commercial dairy farms, the Cochrans employ what is known as "traditional" methods of dairy farming. Traditional dairy farming is less aggressive than larger-scale commercial farming, as it allows cows more room to move and graze and does not use the recombinant Bovine Growth Hormone (rBGH).[2] The Cochrans believe that their methods result in

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[1]The Dairy Act provides: The order shall provide that each person making payment to a producer for milk produced in the United States and purchased from the producer shall ... collect an assessment based upon the number of hundredweights of milk for commercial use handled for the account of the producer and remit the assessment to the Board.

[2]rBGH, also known as recombinant bovine somatotropin (rBST), is a genetically engineered growth hormone administered to dairy cows to boost milk production. Although the Food and Drug Administration has approved the use of rBGH for dairy production in the United States, consumer advocates and small dairy producers have questioned the long-term effects of the growth hormone on humans, cows and the environment. *See Barnes v. Shalala,* 865 F.Supp. 550, 554 (W.D.Wis.1994).

(continued...)

healthier cows, a cleaner environment and superior milk. The Cochrans object to the advertising under the Dairy Act because it conveys a message that milk is a generic product that bears no distinction based on where and how it is produced, and thereby forces them to subsidize speech with which they disagree.

As the First Amendment may prevent the government from prohibiting speech, it may also prevent the government from compelling individuals to express certain views, *Wooley v. Maynard,* 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977); *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), or pay subsidies for speech to which individuals object, *Keller v. State Bar of California,* 496 U.S. 1, 9-10, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990); *Abood v. Detroit Dep't of Educ.,* 431 U.S. 209, 234, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977).

The Cochrans' lawsuit named as defendants Ann Veneman in her official capacity as Secretary of the United States Department of Agriculture ("USDA") and the National Dairy Promotion Board, and sought declaratory and injunctive relief from the remittance of compelled assessments by all dairy producers to finance generic dairy advertisements. Alleging that the Dairy Act unconstitutionally compels them to subsidize speech with which they disagree, the Cochrans filed a motion for summary judgment contending that their case was controlled by the teachings of *United States v. United Foods, Inc.,* 533 U.S. 405, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001), in which the Supreme Court held that compelled subsidies under the Mushroom Promotion, Research, and Consumer Information Act of 1990 ("Mushroom Act"), 7 U.S.C. § 6101 *et seq .,* violated First Amendment protections.

The Government filed a motion to dismiss or, in the alternative, for summary judgment, arguing that this case is controlled by the teachings

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[2](...continued)

of *Glickman v. Wileman Brothers & Elliott, Inc.,* 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997), in which the Supreme Court upheld compelled subsidies for advertising California tree fruit under two marketing orders issued pursuant to the Agricultural Marketing and Agreement Act of 1937 ("AMAA"), 7 U.S.C. § 608c *et seq* . The Government argued that the generic dairy advertising subsidized under the Dairy Act constitutes "government speech" and is therefore immune from First Amendment scrutiny and, moreover, that the Dairy Act is a species of economic regulation that does not violate the First Amendment.[3] The district court agreed with the Government and granted summary judgment in its favor, holding that the Dairy Act survives the deferential First Amendment scrutiny afforded to economic regulation. The Cochrans appeal.

We must decide whether the challenged communications pursuant to the Dairy Act are government speech and thereby immune from First Amendment scrutiny. If these communications are private speech, we must decide whether the Dairy Act violates the First Amendment free speech and association rights of dairy farmers. In doing so, we must consider the quantum of scrutiny to be applied to determine the validity of regulations, such as the Dairy Act, that compel commercial speech.

For the reasons that follow we reverse the judgment of the district court and hold that the compelled speech pursuant to the Dairy Act is private speech, not government speech, and is therefore subject to First Amendment scrutiny. We hold also that the Act violates the Cochrans' First Amendment free speech and association rights by compelling them to subsidize speech with which they disagree. In so doing we conclude that the subsequent Supreme Court decisions of *Glickman* in 1997 and

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[3]Seven Pennsylvania dairy farmers who support the Dairy Promotion Act and Program petitioned the district court for leave to intervene as defendants and the district court granted the petition for intervention under Rule 24(a) of the Federal Rules of Civil Procedure. The Intervenors filed a cross motion for summary judgment, echoing the arguments made by the Government in its motion.

United Foods in 2001 severely dilute the precedential vitality of our ultimate holding in *United States v. Frame,* 885 F.2d 1119 (3d Cir.1989), in which we concluded that the compelled assessments pursuant to the Beef Promotion Research Act of 1985, 7 U.S.C. § 2901 *et seq .,* survived First Amendment scrutiny.

I.

In determining the side on which the axe must fall--on *Glickman* or on *United Foods*--we must start by examining why the Supreme Court went one way in its first case of *Glickman* and the other way in its subsequent decision in *United Foods.*

A.

In *Glickman,* producers of California tree fruits (including nectarines, plums and peaches) challenged the constitutionality of regulations contained in marketing orders promulgated by the Secretary pursuant to the AMAA, 7 U.S.C. § 608c *et seq .,* that imposed mandatory assessments on fruit tree growers to cover the expenses associated with the marketing orders, including the costs of generic advertising. 521 U.S. at 460, 117 S.Ct. 2130. The Court emphasized that besides the advertising decisions, the economic autonomy of the fruit tree growers was otherwise restricted by a broader collective arrangement set forth in the marketing orders:

> California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme.

Id. at 469, 117 S.Ct. 2130.

In addition to advertising, the marketing orders for California fruit tree growers provided for mechanisms for establishing uniform prices, limiting the quality and quantity of tree fruit that could be marketed, determining the grade and size of the fruit and orderly disposing of any surplus. *Id.* at 461, 117 S.Ct. 2130. The orders also authorized joint research and development projects, quality inspection procedures and standardized packaging requirements--all of which were financed by the compelled assessments. *Id.*

The Court determined that the collective arrangement of the fruit tree farmers was similar to the union arrangement at issue in *Abood v. Detroit Board of Education,* 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), and the bar association at issue in *Keller v. State Bar of California,* 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990). In *Abood,* the Court held that the infringement upon First Amendment associational rights by compelled assessments for a union shop arrangement was "constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." 431 U.S. at 222, 97 S.Ct. 1782. Similarly, in *Keller,* the Court held that the infringement upon First Amendment associational rights by compelled assessments for a state bar program was constitutionally justified by the State's interest in regulating the legal profession and improving the quality of legal services. 496 U.S. at 13, 110 S.Ct. 2228. Finding parallels between the facts of *Abood* and *Keller,* in *Glickman* the Court concluded that as part of the AMAA marketing orders, the compelled assessments for generic advertising of California tree fruit were ancillary to a comprehensive marketing program, and therefore were "a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress." 521 U.S. at 477, 117 S.Ct. 2130.

"The opinion and the analysis of the Court [in *Glickman*] proceeded upon the premise that the producers were bound together and required by the statute to market their products according to cooperative rules. To

that extent, their mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation." *United Foods,* 533 U.S. at 412, 121 S.Ct. 2334.

B.

Four terms later, in *United Foods* the Court held that mandatory assessments imposed on mushroom producers for the purpose of funding generic mushroom advertising under the Mushroom Act, 7 U.S.C. § 6101 *et seq .,* violated the First Amendment. 533 U.S. at 416, 121 S.Ct. 2334. The Court distinguished the statutory context at issue in *United Foods* from that in *Glickman,* explaining that under the stand-alone Mushroom Act "the compelled contributions for advertising are not part of some broader regulatory scheme" and the advertising was itself the "principal object" of the Mushroom Act. *Id.* at 415, 121 S.Ct. 2334. As such, "the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity." *Id.* at 413, 121 S.Ct. 2334 (citing *Abood,* 431 U.S. at 209, 97 S.Ct. 1782; *Keller,* 496 U.S. at 1, 110 S.Ct. 2228). The Court concluded that the compelled assessments pursuant to the Mushroom Act were unlike the situation in *Abood, Keller* and *Glickman,* in which:

> Those who were required to pay a subsidy for the speech of the association already were required to associate for other purposes, making the compelled contribution of moneys to pay for expressive activities a necessary incident of a larger expenditure for an otherwise proper goal requiring the cooperative activity.

Id. at 414, 117 S.Ct. 2130.

Fundamentally, the Court noted that "[w]e have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself." *Id.* at 415, 117 S.Ct. 2130. Concluding that the only program the compelled contributions for advertising pursuant to the Mushroom Act serve "is the very advertising scheme in question," the

Court ruled that the compelled assessments were not permitted under the First Amendment. *Id.* at 416, 117 S.Ct. 2130.

C.

Guided by the express reasoning of the Court in *Glickman* and *United Foods,* we must first look at the broader statutory scheme presented in the Dairy Act, or more specifically, we must ascertain whether the dairy producers are "bound together and required by the statute to market their products according to cooperative rules" for purposes other than advertising, or speech. *United Foods,* 533 U.S. at 412, 121 S.Ct. 2334. It is to a description of the Dairy Act we now turn.

II.

The Dairy Promotion Program set forth in the Dairy Act is one in a long series of federal "checkoff" programs for promoting agricultural commodities.[4] Enacted in 1983, the Dairy Act authorizes the Secretary of Agriculture to establish a program for the "advertisement and promotion of the sale and consumption of dairy products [and] for research projects related thereto." 7 U.S.C. § 4504(a). The declared purpose of the Dairy Act is to provide for "an orderly procedure for financing ... and carrying out a coordinated program of promotion

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[4]Other stand-alone checkoff programs established by Congress which have been subject to First Amendment challenges include: Beef Research and Information Act of 1976 ("Beef Act"), 7 U.S.C. § 2901 *et seq* . (invalidated by *Livestock Marketing Ass'n v. U.S. Dep't of Agric.,* 335 F.3d 711 (8th Cir.2003) (*reh'g den.* Oct. 16, 2003)); Pork Promotion, Research, and Consumer Information Act of 1985 ("Pork Act"), 7 U.S.C. § 4801 *et seq* . (invalidated by *Michigan Pork Producers Ass'n, Inc. v. Veneman,* 348 F.3d 157 (6th Cir.2003)); Mushroom Act, 7 U.S.C. § 6101 *et seq* . (invalidated in 2001 by *United Foods,* 533 U.S. at 405, 121 S.Ct. 2334). *Cf. Glickman,* 521 U.S. at 457, 117 S.Ct. 2130 (upholding as constitutional marketing orders for California tree fruits promulgated pursuant to the AMAA, 7 U.S.C. § 608c *et seq .,* which included compelled assessments to fund, among other things, generic advertising).

designed to strengthen the dairy industry's position in the marketplace...." *Id.* § 4501(b).

The Dairy Act is a stand-alone law that was not passed as part of any other federal dairy regulatory scheme. It directs the Secretary to appoint a Dairy Board composed of private milk producers to administer the Dairy Promotion Program. *Id.* §§ 4504(b) & (c). The Act provides that every milk producer must pay a mandatory assessment of 15 cents per hundredweight of milk sold to finance the promotional programs and the Dairy Board's administration of them.

Pursuant to the authority provided in 7 U.S.C. § 4503(a), the Secretary issued an order in March 1984 establishing the Dairy Board, 7 C.F.R § 1150.131, and the Board proceeded to collect the mandatory assessments from all milk producers, 7 C.F.R § 1150.152. For the Cochrans, the compelled assessments amount to roughly $3,500 to $4,000 per year.

The Dairy Board is composed of commercial milk producers who are nominated by "eligible associations," which are private associations of milk producers that engage in dairy promotion at the state and regional level. *Id.* §§ 1150.133, 1150.273. The primary consideration in determining an organization's eligibility is "whether its membership consists primarily of milk producers who produce a substantial volume of milk" and whose overriding interests lay in the production and promotion of fluid milk and other dairy products. *Id.* § 1150.274(b).

In 1994, the Dairy Board created Dairy Management, Inc. ("DMI"), a District of Columbia corporation that now oversees and administers the promotional activities of the Dairy Act. DMI is a joint undertaking of the Dairy Board and the United Dairy Industry Association ("UDIA"), which is an association of state and regional dairy promotional programs that are considered "Qualified Programs" under the Dairy Act. "Qualified Programs" are local promotional programs, many of which preexisted the Dairy Act, to which milk producers may contribute a portion of the

money they would otherwise pay in assessments under the Act. *See* 7 U.S.C. § 4504(g)(4), 7 C.F.R. §§ 1150.152(c), 1150.153. The Act thus requires dairy farmers to pay either the full 15 cent per hundredweight assessment to the Dairy Program or part to the Dairy Program and part to a Qualified Program that engages in state or regional generic advertising. The Dairy Board and the DMI Board are composed entirely of private milk producers and other private parties, and the Dairy Promotion Program is funded entirely by private milk producers through the compelled assessments. The Dairy Promotion Program website explains: "Checkoff programs are funded by dairy producers--NOT TAXPAYERS. They are not governmental programs; rather, they are businesses with governmental oversight."[5]

The Secretary's oversight responsibilities pursuant to the Dairy Act are conducted by the Agricultural Marketing Service ("AMS"), a division of the USDA, and are limited to ensuring that the Dairy Promotion Program is in compliance with the Act. *See, e.g.,* 7 U.S.C. § 4507(a) (authorizing the Secretary to terminate an order issued under the Act only when she determines that it "obstructs or does not tend to effectuate the declared policy of" the Act). AMS guidelines explain that "[i]t is the policy of AMS in carrying out the oversight responsibility to ensure that legislative, regulatory, and Department policy requirements are met. It is not the intent to impose constraints on board operations beyond these requirements." AMS, Guidelines for AMS Oversight of Commodity Research and Promotion Programs 1 (1994). The Secretary's oversight functions for the Dairy Program are funded by the compelled assessments. 7 U.S.C. § 4504(g)(2); 7 C.F.R. § 1150.151(b). Moreover, the dairy producers, not the government, control whether the Dairy Promotion Program continues via a referendum process. 7 U.S.C. § 4506(a).

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[5]Dairy checkoff Works!--How the Dairy Checkoff works, *available at* http://www.dairycheckoff.com/howitworks.htm (last visited June 3, 2002 (J.A. at 231)).

All advertising and promotional programs that are financed by the compelled assessments under the Dairy Act and created by the Dairy Board and DMI promote milk as a generic product. 7 C.F.R. § 1150.114. Among advertising campaigns financed by the Dairy Promotion Program are "Got milk? ®" and "Ahh, the power of cheese."

III.

In addition to the Dairy Act, the dairy industry is subject to a patchwork of federal and state regulatory laws. The district court noted four federal laws in particular that it deemed relevant to this case: (1) the Agricultural Marketing Agreement Act of 1937 ("AMAA"), 7 U.S.C. § 608c *et seq .;* (2) the Agriculture Act of 1949, 7 U.S.C. § 1446; (3) import control regulations under 19 U.S.C. § 1202; and (4) the Capper-Volstead Act, 7 U.S.C. § 291.

An examination of the provisions of these statutes is crucial to determine whether these legislative acts, in conjunction with the Dairy Act, bring the case at bar within the rubric of *Glickman*--*i.e.,* requiring that milk producers are bound together and obligated by statute to market their products according to some set of cooperative rules. The district court held that such a cooperative arrangement exists for dairy producers, but we conclude otherwise.

A.

The AMAA, 7 U.S.C § 608c, permits the Secretary to issue marketing orders that regulate the handling and sales of various agricultural commodities, including milk, in different regions of the country. For milk, the marketing orders establish a classification system and set minimum prices that handlers must pay in the regions in which the orders apply. *See* 7 U.S.C. § 608c(5); 7 C.F.R. § 1000.1 *et seq* . The AMAA

applies only to "handlers"[6] of the covered commodities. 7 U.S.C. §§ 608c(1) & (5)(A). "Producers," such as dairy farmers in general, and Joseph and Brenda Cochran in particular, are specifically exempted from the application of marketing orders. *Id.* § 608c(13)(B) (stating that no marketing order "shall be applicable to any producer in his capacity as a producer").

Although milk marketing orders restrict the decisions of dairy handlers, they do not interfere with the decisions of dairy producers, such as the Cochrans, with regard to how much milk to produce, sell or whether they must sell milk at all to dairy handlers. *See id.* § 608c(5).[7] At least 25 percent of the milk sold in the United States is sold outside of federal milk marketing orders. The Cochrans are able to and do sell much of their milk outside any milk marketing order.

B.

The Agricultural Act of 1949, 7 U.S.C. § 1446, establishes a price support program wherein manufacturers and processors of cheese, nonfat dry milk and butter can sell those products to the federal government as buyer of last resort. Producers of *fluid milk,* such as the Cochrans, however, are not covered by the Agricultural Act and are not permitted

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[6]A handler is a person who purchases milk from a producer in an unprocessed form for the purpose of processing it.

[7]Milk marketing orders under the AMAA are implemented on a regional basis. *See* 7 U.S.C. § 608c(11). Not all parts of the country are covered, and some states--including California, Virginia, Maine and Montana--are outside the territory of any milk marketing order. Portions of Pennsylvania fall within two different milk marketing regions, the Northeast Area and the Mideast Area. *See* 7 C.F.R. §§ 1001.1, 1033.1. Certain portions of the state, however, including where the Cochrans are located, fall outside of any federal milk marketing order. The effect of the AMAA provisions is that any particular producer's milk is subject to a marketing order only if the producer chooses to sell to a regulated handler in an area covered by a marketing order. *See id.* §§ 1001.13, 1033.13.

to sell their product to the government under the price support program.

C.

Similarly, the import control regulations under Chapter 4 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202, subject a multitude of commodities and products to annual import quotas. Although certain dairy products are included--namely butter, dry milk and cheese-- *fluid milk* is not. *See* 7 C.F.R. Pt. 6, Apps. 1, 2, 3.

D.

Finally, the Capper-Volstead Act, 7 U.S.C. § 291, permits producers of agricultural products--including milk, mushrooms and others--to enter into manufacturing and marketing cooperatives without fear of violating antitrust laws. It does not, however, require producers to enter into such cooperatives, as federal law expressly protects producers' freedom not to join any cooperative. *See* Agricultural Fair Practices Act of 1967, 7 U.S.C. § 2301 *et seq .; Michigan Canners & Freezers Ass'n, Inc. v. Agric. Mktg. & Bargaining Bd.,* 467 U.S. 461, 477-478, 104 S.Ct. 2518, 81 L.Ed.2d 399 (1984). The Cochrans do not belong to any cooperatives protected by the antitrust exemption created by the Capper-Volstead Act.

E.

Considering the foregoing provisions of the Dairy Act and other statutes governing the dairy industry, we now turn to the First Amendment issues that constitute the heart of this appeal.[8]

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[8]The United States District Court for the Middle District of Pennsylvania had jurisdiction pursuant to 28 U.S.C. § 1331 based on the Cochrans' First Amendment claim. We have jurisdiction in this timely appeal pursuant to 28 U.S.C. §§ 1291. We review de novo the constitutionality of an Act of Congress. *Dyszel v. Marks,* 6 F.3d 116, 123 (3d Cir.1993). Similarly, our review of the district court's granting of judgment on the pleadings and summary judgment is plenary. *Anker Energy Corp. v.*

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IV.

We must first consider whether the compelled assessments generated under the Dairy Act constitute private or government speech. Although the district court did not address this issue, the Government contended before the district court that the expressions generated under the Dairy Act constitute government speech. Therefore, the issue is subject to our review.

The First Amendment prohibits the government from regulating private speech based on its content, but the Court has "permitted the government to regulate the content of what is or is not expressed when [the government] is the speaker or when [the government] enlists private entities to convey its own message." *Rosenberger v. Rector & Visitors of the Univ. of Virginia,* 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995).

The Court has not decided whether speech generated under commodity promotion laws such as the Dairy Act constitutes government speech and is thereby immune from First Amendment scrutiny.[9] But in *Frame,* this court did meet the issue. 885 F.2d at 1132-1133.

In line with our sister Courts of Appeals in *Michigan Pork Producers Ass'n, Inc. v. Veneman,* 348 F.3d 157, 161-162 (6th Cir.2003) and *Livestock Marketing Ass'n v. U.S. Dep't of Agric.,* 335 F.3d 711, 720

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[8](...continued)
Consolidation Coal Co., 177 F.3d 161, 169 (3d Cir.1999).

[9]The two decisions of the Court involving commodity promotion programs do not address the issue of government speech. In *Glickman,* the Secretary of Agriculture waived the issue by not pursuing it before the Supreme Court. 521 U.S. at 482 n. 2, 117 S.Ct. 2130 (Souter, J., dissenting). In *United Foods,* the Court refused to address the issue because the government failed to raise it before the Court of Appeals. 533 U.S. at 416-417, 121 S.Ct. 2334.

(8th Cir.2003), we held that the Beef Promotion Program was not government speech because it required only beef producers to fund it and it attributed the advertising under the program to the beef producers. *Frame,* 885 F.2d at 1132-1133. Recognizing that the Beef Promotion Program directed the Secretary to appoint all Cattlemen Board members and approve all budgets, plans, contracts and projects entered into by the Board, this court nevertheless concluded that "[t]he Secretary's extensive supervision ... does not transform this self-help program for the beef industry into 'government speech.' " We explained:

> The Cattlemen's Board seems to be an entity "representative of one segment of the population, with certain common interests." Members of the Cattlemen's Board and the Operating Committee, though appointed by the Secretary, are not government officials, but rather, individuals from the private sector. The pool of nominees from which the Secretary selects Board members, moreover, are determined by private beef industry organizations from the various states. Furthermore, the State organizations eligible to participate in Board nominations are those that "have a history of stability and permanency," and whose "primary or overriding purpose is to promote the economic welfare of cattle producers."

Id. at 1133 (quoting 7 U.S.C. § 2905(b)(3) & (4)).

The government's role in the Dairy Promotion Program is in all material respects the same as it was in the Beef Promotion Program, and under the precedent established in *Frame,* the Secretary's supervisory responsibilities are not sufficient to transform the dairy industry's self-help program into "government speech." On the dairy checkoff website, the government itself describes the Dairy Promotion Program as a non-governmental program, financed and directed by dairy farmers.

Although this court's First Amendment discussion and ultimate holding in *Frame* have been abrogated by *Glickman* and *United Foods,* none of the Court's subsequent decisions regarding "government speech"

undermine our analysis of that issue in *Frame.*[10] Accordingly, we conclude that this is a private speech case, and thus is not immune from First Amendment scrutiny.

V.

The teachings of *United Foods* require us to decide whether the dairy producers are "bound together and required by the statute to market their products according to cooperative rules[,]" 533 U.S. at 412, 121 S.Ct. 2334, for purposes other than advertising, or speech. That is our next task.

The Cochrans contend that the Dairy Act violates their First Amendment free speech and association rights by compelling them to subsidize generic advertising that promotes milk produced by methods they view as wasteful and harmful to the environment.

The First Amendment protects the right to refrain from speaking and

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[10]Notwithstanding the Government's assertions to the contrary, we are not convinced that any decisions rendered by the Court in the years following our decision in *Frame* require us to cast aside the government speech analysis we performed in *Frame. See Legal Servs. Corp. v. Velazquez,* 531 U.S. 533, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001) (concluding that restrictions placed on the private speech of a lawyer receiving government funding from the Legal Services Corporation were unconstitutional); *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth,* 529 U.S. 217, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000) (stating in dicta, in a case where the government affirmatively disavowed any connection to the speech involved, that a government speech analysis might apply if a state university used general tuition money to fund speech attributed to the school or its administrators); *Lebron v. Nat'l R.R. Passenger Corp.,* 513 U.S. 374, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995) (holding that Amtrak is a government actor for First Amendment purposes because it was created by statute to further government objectives and the government maintained substantial control over its daily operations); *Rust v. Sullivan,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (concluding that the government can prevent private doctors at family planning clinics that receive federal funding from providing abortion counseling).

the right to refrain from association. *See, e.g., Wooley,* 430 U.S. at 714, 97 S.Ct. 1428. Moreover, the government may not compel individuals to fund speech or expressive associations with which they disagree. *See United Foods,* 533 U.S. at 411, 121 S.Ct. 2334. "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors.... As a consequence, the compelled funding for the advertising must pass First Amendment scrutiny." *Id.* The individual's disagreement can be minor, as "[t]he general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Id.* (quoting *Edenfield v. Fane,* 507 U.S. 761, 767, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993)). When, however, regulation compelling funding for speech is ancillary to a broader collective enterprise that otherwise restricts the individual's market autonomy, it is considered "economic regulation," which enjoys a "strong presumption of validity" when facing a First Amendment challenge. *See Glickman,* 521 U.S. at 477, 117 S.Ct. 2130.

We conclude that in upholding as constitutional the compelled subsidies under the Dairy Act, the district court misapplied *Glickman* and misconstrued the effect of the "entire regulatory scheme applicable to milk producers...." (District Court Op. at 15 n. 5.) The Court in *United Foods* made clear that *Glickman* applied only in circumstances similar to *Abood* and *Keller*--in which individuals are "bound together" in a collective enterprise, such as a union or an integrated state bar, and the compelled subsidies are the "logical concomitant of a valid scheme of economic regulation." 533 U.S. at 412, 121 S.Ct. 2334.

The provisions of the Dairy Act do not require milk producers to participate in a collective enterprise and do not compel them to market their product, fluid milk, according to any rules of a cooperative. Although the dairy industry is "regulated" in the sense that it is subject to a patchwork of state and federal laws, there is no association that all milk producers must join that would make the entire industry analogous to a union, an integrated bar or the collective enterprise at issue in *Glickman.*

The Dairy Act is a free-standing promotional program that applies to *all* dairy producers regardless of whether they are subject to marketing orders or any other dairy regulations. It is not ancillary to any collective enterprise or compelled association with a non-speech purpose because there is no such enterprise or association for milk that encompasses all dairy producers. Indeed, the AMAA provision for milk marketing orders, which preexisted the Dairy Act, authorizes the Secretary and marketing administrators to create dairy promotional programs that literally would be ancillary to the regulatory aspects of the milk marketing orders. *See* 7 U.S.C. 608c(5)(I). Congress chose not to utilize this precise provision of the AMAA, however, and instead adopted an entirely separate program which does not operate in concert with any collective aspect of any milk marketing order.

Moreover, as independent small-scale dairy producers, the Cochrans are exempted from the regional marketing orders under the AMAA and have chosen not to enter into manufacturing and marketing cooperatives. They, and they alone, determine how much milk to produce, how to sell and market it and to whom it will be sold. Nevertheless under the Dairy Act they are compelled to pay assessments to subsidize generic dairy advertising, a form of speech with which they are in total disagreement. *Cf. Glickman,* 521 U.S. at 471, 117 S.Ct. 2130 (noting that "none of the generic advertising conveys any message with which respondents disagree").

Furthermore, as the Court in *United Foods* determined that speech is the principal purpose of the Mushroom Act, so it is of the Dairy Act.[11]

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[11]Congress' declared policy of the Mushroom Act was that it is in the public interest to authorize the establishment, through the exercise of the powers provided in this chapter, of an orderly procedure for developing, financing through adequate assessments on mushrooms produced domestically or imported into the United States, and carrying out, an effective, continuous, and coordinated program of promotion, research, and consumer and industry information designed to--(1) strengthen the mushroom industry's position in the marketplace; (2) maintain and expand existing

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Indeed, "almost all of the funds collected under the mandatory assessments are for one purpose: generic advertising." *United Foods,* 533 U.S. at 412, 121 S.Ct. 2334. In *United Foods,* the Court made clear that compelled subsidies may not be upheld where they are only germane to a program whose "principal object is speech itself." *Id.* at 415, 121 S.Ct. 2334.

We conclude, therefore, that being compelled to fund advertising pursuant to the Dairy Act raises a First Amendment free speech and associational rights issue. But our determination that the Act's compelled assessments for generic advertising implicate the Cochrans' First Amendment rights does not end our inquiry. As this court held in *Frame,* "[t]he rights of free speech and association are not absolute. Thus, we must next identify the proper standard for evaluating whether the statute ... nevertheless passes constitutional muster." 885 F.2d at 1133.[12]

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[11](...continued)
markets and uses for mushrooms; and (3) develop new markets and uses for mushrooms. 7 U.S.C. § 6101(b). Congress' declared purpose for the Dairy Act is that it is in the public interest to authorize the establishment ... of an orderly procedure for financing (through assessments on all milk produced in the United States for commercial use and on imported dairy products) and carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products. 7 U.S.C. § 4501(b).

[12]Upon concluding that milk producers are regulated to a similar degree as the California tree fruit growers in *Glickman,* the district court applied a three-part test set forth by the Supreme Court in *Glickman:* (1) whether the Act imposes a restraint on the freedom to communicate; (b) whether the Act compels any person to engage in any actual or symbolic speech; (c) whether the Act compels dairy producers to endorse or finance any political or ideological views. (District Court Op. at 16-18.) This test, however, is inappropriate because, like the Supreme Court in *United Foods,* we have concluded that the Dairy Act is not a species of economic regulation, as it is not ancillary to a more comprehensive program restricting the marketing autonomy of dairy farmers. In *United Foods* the Court did not apply this three-part test. Nor do we.
(continued...)

VI.

This case is properly characterized as a compelled commercial speech case. *See United Foods,* 533 U.S. at 410, 121 S.Ct. 2334; *Frame,* 885 F.2d at 1146 (Sloviter, J., dissenting). The Supreme Court, however, has left unresolved the standard for determining the validity of laws compelling commercial speech, and the circuit courts are divided on the issue. There are at least four variations in the judiciary's cumulative experience. One is the more lenient standard applied to commercial speech cases. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n,* 447 U.S. 557, 564, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). Another is the "germaneness" test of compelled speech cases. *See, e.g., Abood,* 431 U.S. at 235-236, 97 S.Ct. 1782. Still another is an adaptation of the commercial speech standard. *See Livestock Marketing,* 335 F.3d at 722-723. And, in *Frame,* a pre-*Glickman* and pre-*United Foods* case, this court applied the stringent level of scrutiny for associational rights cases. 885 F.2d at 1134. We now summarize the various standards.

A.

In *Central Hudson,* the Supreme Court held that to evaluate the constitutionality of regulatory restrictions on *commercial* speech the Constitution requires only intermediate scrutiny--namely, that (1) the state must "assert a substantial government interest"; (2) "the regulatory technique must be in proportion to that interest"; and (3) the incursion on commercial speech "must be designed carefully to achieve the State's goal." 447 U.S. at 564, 100 S.Ct. 2343. Commercial speech is "expression related solely to the economic interests of the speaker and its audience." *Id.* at 561, 100 S.Ct. 2343.

But the Court has left open the question of whether *Central Hudson'*

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[12](...continued)

s more relaxed First Amendment test applies to cases involving *compelled* commercial speech. In *United Foods* the Court stepped back from addressing the issue in *ipsis verbis,* explaining: "the Government itself does not rely upon *Central Hudson* to challenge the Court of Appeals' decision, ... and we therefore do not consider whether the Government's interest could be considered substantial for purposes of the *Central Hudson* test." 533 U.S. at 410, 121 S.Ct. 2334. Nevertheless, in the earlier case of *Glickman,* the Court questioned the application of the commercial speech test to compelled speech cases:

> The Court of Appeals fails to explain why the *Central Hudson* test, which involved a restriction on commercial speech, should govern a case involving the compelled funding of speech. Given the fact that the Court of Appeals relied on *Abood* for the proposition that the program implicates the First Amendment, it is difficult to understand why the Court of Appeals did not apply *Abood*'s "germaneness" test.

521 U.S. at 474 n. 18, 117 S.Ct. 2130.

Indeed, in *United Foods,* notwithstanding its specific disclaimer regarding *Central Hudson,* the Court seemingly applied the "germaneness" test:

The only program the Government contends the compelled contributions serve is the very advertising scheme in question. Were it sufficient to say speech is germane to itself, the limits observed in *Abood* and *Keller* would be empty of meaning and significance. The cooperative marketing structure relied upon by a majority of the Court in *Glickman* to sustain an ancillary assessment finds no corollary here; *the expression respondent is required to support is not germane to a purpose related to an association independent from the speech itself;* and the rationale of *Abood* extends to the party who objects to the compelled support for this speech. For these and other reasons we have set forth, the assessments are not permitted under the First Amendment.

533 U.S. at 415-416, 121 S.Ct. 2334 (emphasis added).

As we previously explained, the purpose of the Dairy Act is in all

material respects the same as that of the Mushroom Act at issue in *United Foods,* and the Dairy Act is not ancillary to a broader cooperative marketing regime like the fruit tree marketing orders at issue in *Glickman.* The compelled assessments for generic dairy advertising under the Dairy Act are germane to nothing but the speech itself. "[A]lmost all of the funds collected under the mandatory assessments are for one purpose: generic advertising." *Id.* at 412, 121 S.Ct. 2334. It would thus seem that the Dairy Act would not survive *Abood'* s germaneness test.

Other courts have applied the germaneness test to cases involving compelled assessments pursuant to promotional programs and have rejected the application of *Central Hudson. See, e.g., Michigan Pork,* 348 F.3d at 163 (noting that "[e]ven assuming that the advertising funded by the [Pork] Act is indeed commercial speech, the more lenient standard of review applied to limits on commercial speech has never been applied to speech--commercial or otherwise-- that is compelled"); *In re Washington State Apple Adver. Comm'n,* 257 F.Supp.2d 1274, 1287 (E.D.Wash.2003) (concluding that "[b]ecause the Commission's assessments do not restrict speech, it is inappropriate to apply the *Central Hudson* test for restrictions on commercial speech").

In *Livestock Marketing,* however, the Eighth Circuit concluded that an adaptation of the *Central Hudson* test applied, explaining that "*Central Hudson* and the case at bar both involve government interference with private speech in a commercial context." 335 F.3d at 722. All the same, the court concluded that the Beef Act did not survive the intermediate scrutiny of *Central Hudson. Id.* at 725-726. Relying on the reasoning set forth in *United Foods,* the court determined that the beef checkoff program is in all material respects identical to the mushroom checkoff program, and concluded that "the government's interest in protecting the welfare of the beef industry by compelling all beef producers and importers to pay for generic beef advertising is not sufficiently substantial to justify the infringement on appellees' First Amendment free speech right." *Id.*

Finally, in *Frame,* which was decided before the teachings of both *Glickman* and *United Foods,* this court applied the stringent associational rights standard but nevertheless upheld the constitutionality of the Beef Act, 7 U.S.C. § 2901 *et seq* . Back in 1989, this court concluded that the government's interest in "maintaining and expanding beef markets proves ... compelling[,]" and "[m]aintenance of the beef industry ensures preservation of the American cattlemen's traditional way of life." *Frame,* 885 F.2d at 1134- 1135 (citations omitted).

Judge Sloviter, however, dissented on this issue in *Frame:*

> I doubt that the type of compelled speech at issue here can be justified on any basis. Nonetheless, I do not reach the majority's stringent associational rights standard because I believe that no justification can be found, even under the less exacting criteria adopted by the Supreme Court in evaluating the permissibility of regulation of commercial speech [in *Central Hudson*].... While the government has a general interest in the health of the beef industry, it does not follow that the government has a substantial interest in compelling the beef industry to make and support such a promotion campaign. Instead, ... the messages represent the economic interests of one segment of the population....

Id. at 1146-1147 (Sloviter, J., dissenting) (citations and internal quotations omitted).

As in *Frame,* the Government here argues that it has a sufficient interest in increasing the demand for an agricultural product. Moreover, the Government contends that it has an interest in decreasing its obligation to purchase dairy products under the price support program, 7 U.S.C § 1446. We previously have emphasized, however, that the Court's subsequent holding in *United Foods* that clarified and limited the teachings of *Glickman,* cut away the underpinning of this court's analysis in *Frame. United Foods* makes clear that the government may not compel individuals to support an advertising program for the sole purpose of increasing demand for that product. 533 U.S. at 415, 121 S.Ct. 2334. In *United Foods,* the Court concluded that the Mushroom Act's

compelled subsidies would be unconstitutional even under the lesser scrutiny accorded to commercial speech. *Id.* at 410, 121 S.Ct. 2334.

Although the Government's contention that it has a substantial interest in decreasing its obligation under the dairy price support program is somewhat unique from the government interest asserted in *United Foods,* this interest is undermined by the fact that as a stand-alone statute, the Dairy Act does not operate in conjunction with the price support program. Indeed, producers of liquid milk such as the Cochrans are not covered by the support program. Moreover, reductions in the government's obligations under the price support program are insignificant to the Dairy Promotion Program's existence, as whether the compelled assessments continue is controlled by the dairy producers via the referendum process. 7 U.S.C. § 4506(a).

We conclude, therefore, that the government's interest in promoting the dairy industry is not sufficiently substantial to justify the infringement on the Cochran's First Amendment free speech and association rights. As Judge Sloviter suggested in her dissent in *Frame,* promotional programs such as the Dairy Act seem to really be special interest legislation on behalf of the industry's interest more so than the government's. We believe that the Supreme Court reached the same conclusion by ruling in *United Foods* that the compelled assessments pursuant to the Mushroom Act are not permitted by the First Amendment.

B.

In light of the reluctance of the Supreme Court in *United Foods* to enter the controversy over the applicable scrutiny for compelled commercial speech cases, however, we will follow suit. "[W]e find no basis under either *Glickman* or our other precedents to sustain the compelled assessments sought in this case." 533 U.S. at 410, 121 S.Ct.

2334.[13]

The compelled assessments for generic dairy advertising under the Dairy Act relate to speech and only to speech. Indeed, "almost all of the funds collected under the mandatory assessments are for one purpose: generic advertising." *Id.* at 412, 121 S.Ct. 2334.

Measured by any degree of scrutiny set forth in the foregoing discussion, we conclude that this case runs on all fours with the teachings and holding of *United Foods,* and accordingly hold that the Dairy Promotion Stabilization Act of 1983 does not survive the First Amendment challenge lodged by Appellants Joseph and Brenda Cochran. The district court erred in sustaining the constitutionality of the Dairy Act on the basis of *Glickman.*

* * * * * *

In sum, we conclude that the generic advertising pursuant to the Dairy Promotion Stabilization Act of 1983 does not constitute government speech and is therefore subject to First Amendment scrutiny. We hold that the Dairy Act violates the Cochrans' First Amendment free speech and associational rights. Although the dairy industry may be subject to a labyrinth of federal regulation, the Dairy Act is a stand-alone law and the compelled assessments for generic dairy advertising are not germane to a larger regulatory purpose other than the speech itself.

The judgment of the district court sustaining the constitutionality of the Dairy Promotion Stabilization Act of 1983 will be reversed and the proceedings remanded with a direction to enter a decree in favor of Appellants in accordance with the foregoing.

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[13]We reach this conclusion whether accepting the standard explicitly expressed in *Frame* or deciding that in view of the Court's discussion in *United Foods,* that standard is not longer controlling.

RENDELL, Circuit Judge, concurring.

RENDELL, Circuit Judge.

I join in our opinion and judgment but write separately to register my view that, having found that the assessments do not pass muster under the Supreme Court's analysis in *United Foods,* and, having noted at the end of Part IV that the compelled subsidies were assessed to support a program whose principal object was speech itself, we need not engage in the exercise of determining the "standard" regarding the extent of the government's interest for purposes of a commercial speech analysis under *Central Hudson,* as the opinion does at Part VI-A. Twice--in both *Glickman* and *United Foods*--the Supreme Court has questioned the need for engaging in a *Central Hudson* analysis.[14] And, I think it unnecessary to apply *Central Hudson* in light of the Court's analysis in *United*

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[14]The Court has not treated these cases as involving a discrete commercial speech issue, instead indicating that "[t]he question is whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced." *United Foods,* 533 U.S. at 410, 121 S.Ct. 2334; *see also id.* (stating that, even if commercial speech is less protected than other speech, there is "no basis under either *Glickman* or our other precedents to sustain the compelled assessments," but refusing to consider "whether the Government's interest could be considered substantial for purposes of the *Central Hudson* test"); *Glickman,* 521 U.S. at 474 & n. 18, 117 S.Ct. 2130 (noting that it was "error for the [Ninth Circuit] to rely on *Central Hudson* for the purpose of testing the constitutionality of market order assessments for promotional advertising," and stating that the Ninth Circuit "fails to explain why the *Central Hudson* test, which involved a restriction on commercial speech, should govern a case involving the compelled funding of speech"). In fact, in *United Foods* the Court appears to explicitly endorse the applicability of the *Abood* /*Keller* germaneness test: "It is true that the party who protests the assessment here is required simply to support speech by others, not to utter the speech itself. We conclude, however, that the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity." 533 U.S. at 413, 121 S.Ct. 2334 (citing *Abood* and *Keller*).

Foods.[15]

In *United Foods* the Court distinguished the situation it faced from the one it considered in *Glickman* by examining the following question: Is the challenged assessment part of a "broader regulatory system" that does not have speech as its primary object. 533 U.S. at 415, 121 S.Ct. 2334. There appear to be two parts to this basic inquiry. First, are the plaintiffs part of a group that is "bound together and required ... to market their products according to cooperative rules?" *Id.* at 412, 121 S.Ct. 2334. Second, is the assessment regulation related to and in furtherance of other non-speech purposes, carrying out other aspects to further other economic, societal, or governmental goals? *Id.* at 415, 121 S.Ct. 2334. Even if the answer to the first question is "no," the assessment might nonetheless be permitted if it is not *only* related to speech. This second inquiry could signal consideration of "germaneness" if, in fact, other goals were implicated. But here, we answered "no" to both questions: we decided that the Cochrans did not surrender their freedom to make independent competitive choices to any collective enterprise, and we concluded that speech was the *only* purpose of the Dairy Act. Thus, it was purely "compelled speech," forbidden by *United Foods* under *any* level of scrutiny. 533 U.S. at 410, 121 S.Ct. 2334. In fact, after discussing the various standards potentially applicable here, Judge Aldisert clearly states in the ensuing Part VI-B that under *any* level of

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[15]The Sixth Circuit, in *Michigan Pork Producers Ass'n, Inc. v. Veneman,* 348 F.3d 157 (6th Cir.2003), also rejected the application of the *Central Hudson* test to an assessment created by a similar promotional program. I find that court's comments on this matter to be instructive: "[W]e find inapplicable to this case the relaxed scrutiny of commercial speech analysis provided for by *Central Hudson,* and relied upon by Appellants. The Pork Act does not directly limit the ability of pork producers to express a message; it compels them to express a message with which they do not agree. Even assuming that the advertising funded by the Act is indeed commercial speech, the more lenient standard of review applied to limits on commercial speech has never been applied to speech-- commercial or otherwise--that is compelled. It is one thing to force someone to close her mouth; it is quite another to force her to become a mouthpiece." *Id.* at 163 (citation omitted).

scrutiny, the assessments for speech only do not pass constitutional muster given *United Foods.* The analysis in Part VI-A regarding the proper level of scrutiny is therefore unnecessary, and, I believe, dicta. 359 F.3d 263

NORTHWEST INDEPENDENT PRODUCERS ASSOCIATION, ET AL. v. USDA.
No. CIV.A. 03-700(RCL).
Filed April 6, 2004.

(Cite as: 312 F.Supp.2d 23).

AMAA – Producer – Handler – Administrative remedies, failure to exhaust – Subject matter jurisdiction, lack of – Standing.

Four fluid milk handlers and one producer seek direct court intervention to challenge the Market Administrator ("MA") from altering the price mechanism for various classes of milk under an existing milk marketing order. If one of the petitioners has proper standing, the court has subject matter jurisdiction and disputes over whether the remaining parties have standing is irrelevant.
Handlers are required under 7 U.S.C. § 608c(15)(A) to petition the Secretary, have a hearing, and receive a ruling before they may file for judicial review. The four handlers acknowledge they have not petitioned the Secretary but allege that such a petition would be "futile." Congress unequivocally directs handlers to first seek administrative relief. In *Block v. Community Nutrition Institute*, 467 U.S. 340, the court observed that Congress channeled disputes over marketing order through the Secretary because only he/she has the expertise necessary to illuminate and resolve questions about them. The AMAA does not provide producers a right of judicial review when there are parties with similar interests who are capable of seeking court review after exhaustion of administrative remedies. *c.f. Community Nutrition op.cit*. at 352, where the producers had no other forum other than the District court in which to protest acts of the Secretary which were alleged to be "beyond the Secretary's statutory authority.

United States District Court,
District of Columbia

MEMORANDUM AND ORDER

LAMBERTH, District Judge.

This matter comes before the Court on defendant's motion to dismiss. Defendant moves to dismiss this action pursuant to Fed.R.Civ.P. 12(b)(1) and Fed.R.Civ.P. 12(b)(6) on grounds that the Court lacks subject matter jurisdiction, that plaintiffs have failed to exhaust administrative remedies, and plaintiffs have failed to state a claim. Upon consideration of defendant's motion, the opposition, the reply, the applicable law, and the facts of this case, the Court finds that defendant's motion to dismiss should be granted.

I. Background

There are five plaintiffs in this action. Four of the plaintiffs are cooperatives of dairy farmers that also act as "handlers." The remaining plaintiff, Northwest Independent Producers Association ("NWI") is only a "producer" and "does not own or operate any processing facilities." Compl. ¶ 10. Plaintiffs bring this action to challenge a regulatory action of the Secretary of Agriculture that alters the mechanism by which price values for various classes of milk are determined under the Agricultural Marketing Agreement Act of 1937 ("AMAA"), *as amended,* 7 U.S.C. § § 601, *et seq* .

II. Analysis

The Court must determine two issues to resolve defendant's motion to dismiss. First, whether the claims of the four handlers should be dismissed for failure to exhaust administrative remedies? Second, whether the claims of the producer should be dismissed for lack of subject matter jurisdiction?

The administrative rights of handlers are set forth with precision in the AMAA. Specifically, the AMAA, 7 U.S.C. § 608c(15)(A), requires

handlers to petition the Secretary, have a hearing, and receive a ruling from the Secretary.[1] Once handlers complete these actions they may then seek judicial review pursuant to the next subpart, 7 U.S.C. § 608c(15)(B).[2]

Plaintiffs claim they have exhausted their administrative remedies. Compl. ¶ 9. But plaintiffs do not allege that they requested an administrative hearing or received a final ruling in accordance with 7 U.S.C. § 608c(15)(A). When confronted with this fact plaintiffs' response is that administrative relief is "chimerical and futile." Pls.' Mem. In Opp'n to Def.'s Mot. To Dismiss at 12 ("Pls.' Opp'n"). The Court finds plaintiffs' arguments of "futility" devoid of merit. The Supreme Court squarely rejected such thinking in *Block v. Community Nutrition Institute,* 467 U.S. 340, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984). The Court stated that "Congress unequivocally directed handlers first to complain to the Secretary" and again stated that "we think it clear that Congress intended judicial review of market orders issued under the Act ordinarily be confined to suits brought by handlers **in accordance with** 7 U.S.C. § 608c(15)." *Id.* at 348, 104 S.Ct. 2450 (emphasis added). *Community Nutrition Institute* involved a suit by consumers, but the Supreme Court's rationale that "[a]llowing consumers to sue the Secretary would severely disrupt this complex and delicate administrative

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[1]7 U.S.C. § 608c(15)(A) (2002) states:

Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

[2]7 U.S.C. § 608c(15)(B) states:

District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling.

scheme [and] would provide handlers with a convenient device for evading the statutory requirement that they first exhaust their administrative remedies" applies equally here. *Id.* In this case, handlers attempt to circumvent the plain statutory language by joining with a producer even though they have not exhausted their administrative remedies. Plaintiffs freely admit this is the case, stating: "[o]nce this Court concludes that [NWI] has standing to sue, it has subject matter jurisdiction and disputes over whether or not remaining plaintiffs have standing is irrelevant." Pls.' Opp'n at 2. This attempt to bootstrap the claims of handlers who have failed to exhaust to the claims of another party is precisely at issue in *Community Nutrition Institute* and is prohibited. The Court finds the handlers' failure to exhaust fatal and because Congress precluded judicial review in these circumstances, the handler plaintiffs' claims must be dismissed for lack of subject matter jurisdiction. Fed.R.Civ.P. 12(b)(1).

The right of judicial review of the remaining plaintiff, a producer, is also determined in large measure by the Supreme Court's holding in *Community Nutrition Institute.* In addition to the statements above, the Supreme Court observed that Congress channelled [sic] disputes concerning marketing orders to the Secretary in the first instance because it believed that only he has the expertise necessary to illuminate and resolve questions about them. Had Congress intended to allow consumers to attack provisions of marketing orders, it surely would have required them to pursue the administrative remedies provided in § 608c(15)(A) as well. The restriction of the administrative remedy to handlers strongly suggests that Congress intended a similar restriction of judicial review of market orders. 467 U.S. at 347, 104 S.Ct. 2450. This same rationale applies to producers as well. The Supreme Court considered both the administrative process and subsequent judicial review under the AMAA. It observed that consumers were not part of the administrative process, which was reserved to handlers and producers. The Court stated that producers are "entitled to participate in the adoption and retention of market orders. 7 U.S.C. § § 608c(8), (9), (16) B." *Id.* at 346, 104 S.Ct. 2450. The Court concluded that as to the administrative process "[i]n a

complex scheme of this type, the omission of such a provision is sufficient reason to believe that Congress intended to foreclose consumer participation in the regulatory process." *Id.* at 347, 104 S.Ct. 2450 (citing cases). The Court then evaluated consumer right to judicial review and conducted the same analysis. It determined that preclusion "turns ultimately on whether Congress intended for that class to be relied upon to challenge agency disregard of the law," and since Congress only provided the right of judicial review to handlers, the Court found no basis for Congressional intent to allow consumers to bypass the administrative remedies or to have a right to judicial review. *Id.* at 347-348, 104 S.Ct. 2450. Similarly, the inclusion of producers in the administrative process but their exclusion from the provisions enabling judicial review is the type of omissions that indicate a specific Congressional intent to omit. This omission is attributed to Congressional intent that handlers be "relied upon to challenge agency disregard of the law." *Id.* at 347, 104 S.Ct. 2450. Such an inference is logical in light of the fact that the " 'essential purpose [of this milk market order scheme is] to raise producer prices.' " *Id.* at 342, 104 S.Ct. 2450 (*quoting* S.Rep. No. 1011, 74th Cong., 1st Sess., 3 (1935)). In the present case, this would be sufficient to determine that NWI cannot seek judicial review. NWI is joined by four handlers, showing a clear interest by those parties intended by Congress to challenge the agency's actions.

The Court also considers *Stark v. Wickard,* 321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733 (1944). In *Stark,* producers were allowed to bring suit when the Secretary made deductions from the producer settlement fund, acts the producers claimed were "beyond the Secretary's statutory power," 321 U.S. at 302, 64 S.Ct. 559. Since handlers could not question the use of the fund as they had no financial interest in it, there was "no forum, other than ordinary courts, to hear this complaint." *Id.* at 309, 64 S.Ct. 559. Thus "[j]udicial review of the producer's complaint was therefore necessary to ensure achievement of the Act's most fundamental objectives." *Community Nutrition Institute,* 467 U.S. at 352, 104 S.Ct. 2450.

Community Nutrition Institute evaluated the implications of the *Stark* holding and determined that the presumption in favor of judicial review found therein was overcome where "Congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.' " 467 U.S. at 351, 104 S.Ct. 2450 (*quoting Data Processing Service v. Camp,* 397 U.S. 150, 159, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970)). As applied in *Community Nutrition Institute* the lack of alternative forum argument failed because the Court concluded that "[h]andlers have interest similar to those of consumers [and][h]andlers can therefore be expected to challenge unlawful agency action and to ensure the statute's objectives will not be frustrated." 467 U.S. at 352, 104 S.Ct. 2450. In this case, plaintiff NWI cannot argue there is no alternative forum because handlers lack an interest in the issue. In fact, plaintiffs cite cases for the proposition that "the interest of dairy processors/manufacturers and their dairy farmer patrons dovetail to a substantial degree." Pls.' Application for a Prelim. Inj. and Mem. Of P. & A. in Supp. of Pls.' Application for a Prelim. Inj. at 57 (Mar. 18, 2003) (citing *Jones v. Bergland,* 456 F.Supp. 635, 650 (E.D.Pa.1978)). Furthermore, the very presence of handlers as plaintiffs in the suit leads inexorably to the conclusion that a suit by a producer is not necessary to "ensure the statute's objectives will not be frustrated."

III. Conclusion

The group of five plaintiffs in this suit is comprised of four handlers and one producer. Defendants move to dismiss the four handlers on ground that they have failed to exhaust the administrative remedies required as a prerequisite to judicial review under 7 U.S.C. § 608c(15). Despite plaintiffs' arguments that such administrative remedies are futile the Court finds that the handlers' failure to exhaust to their administrative remedies deprives this Court of jurisdiction over their claim. Accordingly, defendant's motion to dismiss is GRANTED as to plaintiffs Northwest Dairy Association, Tillamook County Creamery, Farmers Cooperative Creamery, and Agri-Marc, Inc. Defendant also moves this Court to dismiss plaintiff Northwest Independent Producers Association,

a producer, on the ground that the Court lacks subject matter jurisdiction over the producer's claim because the AMAA does not provide producers a right of judicial review. The Court concludes that because handlers possess similar interests to producers and are capable, upon exhaustion of administrative remedies, of bringing suit pursuant to the AMAA, that defendant's motion to dismiss plaintiff Northwest Independent Producers Association is also GRANTED. Therefore, the claims of Northwest Independent Producers Association, Northwest Dairy Association, Tillamook County Creamery, Farmers Cooperative Creamery, and Agri-Marc, Inc. are dismissed for lack of subject matter jurisdiction.

SO ORDERED.

HILLSIDE DAIRY, INC., ET AL. v. USDA.
Nos. CV-S-97-1179 GEB JFM, CV-S-97-1195-GEB JFM.
Filed May 7, 2004.

(Cite As: 317 F.Supp.2d 1194).

AMAA - Commerce clause – Pooling plan, equalization – Producers – Interstate, discrimination against commerce – Roundtripping.

California failed to show how its plan to require an assessment on raw milk procured from out-of-state producers did not violate the Commerce clause and was not discriminatory to out of state producers. California had the burden that no reasonable alternative was available which was not discriminatory. California argues that the plan was prevent "Roundtripping" which was the practice of hauling California produced milk out of California and then back into California to avoid the California assessment.

United States District Court,
E.D. California

BURRELL, District Judge.

ORDER

Plaintiffs in both actions move for summary judgment on their facial challenge to California Food & Agricultural Code §§ 62077 and 62078, and certain 1997 amendments to the California Department of Food and Agriculture Pooling Plan for Market Milk ("Pooling Plan"), arguing these statutes and the amendments are unconstitutional under the Commerce Clause. Defendants oppose the motion, except for the portion that seeks to enjoin Defendants from enforcing §§ 62077 and 62078 on interstate raw milk sales.

CHALLENGE TO 62077 AND 62078

Defendants state the Department of Food and Agriculture has not applied §§ 62077 and 62078 to out-of-state raw milk producers, "does not intend to do so in the future, and ... does not object to a permanent injunction prohibiting the Department from enforcing these provisions on out-of-state dairy farmers...." (Defs.' Supp. Brief in Opp'n to Pls.' Joint Mot. for Summ. J., filed April 5, 2004, at 2.) In light of Defendants' position, it must be determined whether Plaintiffs need an injunction preventing Defendants from doing what they say they have not done and will not do; specifically, Defendants state they have not applied and will not apply §§ 62077 and 62078 to interstate raw milk sales. Before a permanent injunction issues, Plaintiffs have to demonstrate a likelihood of substantial and immediate irreparable injury. *See Easyriders Freedom F.I.G.H.T. v. Hannigan,* 92 F.3d 1486, 1495 (9th Cir.1996) ("The requirements for the issuance of a permanent injunction are 'the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law.' ").

Plaintiffs contend even though Defendants state they do not intend to enforce §§ 62077 and 62078 on interstate raw milk sales, Defendants lack authority under Article III, section 3.5(a) of the California Constitution to "refuse to enforce a statute ... unless an appellate court has made a determination that such statute is unconstitutional...." (Pls.' Supp. Memo. of P. & A. at 19.) Therefore, Plaintiffs contend an

injunction is required because the Department of Food and Agriculture "may [eventually] attempt to enforce" these statutes on interstate raw milk purchases. (*Id.*) But speculation that Defendants may eventually alter their position on enforcement of these statutes is insufficient to justify injunctive relief. Since Defendants have agreed not to enforce these statutes on interstate raw milk sales, it is inappropriate to "pass upon the constitutionality of [the statutes because the] suit ... is not adversary, [and] there is no actual antagonistic assertion of rights." *Congress of Indus. Orgs. v. McAdory,* 325 U.S. 472, 475, 65 S.Ct. 1395, 89 L.Ed. 1741 (1945) (holding that no decision should be reached on the constitutionality of a statute, since the government agreed not to enforce it). Therefore, Plaintiffs' challenge to these statutes is dismissed. *See generally Enrico's, Inc. v. Rice,* 730 F.2d 1250, 1253-55 (9th Cir.1984) (dismissing appeal after government ceased enforcing challenged regulations, since Article III jurisdiction ceased to exist).

CHALLENGE TO 1997 POOLING PLAN AMENDMENT

Plaintiffs also seek to prevent Defendants' application of a 1997 amendment to the Pooling Plan, contending that it discriminates against some interstate raw milk purchases. The challenged 1997 amendment amends § 900 of Article 9 of the Pooling Plan to require certain California processors who buy raw milk from out-of-state producers to make a payment to an equalization pool ("the pool") from which disbursements are made to various California raw milk producers and processors. This payment is calculated as follows: First, the raw milk purchased is assigned a class price corresponding to the use made of that raw milk under § 900(a).[1] Then, the lower of the "value based on the

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[1]California law establishes five classes of dairy products which California processors create from raw milk. *See* Food & Argic. Code §§ 61932-61935. The Pooling Plan "establishes minimum prices to be paid by handlers to producers for market milk in the various classes." *Id.* § 62062. But "[t]he price that a [California processor] pays for raw milk based upon its [class] does not necessarily equal the price that a [California producer] receives for the raw milk" under the Pooling Plan. (Pls.'

(continued...)

receiving plant's inplant usage" or a modified quota price is deducted from the class price assigned under § 900(a).[2] The remainder must be paid into the pool under § 1003.

Defendants explain the effect of this amendment as follows:

> Under the Pooling Plan, as amended, California processors account to the pool for their purchases of out-of-state milk based on the utilization of that milk. The quota and overbase pool prices [which are paid to California raw milk producers] are generated from that pool of revenue, whereas prior to the Amendments, the quota and overbase prices were calculated after the out-of-state milk had, in effect, been subtracted out of the pool. The effect of this change is that quota and overbase prices have increased.

(Defs.' Supp. Undis. Facts ¶ 6.)

Plaintiffs contend this payment, which is made because of interstate raw milk sales and only disbursed to certain California dairy businesses for their benefit, is an unconstitutional tariff.

The issue is whether the facial requirement in the Pooling Plan prescribing that this payment be made constitutes a monetary assessment on interstate raw milk sales for the economic protection of California dairy businesses, which discriminates against interstate raw milk sales. "[U]se [of] the term ... 'discrimination' simply means differential

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[1](...continued)
Undis. Facts ¶ 13.) "Thus, for example, processors of fluid milk pay a premium price, part of which goes into an equalization pool that provides a partial subsidy for cheese manufacturers who pay a net price that is lower than the farmers receive." *Hillside Dairy, Inc. v. Lyons,* 539 U.S. 59, 123 S.Ct. 2142, 2145, 156 L.Ed.2d 54 (2003) (citation omitted).

[2]The quota price, established by Defendants, is "compute[d] based on the weighted average classified prices of all raw milk purchases in the State." (Pls.' Undis. Facts ¶ 15.) The quota price is used to determine the price certain California raw milk producers receive when they sell raw milk to a California processor.

treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually *per se* invalid." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of the State of Oregon,* 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994).

Under the Pooling Plan, when a California dairy products processor purchases raw milk from a California producer, the processor pays into the pool an "establishe[d] minimum price" set by Defendants. Cal. Food & Agric. Code § 62062. Plaintiff's competitor, a California raw milk producer, receives a guaranteed minimum raw milk price because of the Pooling Plan, irrespective of the dairy product to which the raw milk is converted, (Pls.' Undis. Facts ¶ 14), payment of its shipping costs, (Defs.' Opp'n to Pls.' Undis. Facts ¶ 7), and the right to vote on the manner in which the Pooling Plan operates. (Pls.' Undis. Facts ¶ 20.) When a California dairy products processor purchases raw milk from an out-of-state producer, § 900 requires the processor to pay the amount set by Defendants under § 900, regardless of the raw milk purchase price negotiated between the processor and producer. Although California processors, rather than out-of-state raw milk producers, make this payment, that is immaterial to the Commerce Clause analysis. *West Lynn Creamery, Inc. v. Healy,* 512 U.S. 186, 203, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994) ("The idea that a discriminatory tax does not interfere with interstate commerce merely because the burden of the tax was borne by consumers in the taxing State [rather than out-of-state sellers has been] thoroughly repudiated....") (citation and quotation marks omitted). The payments by California processors for interstate raw milk purchases are pooled, and each California raw milk producer is paid "a weighted average 'pool price' " for all raw milk sold to California processors. (Defs.' Memo. of P. & A. at 10.) The face of the Pooling Plan reveals that out-of-state raw milk producers selling milk to California processors receive no benefit from the pool.

Plaintiffs contend the Pooling Plan is similar to the milk system considered in *West Lynn,* 512 U.S. at 190-91, 114 S.Ct. 2205, which was

declared unconstitutional under the Commerce Clause. That system "require[d] every [milk] 'dealer' in Massachusetts to make a monthly 'premium payment' into the 'Massachusetts Dairy Equalization Fund' ... [based on] the amount ... of the dealer's [fluid milk] sales in Massachusetts [regardless of the state where that milk was produced]. Each month the fund [was] distributed to Massachusetts [raw milk] producers." *Id.* The Supreme Court stated this payment was "effectively a tax which makes milk produced out of State more expensive." *Id.* at 194, 114 S.Ct. 2205. The Court explained: "Massachusetts not only rebates to domestic milk producers the tax paid on the sale of Massachusetts milk, but also the tax paid on the sale of milk produced elsewhere." *Id.* at 197, 114 S.Ct. 2205.

Defendants argue *West Lynn* is distinguishable, contending the Pooling Plan does not "require the out-of-state producer to accept [a] minimum price, [because] he can negotiate against [the minimum price applied to in-state raw milk sales], he can compete against his California counterparts but he isn't competing based on the minimum price for butter [sic], he's competing based on the higher minimum floor price that the department has given him...." (April 19, 2004, hearing transcript at 9.) But this argument is unpersuasive because as stated in *West Lynn:* "out-of-staters' ability to remain competitive by lowering their prices would not immunize a discriminatory measure" from being invalidated under the Commerce Clause. *Id.* at 195, 114 S.Ct. 2205.

Since the 1997 amendment to § 900 requires out-of-state raw milk producers to pay for benefits received exclusively by California dairy businesses, it is similar to the milk pricing order invalidated in *West Lynn.* Like the charge in *West Lynn,* this charge attendant to interstate milk sales, which is evident on the face of the Pooling Plan and just benefits certain California dairy businesses, renders § 900 discriminatory "because it, like a tariff, neutralizes advantages belonging to the place of origin." *West Lynn,* 512 U.S. at 196, 114 S.Ct. 2205 (citation and quotation marks omitted).

Defendants argue notwithstanding this discriminatory effect, § 900 should not be invalidated because it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Oregon Waste,* 511 U.S. at 101, 114 S.Ct. 1345. The Commerce Clause requires that any justification advanced for a discriminatory restriction on commerce "pass the strictest scrutiny." *Id.* (citation and quotation marks omitted).

Defendants assert the need to prevent "roundtripping" is a justification for § 900. "Roundtripping" refers to truckloads of raw milk exiting California and then turning around and re-entering California so that the raw milk could be reported as out-of-state milk when it is sold to a California processor.[3] (Lombardo Decl. ¶ 6.)

At the hearing, Defendants' counsel was asked whether this practice could be halted by simply requiring California processors to swear under penalty of perjury whether the raw milk they purchased was produced in California. Defendants' counsel responded:

> Your Honor, that was what the department tried initially. And what happens is that a particular dairy, a particular co-op in California entered into an agreement with an out-of-state co-op whereby they sold their milk to the out-of-state co-op and the out-of-state co-op in turn sold approximately the same amount of milk into the state and gave the in-state dairy a kickback, which was the benefit of roundtripping. If the processor purchasing that milk had stated under penalty of perjury who it purchased that milk from, it would not be identified as round-tripping, it would be identified as a legitimate purpose, coming from out-of-state.

(April 19, 2004, hearing transcript at 54.)

This argument is unpersuasive. Defendants have only addressed the effectiveness of requiring a California processor to identify the seller of

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[3]It is assumed without deciding that preventing roundtripping is a legitimate local purpose.

the raw milk. Defendants have not shown that requiring California processors to state whether the raw milk they purchase was produced in California would be ineffective in preventing raw milk produced in California from being reported as produced elsewhere. Defendants have failed to carry their burden of showing the absence of reasonable, nondiscriminatory alternatives to § 900.

Since § 900 discriminates on its face against interstate raw milk sales and Defendants have not carried their burden of justifying this discrimination, § 900 violates the Commerce Clause. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.* 520 U.S. 564, 581, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997) (holding a statute which discriminated against interstate commerce was "all but *per se* invalid" and violated the Commerce Clause). Therefore, Defendants are permanently enjoined from enforcing § 900 on interstate raw milk sales.[4]

The Clerk's Office shall enter judgment in accordance with this Order. Lastly, Plaintiffs' request for leave to file their respective motions for attorneys' fees within forty days of the date on which this Order is filed is granted.

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[4] Since this injunction remedies the harm to Plaintiffs at issue in this litigation, no injunctive relief regarding other sections of the Pooling Plan is warranted. *See Armstrong v. Davis,* 275 F.3d 849, 872 (9th Cir.2001) ("In determining the scope of injunctive relief that interferes with the affairs of a state agency, we must ensure, out of federalism concerns, that the injunction heels close to the identified violation and is not overly intrusive....") (citation and quotation marks omitted). Nor is Plaintiffs' request for a declaratory judgment granted. A federal court need not issue declaratory relief "[w]here a party [has obtained] ... a substantially similar alternative remedy such as an injunction." *Kinghorn v. Citibank, N.A.,* 1999 WL 30534, at *7 (N.D.Cal. Jan. 20, 1999); *see also Allis-Chalmers Corp. v. Arnold,* 619 F.2d 44, 46 (9th Cir.1980) (finding judge may refuse declaratory relief "[w]here more effective relief can be obtained by other proceedings").

KREIDER DAIRY FARMS, INC. v. USDA.
No. Civ.A.03-CV-04840.
Filed June 17, 2004.

Cite as: 2004 WL 1368806 (E.D.Pa.).

AMAA - Producer-handler, application for – "Riding the pool" – Issue preclusion – Application, mandatory reports do not constitute proper.

Kreider I - Kreider was assessed for non-payment into the producer settlement fund for the period of November 1991 through June 1992 for the partial pool fund and billed monthly thereafter because the USDA Market Administrator ("MA") determined that Kreider did not meet the producer-handler exception because it did not maintain full control of its milk sales and permitted sub-dealers/ re-sellers of its product.

Kreider II - Kreider filed a new appeal in February 1998 to the MA's determination of Kreider's non producer-handler status and also sought a refund of payments into the partial pool fund for the period of December 1995 through December 1997. Kreider failed to make an new application as a producer-handler for the requisite time period of December 1995 thru December 1999 and the Judicial Officer ("JO") denied Kreider's appeal of the MA's assessments for that period.

Appeal of Kreider II. Kreider appealed the JO's decision for the period of December 1995 thru December 1999. The court found the JO's decision was supported by substantial evidence and rendered in accordance with the law. For a portion of the challenged period, Kreider argued that an new application for producer-handler status would have been futile or alternately that filing of monthly reports constituted an new application for producer-handler status. Futility of exhausting administrative procedures is an exception to general rule that bars judicial review however, Kreider failed to substantiate its claim of futility.

United States District Court,
E.D. Pennsylvania

OPINION

GARDNER, J.

This matter is before the court on the parties' cross-motions for summary judgment. For the reasons expressed below, we conclude that

defendant is entitled to judgment as a matter of law on plaintiff's claims. Therefore, we grant defendant's motion, deny plaintiff's motion, and dismiss plaintiff's Complaint.

FACTUAL BACKGROUND

The factual background of this civil action was described in detail by United States District Judge Edward N. Cahn in a related decision, *Kreider Dairy Farms, Inc. v. Glickman,* No. 95-CV-6648, 1996 U.S. Dist. LEXIS 12094, at *5-7 (E.D.Pa. August 14, 1996). The following facts are taken from Chief Judge Cahn's August 14, 1996 decision.

Plaintiff Kreider Dairy Farms, Inc. ("Kreider") is a dairy farm corporation with its principal office in Manheim, Pennsylvania. Manheim is located within what the United States Department of Agriculture ("USDA") considers to be the Middle Atlantic area, a region in which sales of milk are regulated by Federal Milk Marketing Order 4 ("Order 4"). *See* 7 C.F.R. § 1004 (1995). Although Kreider is physically located within the boundaries of Order 4, it sells fluid milk in the marketing area covered by the New York-New Jersey Milk Marketing Order 2 ("Order 2").[1]

Since 1990, Kreider has been selling packaged kosher fluid milk to two subdealers or handlers: the Foundation for the Preservation and Perpetuation of the Torah Laws and Customs, Inc. ("FPPTLC") and Ahava Dairy Products, Inc. ("Ahava"). The FPPTLC is a distributor of fluid milk and milk products and is located in Baltimore, Maryland. It sells fluid milk to customers in Lakewood, New Jersey. Ahava, which is also a distributor of fluid milk and milk products, is located in Brooklyn, New York. Ahava distributes its dairy products in Brooklyn, Manhattan,

[1]*Kreider,* 1996 U.S. Dist. LEXIS 12094, at *5-7.

and Queens, New York.[2]

PROCEDURAL HISTORY

This civil action is closely related to earlier litigation between plaintiff and defendant in *Kreider Dairy Farms, Inc. v. Glickman,* Nos. 95-CV-06648 and 98-CV-00518 (*"Kreider I"*). *Kreider I* and the instant action (*"Kreider II"*) share the same factual background, and the procedural history of *Kreider I* is essential to an understanding of the issues before us on appeal in *Kreider II.* The procedural history of both actions follows, and is taken from, the August 14, 1996 opinion of Chief Judge Cahn in *Kreider,* 1996 U.S. Dist. LEXIS 12094, at *5-7, and from the opinion of the United States Court of Appeals for the Third Circuit in *Kreider Dairy Farms, Inc. v. Glickman,* 190 F.3d 113, 116-117 (3d Cir.1999), where indicated.

Kreider I

In December 1990 the Market Administrator ("MA") responsible for administering Order 2 learned that Kreider was selling fluid milk to Ahava for distribution into the milk marketing area covered by the New York-New Jersey Milk Marketing Order. Subsequently, the MA determined that Kreider also sold milk to the FPPTLC, which distributed it into the Order 2 marketing area.[3]

By letter dated December 19, 1990, the MA informed Kreider that it might be subject to regulation under Order 2 and instructed it to file reports with the MA's office. In January 1991 Kreider filed an application

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[2] *Id.*

[3] *Id.*

for a producer-handler designation with the MA for Order 2.[4] The MA denied the application based on its determination that Kreider did not meet the requirements of a producer-handler as defined in § 1002.12 of Order 2. *See* 7 C.F.R. § 1002.12 (1995).

Kreider, 1996 U.S. Dist. LEXIS 12094, at *3 n. 2 (internal citations omitted).

Instead, in July 1992, following audits of Kreider, the MA concluded that Kreider should be billed as a regulated handler operating a partial pool plant under Order 2. On August 7, 1992 the MA sent a billing statement to Kreider, billing it as a regulated handler under Order 2 for the period November 1991 to June 1992. Subsequently, the MA continued to bill Kreider on a monthly basis as a handler operating a

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[4]A "producer-handler" designation would exempt Kreider from paying into the producer-settlement fund used to regulate the price paid to milk producers under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 608c (1994) ("AMAA"). Specifically:

Milk marketing orders issued under the [AMAA] provide for the classification of milk in accordance with the form in which or the purpose for which it is used, and for the payment to all producers delivering milk to all handlers under a particular order of uniform minimum prices for all milk so delivered. The procedure is generally as follows:

The Market Administrator computes the value of milk used by each pool handler by multiplying the quantity of milk he uses in each class by the class price and adding the results. The values for all handlers are then combined into one total. That amount is decreased or increased by several subtractions or additions.... The result is divided by the total quantity of milk that is priced under the regulatory program. The figure thus obtained is the basic or uniform price which must be paid to producers for their milk. Each handler whose own total use value of milk for a particular delivery period, i.e., a calendar month, is greater that his total payments at the uniform price is required to pay the difference into an equalization or producer-settlement fund. Each handler whose own total use value of milk is less than his total payments to producers at the uniform price is entitled to withdraw the amount of the difference from the equalization or producer-settlement fund. Thus a composite or uniform price is effectuated by means of the equalization or producer-settlement fund.

partial pool plant.[5]

On December 28, 1993 Kreider filed a petition challenging the MA's determination that Kreider was a handler regulated by Order 2 and liable for payments to the producer-settlement fund, rather than a producer-handler exempt from such payments.[6] The Judicial Officer ("JO") dismissed Kreider's petition, affirming the MA's determination that Kreider was not eligible for producer-handler status because it sold milk to two subdealers, Ahava and FPPTLC.[7] The JO found that Kreider's reliance on Ahava and FPPTLC to distribute some of its fluid milk products evidenced its lack of complete and exclusive control over all facilities and resources used for the production, processing and distribution of milk, as required to qualify as a producer-handler under Order 2.[8]

On October 18, 1995 Kreider filed a complaint pursuant to the AMAA in the District Court challenging the JO's decision. *See* AMAA, 7 U.S.C. § 608c(15)(B) (1994). By opinion and Order dated August 14, 1996, the District Court denied the parties' cross motions for summary judgment and remanded for further administrative findings on whether Kreider was "riding the pool," that is, whether Kreider was the type of dairy for which producer-handler status should be denied pursuant to the promulgation history of the producer-handler exemption.[9]

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[5]*Id.*

[6]Decision and Order of Judicial Officer William G. Jensen, dated August 5, 2003 ("August 5, 2003 Decision"), Exhibit 59 to Administrative Record ("Record"), at pages 1-2.

[7]*Id.* at 2.

[8]*Id.*

[9]*Kreider Dairy Farms, Inc. v. Glickman,* 190 F.3d 113, 116-117 (3d Cir.1999).

On remand, Administrative Law Judge ("ALJ") Edwin S. Bernstein held a hearing on April 23, 1997 and issued a Decision and Order dated August 12, 1997 holding that Kreider was "riding the pool" and therefore was not entitled to producer-handler status.[10] Kreider did not timely appeal this decision, and the decision of ALJ Bernstein became final.[11]

Kreider II

On February 17, 1998 Kreider commenced *Kreider II* by filing a new petition for review while ALJ Bernstein's decision was on appeal .[12] The new petition sought a refund of Kreider's payments to the producer-settlement fund from December 1995 through December 1997.[13] Kreider subsequently filed an amended petition which expanded the time period under review to December 1999.[14]

Kreider II first came before Judicial Officer William G. Jensen on a certified question from ALJ Dorothea A. Baker as to whether or not it should be dismissed based on the doctrine of res judicata.[15] JO Jensen found that *Kreider II* was barred by claim preclusion to the extent that it pertains to the period December 1995 to April 1997 (the period during

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[10]*Id.*

[11]*Id*

[12]Petition Pursuant to 7 U.S.C. § 608C(15)(A) and 7 C.F.R. §§ 900.50-900.71, filed February 17, 1998, Exhibit 1 to Record.

[13]*Id.* at paragraphs 13-15.

[14]Amended Petition Pursuant to 7 U.S.C. § 608C(15)(A) and 7 C.F.R. §§ 900.50-900.71, filed September 7, 2000, Exhibit 22 to Record.

[15]Certified Question, filed December 21, 2000, Exhibit 30 to Record at page 1.

which Kreider sold milk products to Ahava).[16] Because *Kreider I* did not decide the issue of Kreider's status during the period when Kreider did not sell fluid milk products to Ahava, JO Jensen did not preclude Kreider from litigating its status under Order 2 for the period from May 1997 through December 1999.[17]

Further proceedings before ALJ Jill S. Clifton led her to dismiss the portion of *Kreider II* which survived JO Jensen's issue-preclusion decision, on the grounds that Kreider's failure to re-apply for producer-handler status rendered the petition defective.[18] In the alternative, ALJ Clifton found that it would have been reasonable for the MA to deny any such application on the basis of Kreider's ongoing sales to subdealers.[19]

On August 5, 2003 JO Jensen affirmed ALJ Clifton's decision.[20] Specifically, JO Jensen held that Kreider's January 1991 application for designation as a producer-handler did not constitute an application for designation as a producer-handler for the period from December 1995 through December 1999.[21] Finding that an application was a necessary prerequisite for designation as a producer-handler, JO Jensen determined that the *Kreider II* petition was premature.[22]

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[16]*Id.* at 10-11.

[17]*Id.* at 11.

[18]Decision, filed May 31, 2002, Exhibit 49 to Record, at page 1.

[19]*Id.*

[20]August 5, 2003 Decision.

[21]*Id.* at 19-22, 45.

[22]*Id.* at 22-23.

In the alternative, JO Jensen found that Kreider was barred by issue preclusion from litigating its status under Order 2 for the period from December 1995 through April 1997, when Kreider was still selling fluid milk products to Ahava.[23] As for the remaining period of time from May 1997 through December 1999, when Kreider was no longer selling to Ahava, JO Jensen held that Kreider would not have been entitled to producer-handler status based on its sales to FPPTLC.[24] JO Jensen based this finding on a combination of factors that were indicative of Kreider's lack of control over distribution of its products, including Kreider's lack of familiarity with FPPTLC's operations[25] and FPPTLC's ability to turn to other suppliers during periods of short supply.[26]

On August 22, 2003 plaintiff filed a one-count Complaint against defendant seeking judicial review of the August 5, 2003 decision pursuant to the Agricultural Marketing Agreement Act, 7 U.S.C. § 608c(15)(B), and the Administrative Procedure Act, 5 U.S.C. § 706. Defendant filed an Answer to the Complaint on November 10, 2003, and the administrative record of the USDA decision was filed on December 15, 2003.

On February 20, 2004 plaintiff filed a Motion for Summary Judgment. Defendant's Motion for Summary Judgment was filed on April 1, 2004. Plaintiff filed its Memorandum of Plaintiff, Kreider Dairy Farms, Inc. in Opposition to Defendant's Motion for Summary Judgment on April 23, 2004.

The parties agree that there are no issues of material fact. Each party

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[23] *Id.* at 22-23.

[24] *Id.* at 23-25.

[25] *Id.* at 30.

[26] *Id.* at 31.

believes that it is entitled to judgment as a matter of law on the Complaint based on the undisputed facts.

For the reasons which follow, we find that defendant is entitled to judgment as a matter of law on plaintiff's Complaint. Thus, we now grant defendant's motion for summary judgment, deny plaintiff's motion, and dismiss plaintiff's Complaint.

STANDARD OF REVIEW

Our review of the Decision and Order "is limited to a determination whether the rulings of the Secretary [of the USDA] are in accordance with law and his findings are supported by substantial evidence." *Lewes Dairy, Inc. v. Freeman,* 401 F.2d 308, 315-316 (3d Cir.1968); *see* 7 U.S.C. § 608c(15)(B). We may not find facts de novo. *Id.* at 315. Specifically, "[t]he scope of review is a narrow one and the court should not substitute its judgment for that of the agency. *Kreider I,* 1996 U.S. Dist. LEXIS 12094, at *7-8 (citing *Motor Vehicle Manufacturers Association v. State Farm Mutual,* 463 U.S. 29, 43, 103 S.Ct. 2856, 2866-2867, 77 L.Ed.2d 443, 457-458 (1983)). Because we find that the August 5, 2003 Decision was supported by substantial evidence and was in accordance with the law, we affirm that Decision and Order. Therefore, we grant defendant's motion, deny plaintiff's motion, and dismiss plaintiff's Complaint.

DISCUSSION

The basis for the instant appeal of JO Jensen's August 5, 2003 Decision is the denial of producer-handler status to Kreider for the period of December 1995 to December 1999. Specifically, JO Jensen affirmed the decision of ALJ Clifton that Kreider's failure to re-apply for producer-handler status for the period at issue rendered the petition defective. For the reasons explained below, we find that the August 5, 2003 Decision was supported by substantial evidence and was rendered in accordance with the law. Accordingly, we grant defendant's motion and

deny plaintiff's motion.

For the time period relevant to this action, 7 C.F.R. § 1002.12 controlled the designation of handlers as producer-handlers in Order 2.[27] Specifically, 7 C.F.R. § 1002.12 provided for such a designation "following the filing of an application pursuant to" the requirements set forth in detail in § 1002.12. Thus, at a minimum, a handler was required to properly apply for producer-handler status.

Kreider argues that its January 1991 application for producer-handler status satisfies this application requirement. However, the January 1991 application was denied by the MA on August 7, 1992.[28] On appeal to the JO, the MA's decision was affirmed. After the issue of the MA's denial of Kreider's application was remanded to the USDA by Chief Judge Cahn's Opinion and Order dated August 14, 1996, ALJ Bernstein again affirmed the denial of producer-handler status on August 12, 1997.[29] That decision was not timely appealed and became final.[30] Thus, Kreider's January 1991 application for producer-handler status was finally resolved and the denial of such application affirmed.

For this reason, we find that the decision of JO Jensen that the January 1991 application for producer-handler status did not constitute an application for such designation for the period of December 1995 to December 1999 as required by 7 C.F.R. § 1002.12 was rendered in

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[27]Effective January 1, 2000, the AMAA was reorganized and the area formerly known as "Order 2" was incorporated into the newly organized "Northeast Marketing Area". The issues formerly addressed by 7 C.F.R. § 1002.12 are now governed by 7 C.F.R. § 1001.

[28]*Kreider,* 1996 U.S. Dist. LEXIS 12094, at *6-7.

[29]*Kreider,* 190 F.3d at 116-117.

[30]*Id.*

accordance with the law and based on substantial evidence of record.[31]

Kreider next argues that its monthly reporting and ongoing litigation with the USDA constituted an application sufficient to allow administrative judicial review. However, we must defer to the administrative agency's findings in this regard. *See Motor Vehicle Manufacturers,* 463 U.S. at 43., 103 S.Ct. at 2866-2867, 77 L.Ed.2d at 457-458. JO Jensen's decision affirmed the conclusions of ALJ Clifton that such filings did not constitute an application.[32] Kreider's failure to re-apply for producer-handler status wholly by-passed the MA who could have granted Kreider's new application. We find JO Jensen's conclusions to be in accordance with the requirement of 7 C.F.R. § 1002.12 that Kreider file a formal application for the producer-handler designation. Thus, we conclude that JO Jensen's decision not to treat Kreider's monthly reports to the MA as an application for producer-handler status was rendered in accordance with the law.

Finally, Kreider argues that a formal re-application for producer-handler status for the period from December 1995 to December 1999 would have been futile. Futility is a recognized exception to the general rule that the failure to exhaust administrative remedies bars judicial review of agency action. *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor,* 619 F.2d 231, 245 (3d Cir.1980). In its brief, however, Kreider does no more than conclusively state that a re-application would have been futile.

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[31]We note that the August 5, 2003 Decision of JO Jensen was based on his interpretation of applicable law, and was not contradicted by any evidence of record. JO Jensen relied upon the absence in the evidentiary record of any attempt by Kreider to formally re-apply for producer-handler status. It is exactly this lack of evidence which supports JO Jensen's decision. Because the evidence of record does not include any re-application by Kreider, we find that the August 5, 2003 Decision is supported by substantial evidence.

[32]August 5, 2003 Decision, at 18.

On such a bare assertion we cannot find that such a re-application would have been futile. Moreover, by failing to re-apply for designation as a producer-handler in December 1995 Kreider denied the MA the opportunity to reconsider Kreider's status in light of the changed circumstance that Kreider had stopped selling fluid milk to Ahava. There is no basis for this court to determine that such re-application under changed circumstances would have resulted in a denial of the producer-handler designation and thus have proved futile. Thus, we reject Kreider's argument that the futility exception applies to exempt Kreider from the administrative requirements of 7 C.F.R. § 1002.12.

Therefore, we find that the August 5, 2003 Decision and Order of JO Jensen determining that Kreider failed to first re-apply for such status before seeking administrative judicial review was rendered in accordance with the law and was supported by substantial evidence. Because we affirm JO Jensen's decision that Kreider's petition was premature, we need not address JO Jensen's alternative reasoning for denying such designation.

CONCLUSION

For all the foregoing reasons, we grant defendant's motion for summary judgment and deny plaintiff's motion for summary judgment. Accordingly, we enter judgment in favor of Defendant on plaintiff's claims and dismiss plaintiff's Complaint.

ANIMAL QUARANTINE ACT

COURT DECISION

AG-INNOVATIONS, INC. v. USDA.
No. 03-6159.
Filed April 22, 2004.

(Cite as: 95 Fed. Appx. 384).

AQ – TSE – Scrapie – BSE - Extra-ordinary emergency – Subject matter jurisdiction – Agency action, final – Speculative agency action – Quarantine – Preliminary injunction.

Sheep recently imported from Europe believed to be infected with a variant strain of TSE "Scarpie" were seized and destroyed under four-year quarantine by the USDA. The Sheep owner unsuccessfully sought a preliminary injunction and Stay Order, and thereafter the sheep and germ plasma were seized and destroyed. Court determined that although the portion of Plaintiff's claim was moot as to the already destroyed sheep, Plaintiffs contended the prospective effect of a quarantine of any future sheep importation was speculative. Since a denial of a stay is not *res judicata* on the merits, Plaintiff was permitted to amend their complaint as to the effect of any future quarantine order.

United States District Court for the
District of Vermont

Present: LEVAL, CALABRESI, Circuit Judges, and RAKOFF, District Judge.*

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED,

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*The Honorable Jed S. Rakoff, U.S. District Judge for the Southern District of New York, sitting by designation.

ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is **AFFIRMED,** but the case is **REMANDED** to the district court to permit the plaintiffs to amend their complaint.

Plaintiffs-Appellants AG-Innovations, Inc., Lawrence Faillace, and Linda Faillace (collectively, "AG-Innovations") appeal from the district court's dismissal of their Fed.R.Civ.P. 60(b) motion for relief from an earlier judgment of that court (Murtha, *J.*). The relevant facts of the underlying case are as follows: On July 14, 2000, the United States Department of Agriculture ("USDA") issued an administrative order mandating that the plaintiffs allow the USDA to seize and destroy of some of their sheep and any associated germ plasm (sperm and embryos). The order was authorized by a declaration of extraordinary emergency issued by the Secretary of Agriculture, *see* 21 U.S.C. § 134a(b), *repealed by* Act May 13, 2002, Pub. L. No. 107-171, Title X, Subtitle E, § 10418(a)(17), 116 Stat. 508, which stated that a transmissible spongiform encephalopathy (TSE) "of foreign origin"[1] had been detected in several sheep in Vermont, and that any sheep that had been affected or exposed, and their germ plasm, had to be destroyed. *See* 65 Fed. Reg. 45,018 (July 20, 2000).

Within a few days of the issuance of the order, the plaintiffs brought suit against the USDA, asking the district court to pronounce the order and the declaration of extraordinary emergency invalid, unlawful, and unenforceable, and to enjoin the defendants from seizing their sheep and germ plasm. The district court rejected the plaintiffs' request for a preliminary injunction. After reviewing additional briefs and an expanded

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[1]TSE is the name given to a group of diseases which includes scrapie, a disease common in sheep in the United States, and BSE (bovine spongiform encephalopathy), also known as "mad cow disease." Although scrapie is not considered a risk to human health, BSE is the probable cause of variant CJD (Creutzfeldt-Jakob Disease), which is fatal in humans. The USDA determined that the Ag-Innovations sheep, which had recently been imported from Europe, might have been exposed to a variant form of TSE that could not be distinguished from BSE.

administrative record, the court entered final judgment in favor of the USDA, and instructed the plaintiffs to comply with the order. AG-Innovations sought a stay pending appeal, but this request was denied by both the district court and this Court. With no stay in effect, the USDA seized and destroyed the sheep and germ plasm in question.

The USDA then moved this Court to dismiss the appeal as moot, arguing (1) that the plaintiffs could no longer secure any effectual relief from the agency order, (2) that this Court had no subject matter jurisdiction to review the declaration of extraordinary emergency in the abstract, because it was not, on its own, a final agency action reviewable under the Administrative Procedures Act, *see* 5 U.S.C. § 704, and (3) that the possibility of future administrative orders was "speculative," and in any case could not be the basis for jurisdiction because such orders would not evade review, as they could be challenged just as the instant order had been. Noting that the plaintiffs sought only prospective relief, and that any future agency action was "entirely speculative," we vacated the judgment of the district court and remanded with instructions to dismiss the case as moot. *Ag-Innovations, Inc. v. United States Dep't of Agric.,* 6 Fed.Appx. 97, 98 (2d Cir.2001) (unpublished disposition).

On August 26, 2002, the USDA issued an order quarantining, for four years, certain animals and areas of the plaintiffs' property. It asserted that such measures were necessary to prevent the spread of the foreign variant of TSE.[2] On December 31, 2002, AG-Innovations filed a complaint requesting relief from the underlying judgment dismissing the case as moot, arguing (1) that the defendants had procured a dismissal of its claims through fraud by falsely representing to this Court that the issue was moot, and (2) that it was no longer equitable for the judgment to have a "prospective" effect, because the USDA had misrepresented the alleged risk. The district court held that the complaint failed to state a

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[2]The USDA relied, in its order, upon 7 U.S.C. § 8306 and § 8315, and, although the order does not explicitly say so, presumably also upon the July 2000 declaration of extraordinary emergency.

claim, and dismissed it.

The plaintiffs styled their complaint as a plea for "relief from [the underlying] judgment and any prospective operations thereof." The underlying case having been dismissed as moot and the original district court opinion having been vacated, however, there is in place no judgment adverse to the plaintiffs, or that has a prospective effect. *See DeWeerth v. Baldinger,* 38 F.3d 1266, 1275-76 (2d Cir.1994) (citing *Twelve John Does v. District of Columbia,* 841 F.2d 1133 (D.C.Cir.1988)). The judgment unfavorable to the plaintiffs was vacated.

Plaintiffs' present quarrel is with the new quarantine order. Because the prior judgment was vacated and the prior action dismissed as moot, the prior litigation poses no obstacle to the plaintiffs' new attack on the quarantine order (or on the findings that underlie it).[3] Plaintiffs are free to attack it directly without need for any relief from the prior judgment.

We have considered all of the plaintiffs' claims and find them meritless. We therefore AFFIRM the judgment of the district court. But we REMAND the case to the district court so that it may allow the plaintiffs to amend their complaint--should they wish--in order to attempt to state a claim attacking the quarantine order itself.

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[3]During oral argument before this Court, the Government conceded this point. We also note that the denial of the stay in the original case does not constitute a judgment on the merits, and does not have *res judicata* effects. *See National Equipment Rental, Ltd. v. Fowler,* 287 F.2d 43, 46 n. 1 (2d Cir.1961).

ANIMAL WELFARE ACT

COURT DECISION

MICHAEL LEE HASTEY v. USDA.
No. 03-11086.
Filed June 14, 2004.

(Cite as:100 Fed.Appx. 319).

AWA – Injury-in-fact – Standing – Constitutional rights violated personal, not public – Conjecture and particularized – Active and eminent – Conjecture, not hypothetical.

Plaintiff claimed the enforcement of animal rights legislation was a violation of his constitutional rights. Court dismissed his claim for lack of standing in that his claim was not shown to be other than hypothetical or conjecture; was not concrete and particularized; was not shown to be active and eminent; and was not shown to be a violation of his personal loss of constitutional rights instead of that of the general public.

United States Court of Appeals,
Fifth Circuit

Before BARKSDALE, EMILIO M. GARZA, and DENNIS, Circuit Judges.

PER CURIAM.*

Michael Lee Hastey appeals the dismissal of his complaint pursuant to a Fed.R.Civ.P. 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction. We AFFIRM.

"[B]efore a federal court can consider the merits of a legal claim, the

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*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

person seeking to invoke jurisdiction of the court must establish the requisite standing to sue." *Whitmore v. Arkansas,* 495 U.S. 149, 154-55, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990). To establish standing, a plaintiff must show, *inter alia,* that he has suffered an "injury in fact" that is concrete and particularized and actual or imminent, not conjectural or hypothetical. *McClure v. Ashcroft,* 335 F.3d 404, 409 (5th Cir.2003). A plaintiff cannot establish standing simply by claiming an interest in governmental observance of the Constitution, he must set forth instead a particular and concrete injury to a personal constitutional right. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 482, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). Hastey has failed to identify how the enactment of animal-rights legislation has interfered with his constitutional rights. He thus has failed to meet his burden of establishing standing. *See Valley Forge,* 454 U.S. at 482, 102 S.Ct. 752; *see also Ramming v. United States,* 281 F.3d 158, 161 (5th Cir.2001) (the party asserting jurisdiction bears the burden of proof). The district court did not err by granting the defendants' motion to dismiss. *See Hebert v. United States,* 53 F.3d 720, 722 (5th Cir.1995) (grant of a Fed.R.Civ.P. 12(b)(1) motion for lack of subject-matter jurisdiction is reviewed *de novo*).

Although he alleges judicial bias, Hastey has not identified any ruling by the court, other than the grant of the motion to dismiss, in support of his claim. Adverse judicial rulings will support a claim of bias only if they reveal an opinion based on an extrajudicial source or if they demonstrate such a high degree of antagonism as to make fair judgment impossible. *See Liteky v. United States,* 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Hastey has not shown that either situation applies here. Because we AFFIRM the dismissal of the complaint for lack of subject-matter jurisdiction, we do not address Hastey's argument that the animal-rights legislation at issue violates the Constitution.

AFFIRMED.

ANIMAL WELFARE ACT

DEPARTMENTAL DECISION

In re: DAVID MCCAULEY.
AWA Docket No. 02-0010.
Filed January 30, 2004.

AWA – Failure to appear at hearing – License expired – Deceptive practices – Revocation.

Dealer allowed his Class "B" license to expire but nevertheless continued to sell exotic animals (kangaroos and/or wallabies) by means of fake bills of sale and payments through a licensed dealer.

Robert Ertman, for Complainant
Respondent - Pro se
Decision and Order by Marc Hillson, Chief Administrative Law Judge

DECISION

I find that Respondent David McCauley (hereinafter "Respondent") willfully violated the Animal Welfare Act ("the Act"). As a result of this finding, I am assessing a civil penalty of $10,000 against Respondent, am revoking his license to operate as a dealer under the Act, and am ordering him to cease and desist from violating the Act (7 U.S.C. § 2131 *et seq* .).

PROCEDURAL HISTORY

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq* .), by a complaint (hereinafter "Complaint") filed by the Administrator, Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture, alleging that the Respondent willfully violated the Act and the regulations issued pursuant to the Act (9 C.F.R. § 1.1 *et seq* .).

A copy of the Complaint and the Rules of Practice governing

proceedings under the Act was served on Respondent by the Office of the Hearing Clerk. Respondent filed a timely answer and Complainant filed a motion to set a date for hearing. Respondent participated in two pre-hearing telephone conferences where hearing dates were set—first, on December 3, 2002, where a July 16, 2003 hearing date was set by Chief Administrative Law Judge James W. Hunt, and second, after Judge Hunt postponed the hearing, with me on July 28, 2003. At the latter conference, the case was set for hearing in San Antonio, Texas beginning on October 22, 2003. A summary of both of the teleconferences was duly served on Respondent. On August 26, 2003, with the agreement of the parties, the beginning date of the hearing was changed from October 22 to October 23, and a memorandum signed by me was served on both parties. On October 2, 2003, I issued a notice setting the specific time and location of the hearing in San Antonio, which was also served upon both parties.

Respondent failed to appear at the hearing. The Rules of Practice specify the options available for failure to appear. In particular, by not appearing at the hearing, Respondent is deemed to have "waived the right to an oral hearing in the proceeding and to have admitted any facts which may be presented at the hearing. Such failure by the respondent shall constitute an admission of all the material allegations of fact contained in the complaint." 7 C.F.R. § 1.141(e)(1). The Rules provide Complainant with a choice of two options—either to proceed as if there was a failure to file an answer or as if all material allegations were admitted, or to present evidence to the administrative law judge. Complainant opted to present the in-person testimony of two witnesses, and submitted 43 exhibits.[**]

DISCUSSION

The uncontradicted evidence overwhelmingly demonstrates that for many months Respondent knowingly and willfully operated as a "Dealer" of "Exotic animals" without a license (9 C.F.R. § 1.1). Respondent was

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[**]The exhibits are numbered 1 to35, and 37 to 44. There is no exhibit 36.

fully aware that he was unlicensed and even engaged in a variety of deceptive measures to hide that he was unlicensed.

In his Answer, Respondent, blaming the stress of marital difficulties leading to a divorce, admits letting his class B license lapse. Complainant showed at hearing that Respondent was issued a class B dealer's license which clearly indicated that it would expire on November 9, 1999. CX 40. In August, 1999, APHIS issued Respondent a letter reminding him that he needed to renew his license before November 9, 1999. CX 41. On November 16, 1999, Respondent wrote the Agency that he had forgotten to renew his license, due to his domestic difficulties, and asked for a 30-day extension of the license renewal date. CX 42. In that letter, Respondent stated that he had a temporary facility for his wallaby business. On December 2, 1999, Respondent was informed that the Agency did not grant extensions on license renewals and that since the license was for a specific location, any new location would have to be inspected for compliance in any event. CX 43. Between November 10, 1999 and sometime after March, 2002, when he filed his Answer, Respondent did not have a dealer's license. Tr. 28.

Even though his license was suspended, Respondent continued to operate his business. Numerous exhibits document that Respondent advertised wallabies for sale in trade publications published at the time he was unlicensed. CX 1-12, 25-28. Further, the Agency established that Respondent had made at least two sales during the period that he was unlicensed.

In particular, Jacqueline Freeman, who was a Senior Investigator for APHIS at the time in question, testified that Respondent had sold a red kangaroo to the Racine Zoo in Racine, Wisconsin in August, 2000, at a time when he did not have a license. Tr. 8-18. Exhibits CX 13-24 unequivocally document this transaction. Moreover, Complainant showed that Respondent McCauley arranged to have a fake Bill of Sale prepared by Arnold Sorensen of Someday Farms to make it appear that Sorensen made the sale rather than McCauley. Sorensen stated in CX 24 that Respondent "begged" him to do so because Respondent had no license.

Complainant further demonstrated that in April, 2001 Respondent

sold a wallaby to Silver Streak Kennels in Morris, New York. Tr. 16-19, CX. 31-33. Respondent remained unlicensed at this time, and once again used Arnold Sorensen's name and the business name of Someday Farms on the shipping papers to attempt to cover this fact. CX 29-30. However, the payments for this wallaby were made out to Dave's Animal Farm. CX 33. Subsequently, Arnold Sorensen e-mailed Ms. Freeman stating that Respondent's use of Sorensen's personal and business name for this New York transaction was unauthorized. CX 35.

Thus, Complainant has clearly established that Respondent, knowing that he was unlicensed, continued to advertise and transact his business over a period of at least 18 months. Given that Respondent (1) knew he was operating without a license, (2) placed at least 16 advertisements for business during the time he was unlicensed, (3) made at least two sales of exotic animals for which a license was required, and (4) engaged in deceptive practices in an attempt to conceal his role in both transactions, a civil penalty of $10,000 and revocation of Respondent's license, which had been subsequently reissued, is an appropriate remedy.

Findings of Fact

1. Respondent David McCauley is an individual whose mailing address is Post Office Box 358, McQueeney, Texas 78123.

2. Respondent, operating as Dave's Animal Farm, being fully aware that his license to operate under the Animal Welfare Act had expired, continued to operate his business as a class B dealer of Exotic animals between November, 1999 and sometime after March, 2002.

3. During the period when he was unlicensed, Respondent continued to advertise his business as a Dealer in wallabies in trade journals.

4. At least twice during the period he was unlicensed, Respondent made sales for which a license was required. In particular, in August, 2000, Respondent sold a red kangaroo to the Racine Zoo in Racine Wisconsin, and in April, 2001 sold a wallaby to Silver Streak Kennels in Morris, New York.

5. Wallabies and Kangaroos are Exotic animals as defined by 9 C.F.R. § 1.1.

6. Respondent acted knowingly and willfully, to the extent that he deliberately utilized the name and address of another business during the course of his transactions.

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.
2. Respondent, at all times material hereto, was operating as a Dealer as defined in the Act and the regulations. (9 C.F.R. § 1.1)
3. Respondent, at all times material hereto, was operating as a "Dealer" as defined in the Act and the regulations without having obtained a license, in willful violation of chapter 54 of the Act (7 U.S.C. § 2134 *et seq*) and the regulations (9 C.F.R. 2.1(a)(1)). Respondent's violations include, but are not limited to, the purchase and the sale of a kangaroo on or about August 2, 2000, the sale of a wallaby on or about April 19, 2001, and the offer for sale of wallabies through periodic advertisements in at least 16 instances.

For the foregoing reasons, I issue the following order:

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall not operate as a Dealer without being licensed as required.
2. Respondent is assessed a civil penalty of $10,000, which shall be paid by a certified check or money order made payable to the Treasurer of the United States.
3. Respondent's class B license is hereby revoked.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without

further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

[This Decision and Order became final March 8, 2004.-Editor]

BEEF PROMOTION AND RESEARCH ACT

COURT DECISION

LIVESTOCK MARKETING ASSOCIATION, ET AL. v. USDA.
No. 03-1164.
Filed May 24, 2004.

(Cite as: 124 S.Ct. 2389).

BPRA – Beef "check off."

Supreme Court
of the United States

Motion of 48 Cattle and Agricultural Associations for leave to file a brief as *amici curiae* in No. 03-1164 granted. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit granted limited to Question 1 presented by each petition. These cases are consolidated and a total of one hour is allotted for oral argument.

DEBARMENT AND SUSPENSION (NON-PROCUREMENT)

DEPARTMENTAL DECISION

In re: ARNOLD M. ADCOK, a/k/a ARNOLD ADCOCK.
DNS-RMA Docket No. 04-0001.
Filed May 6, 2004.

DNS – Debarment – Acts & Omissions.

Respondent was debarred for up to two years from further association with the Federal Crop Insurance program for his acts and omissions in multiple instances of filing of fraudulent records, inaccurate records, and counseling of a subordinate how to falsify records so that the incorrect records will escape discovery.

Donald A. Brittenham, Jr., for Complainant.
Respondent, Pro se.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

Decision Summary

[1] In this Decision, I determine that the Debarring Official, Federal Crop Insurance Corporation, and Risk Management Agency, had the authority and ample evidence to debar Respondent Arnold M. Adcock. The actions and omissions of Respondent Adcock constitute a cause of so serious or compelling a nature that it affects the present responsibility of Respondent Adcock. 7 C.F.R. § 3017.800(d); formerly 7 C.F.R. § 3017.305(d). I affirm the two-year period of debarment, concluding that it is commensurate with the seriousness of Respondent Adcock's acts and omissions.

Procedural History

[2] The Suspending Official, Federal Crop Insurance Corporation, and Risk Management Agency, suspended Arnold M. Adcock, also known as Arnold Adcock (herein frequently referred to as "Respondent Adcock") on January 8, 2003; upheld the suspension on May 23, 2003; and then,

after taking into account the length of the suspension, the Debarring Official, Federal Crop Insurance Corporation, and Risk Management Agency, debarred Respondent Adcock on January 6, 2004, for a period "not to exceed two years."

[3] Respondent Adcock's one-page appeal of his debarment was timely filed on February 5, 2004. Respondent Adcock failed to attach any portion of the Debarment Decision he was appealing, and he neglected to identify any agency, such as the Federal Crop Insurance Corporation or the Risk Management Agency, so more than two weeks were lost in the process of completing the record. Nevertheless, the Administrative Record (Agency Record and Debarment Decision) were timely filed and served upon Respondent Adcock. The Debarring Official's Response to Respondent's Appeal was timely filed on March 11, 2004. Respondent Adcock's Reply was diverted for irradiation, a routine security procedure, and the irradiation so blackened the pages that no words are discernible. Accordingly, Respondent Adcock's replacement Reply, received April 13, 2004, is accepted as timely filed.

[4] The debarment decision may be vacated only if I determine that it is (1) not in accordance with law; (2) not based on the applicable standard of evidence; or (3) arbitrary and capricious and an abuse of discretion. *See*, 7 C.F.R. § 3017.890, entitled "How may I appeal my debarment?"

[5] Respondent Adcock's appeal must specify the basis of the appeal (7 C.F.R. § 3017.890). Respondent Adcock stated 4 specific reasons for appealing his debarment, and he added, "Once again, I am asking that all information be fairly investigated and reviewed."

[6] Following a thorough review of the Administrative Record (herein frequently referred to as "AR"), having 13 tabs, and the parties' other filings herein, I determine that the evidence fully supports the Federal Crop Insurance Corporation and Risk Management Agency Debarment Decision issued January 6, 2004 (herein frequently referred to as "Debarment Decision"). I essentially adopt as my own, the Findings of Fact of the Debarment Decision, none of which was specifically challenged on appeal by Respondent Adcock. Further, I determine that no relief can be granted to Respondent Adcock for any of the 4 specific

reasons itemized in his appeal.

Findings Of Fact

[7] In 1989, Respondent Adcock was a contract adjuster for IGF Insurance Company (IGF). He remained in that position until 1997, when he became a full-time employee of IGF. In 2001, American Agrisurance, Inc. (AmAg) acquired IGF, and Respondent Adcock was employed as its state supervisor for the State of Louisiana. Respondent Adcock remained in that position until terminated, as a result of the Suspension, on January 9, 2003. (AR, Tab 4, pp. 1-2).

[8] For the 2002 crop year, AmAg employed Victor Smith (Smith) as a loss adjuster. Respondent Adcock was Smith's supervisor during that crop year. (AR, Tab 4, p. 2).

[9] In the spring and summer of 2002, AmAg assigned Smith to duties in the State of Kansas. When this re-assignment occurred, Respondent Adcock instructed Smith to deliver his active files and claims in process to Anita Hendrix (Hendrix), a contract adjuster for AmAg. (AR, Tab 4, p. 2).

[10] Smith delivered his active files and claims in process to Hendrix. Subsequently, Hendrix contacted Respondent Adcock with regard to inaccuracies she noted in the claims being handled by Smith. Respondent Adcock reviewed the file materials, including that Stand Reduction Appraisal Worksheets (Worksheets). (AR, Tab 5, pp. 1-2). [11] Respondent Adcock noticed that all of the surviving plants reportedly counted by Smith were in multiples of ten. All of the insureds involved were using a 38" row width, which meant the appraisal should include a 138' row length for a 1/100-acre appraisal. (AR, Tab 5, p. 2).

[12] Smith had used the "Guarantee" rather than the "APH" in the Base Yield column of every Worksheet. Using the "Guarantee" resulted in incorrect numbers for the Appraisal for Sample and Total. Using the "APH" would result in an increase in the potential appraised and a corresponding decrease, sometimes substantial, in the insured's claim. (AR, Tab 5, pp. 2-4).

[13] Respondent Adcock believed that some of the Worksheets had

incomplete or incorrect information, such as the Unit Number, Claim Number, FSA Farm Number, Field Number, and Number of Acres Appraised. (AR, Tab 4, pp. 2-3).

[14] Respondent Adcock contacted Smith by telephone in Kansas and told Smith that he would have to fix and correct the appraisals. (AR, Tab 5, p. 2). [15] Respondent Adcock telefaxed the Worksheets to Smith in Kansas and instructed Smith to correct and complete the forms. (AR, Tab 5, p. 2).

[16] The Federal Crop Insurance Corporation federally reinsured the policies in question.

[17] Respondent Adcock stated in his March 21, 2003, statement that Smith never told him how he arrived at the plant counts he used in his appraisals. (AR, Tab 6, p. 3).

[18] Respondent Adcock stated that he encouraged Smith to correct his appraisals and plant counts so the revised appraisals would be fair to the insured producer. (AR, Tab 6, p. 3).

[19] Smith apparently made mistakes during an appraisal involving the Base Yield calculation. Smith became concerned by Respondent Adcock's instructions as to how these mistakes should be corrected. Acting on his concerns, Smith began tape recording the telephone conversations between Respondent Adcock and himself. (AR, Tab 1, p. 2).

[20] On July 31, 2002, Smith provided the Risk Management Agency's Southern Regional Compliance Office (SRCO) with an audiotape of the recorded conversations. After listening to portions of the audiotape, SRCO decided to have a certified court reporter transcribe the audiotape. (AR, Tab 1, p. 2).

[21] The taped conversations took place between July 1 and July 19, 2002. At the time of the recording Smith was in Kansas and Respondent Adcock was in Louisiana. (AR, Tab 1, p. 3).

[22] Federal law allows a person to tape record a conversation over the telephone when such person is a party to the conversation. *See* 18 U.S.C. § 2511(2)(c). In addition, both Kansas and Louisiana allow such conduct as well. *See State of Louisiana v. Vaughn*, 431 S.2d 763, 767 (1983) and *State of Kansas v. Roudybush*, 235 Kan. 834, 845 (1984).

[23] In one conversation Respondent Adcock instructed Smith to prepare inaccurate appraisals. He said, ". . . make the appraisals to come out. Don't let them be any more than what you've got on these sheets right here. So you're going to have to work this stuff backwards." (AR, Tab 2, p. 65, lines 6-9).

[24] Working backwards means to determine what you want the appraisal to be and then inserting the number that will give you the result you desire. Sometimes this is called working a claim right to left. (AR, Tab 1, p. 5).

[25] Respondent Adcock stated that Smith should change his production numbers so that they end in odd numbers, because by ending in zero, like 10, 20, or 30, it would subject the claim to increased scrutiny by "federal people." (AR, Tab 2, p. 66, lines 2-9).

[26] Respondent Adcock was accepting of Smith preparing false and inaccurate appraisals. He said, "If y'all made up some appraisals, that's all right, you know . . .. End them in odd numbers, don't end them in no zero." (AR, Tab 2, p. 66, lines 13-15).

[27] Again, in this conversation Respondent Adcock told Smith he should change the ending number to a number besides zero since it will look more realistic and not send up a red flag. Respondent Adcock also said, "You're going to have to lower your counts down to come up with what you originally told the [farmer]." (AR, Tab 2, p. 67, lines 16-18).

[28] Respondent Adcock continued by stating "You've got to redo every one of these to where – you've got to put the counts in there against what your APH is where they'll come down to what you have down here." (AR, Tab 2, p. 68, lines 4-6).

[29] Further, Respondent Adcock stated, "Today - by catching it here, we can change it today between me and you, because I'm going to let you do it. But, really, by the counts you've got down there, by right we ought to charge him the extra bushels … [*w]hich would be the right thing, you know, for the company*, but because it ain't right for the farmer … that's too many bushels." (Emphasis added). (AR, Tab 2, p. 68, line 25 through p. 69, line 8).

[30] Ultimately Respondent Adcock told Smith, "the right thing to do is [to give the farmer the appraisal amount that you told him earlier], so

you're going to have to back down." (AR, Tab 2, p. 70, lines 1-3).

[31] Respondent Adcock acknowledges that Smith made errors by stating, ". . . in good faith you told [the farmer the appraisal amount]. You just made a mistake. In good faith you told him that's what the thing was. You just made a mistake in working it." (AR, Tab 2, p. 69, lines 18-21).

[32] During his conversation with Smith, Respondent Adcock admitted that he had to do the same thing last year, creating production numbers, due to a mistake that he made on a claim. (AR, Tab 2, p. 78, lines 3-5; p. 79, lines 5-15).

[33] Respondent Adcock explained to Smith in detail how to falsify an appraisal. He said, "You've just got to bring your counts down – you know, you want counts that end in an odd number. Don't let them be in zero. It'll be all right to put a zero in there. You have 10 plants every now and then or 30 plants, but you need some 37 plants and 33 plants and 69 plants." (AR, Tab 2, p. 73, lines 15-20).

[34] Respondent Adcock instructed Smith to invent the dates that he performed the appraisals by stating "you're going to have to come up with the dates that you were there or close to it anyway." (AR, Tab 2, p. 80, lines 5-7). [35] Prior to the correction of the Worksheets, Smith terminated his employment with AmAg. (AR, Tab 5, p. 2 - 3).

[36] As a result of Smith's termination of employment, Respondent Adcock instructed Hendrix to correct the Worksheets originally completed by Smith using the surviving plant counts that were taken by Smith, but using the "APH" rather than the "Guarantee" for the Base Yield. This correction resulted in an increase of the appraised potential and a corresponding decrease of the insured's claim. (AR, Tab 5, pp. 3-4).

[37] In Respondent Adcock's January 20, 2003, submission in opposition to the Suspension, he includes 32 pages of Worksheets for various producers. These are copies of allegedly handwritten Worksheets prepared by Smith, with the corrections made by Hendrix and copies of the computer generated Worksheets prepared by Hendrix. (AR, Tab 5, pp. 5-36). Only 2 out of 18 handwritten Worksheets contain the partial signature of Smith. Smith's signature does not appear on the remaining

16 handwritten Worksheets.

[38] By letter dated March 21, 2003, Respondent Adcock submitted additional information in support of his opposition to the Suspension. Enclosed with this letter was an AmAg Quality Control Evaluation Report (Evaluation Report) signed and dated on February 17, 2003 (after Respondent Adcock received the Suspension), by Kelly Gwin. (AR, Tab 7).

[39] The Evaluation Report completed by Kelly Gwin evaluated Smith's performance in the adjustment of a corn policy, policy number 17-067-1011246-02. The review indicated that appraisals were not accurately calculated, because Smith used the "Guarantee" rather than the "APH" to calculate the loss. (AR, Tab 7, pp. 3-4).

[40] Respondent Adcock indicated that Hendrix made corrections to Smith's appraisals by using his incorrect plant count and using the "APH" rather than the "Guarantee" used by Smith. (AR, Tab 5, p. 3). This resulted in a decrease in the insured's indemnity.

[41] Respondent Adcock stated that he and the insureds would not have had a problem if Smith had performed the appraisals using the "APH" instead of the "Guarantee" in the Base Yield computation. (AR, Tab 6, p. 3).

[42] Respondent Adcock contends that he did not advise or instruct Smith, or any other loss adjuster to: (1) submit false, misleading, and incorrect appraisal and claim information; (2) incorrectly lower production counts on an appraisal so that the final figures would equal an incorrect amount that was originally told to the producer; or (3) work an appraisal "backwards" and instruct such person on how this could be done. (AR, Tab 4, p. 4).

[43] On May 23, 2003, the Suspending Official issued a Decision Regarding the Opposition to the Notice of Suspension. (AR, Tab 8).

[44] On May 2, 2003, the Risk Management Agency's Southern Regional Compliance Office requested debarment action against Respondent Adcock. (note: Exhibit 1, Transcript is located at AR, Tab 2). (AR, Tab 9).

[45] The Risk Management Agency's Southern Regional Compliance Office received a signed written statement from a second loss adjuster

regarding a rice replant claim incident he had with Respondent Adcock (claim number 02-7622). (AR, Tab 9, at Exhibit 2, pp. 1-4).

[46] On May 23, 2002, the loss adjuster met with a producer to inspect his fields. There were an estimated 93 acres on this particular unit of the field. The producer indicated to the loss adjuster that he had originally planted at a seed rate of three bushels per acre. The producer stated that the partial replant was at a rate of 1.5 bushes per acre over part of an estimated 29 acres. According to the loss adjuster, claim number 02-7622 did not qualify for a replant payment. (AR, Tab 9, at Exhibit 2, p. 1).

[47] The loss adjuster documented his determination on an Adjuster's Special Report and read it to the producer. The producer signed the Adjuster's Special Report agreeing with the loss adjuster's determination. The producer also signed a Withdrawal of Claim form. (AR, Tab 9, at Exhibits 2, 3, and 4). [48] The loss adjuster stated that on June 9, 2002, he gave the rice replant claim (claim number 02-7622) to Respondent Adcock. According to the loss adjuster, Respondent Adcock appeared upset that the claim had not been paid and told the loss adjuster that he would take of it. (AR, Tab 9, at Exhibit 2, p. 1).

[49] According to the loss adjuster's statement, Respondent Adcock removed the Withdrawal of Claim form and the Adjuster's Special Report from the producer's record. Respondent Adcock told the loss adjuster that the claim would be reworked. (AR, Tab 9, at Exhibit 2, p. 1).

[50] The loss adjuster stated that on June 10, 2002, Respondent Adcock called him and said that loss adjuster Kelly Gwin (Gwin) had the claim and would work it. (AR, Tab 9, at Exhibit 2, p. 2).

[51] On February 12, 2003, Compliance Investigator Mack Senn, of the Southern Regional Compliance Office, met with and interviewed the producer in connection with the rice replant. The producer signed a written statement stating that the first adjuster had told him that the claim was not a payable claim, as he had not put out enough seed for the replant. The producer also stated that he understood why he was not due a replant payment and signed the Adjuster's Special Report acknowledging that he understood. (AR, Tab 9, at Exhibit 5).

[52] The producer stated that the loss adjuster asked him if he wanted

to withdraw his claim, and he agreed. The producer signed a Withdrawal of Claim form and stated that he thought that was the final decision on the claim. (AR, Tab 9 at Exhibit 5, p. 3).

[53] During the interview with Risk Management Agency representatives, the producer stated that a few days later Respondent Adcock called him and told him that he did have a payable claim and that the first loss adjuster had made a mistake. (AR, Tab 9, at Exhibit 4 and Exhibit 5, p. 3).

[54] According to the producer's statement, Respondent Adcock told him that the replant claim was a payable loss and explained that he had all the paperwork ready and all Respondent Adcock needed was the producer's signature. (AR, Tab 9, at Exhibit 5, pp. 1-3).

[55] In his signed statement, the producer stated that Gwin visited the farm and asked him to sign paperwork regarding his replant. The producer said that Gwin did not inspect the field nor did he do any counts and that he only asked the producer to sign the documents. These documents were recorded under a new claim number, 13099. (AR, Tab 9, at Exhibit 5, p. 2).

[56] The producer stated that Gwin also told him that the replant claim was a payable loss. (AR, Tab 9, at Exhibit 5, pp. 2-3).

[57] By notice letter dated August 28, 2003, Respondent Adcock was advised of a proposed three-year debarment, by the Debarring Official, Ross J. Davidson, Jr. (AR, Tab 10).

[58] Respondent Adcock stated that the reason for changing an appraisal was based on errors found. The loss adjuster working the claim should have corrected any errors made. (AR, Tab 11, p. 1).

[59] Respondent Adcock stated that to help jog the loss adjuster's memory of what occurred that he went as far as to explain that in the past he himself had used the wrong chart in determining an appraisal and his supervisor returned the packet for correction. (AR, Tab 11, p. 1).

[60] Respondent Adcock stated that he discussed this loss adjuster's errors with his supervisor Bob Jandreau (Jandreau). According to Respondent Adcock, Jandreau told him that there was no problem with the loss adjuster making the necessary corrections. If errors had been made, the claim form should be revised. (AR, Tab 11, p. 1).

[61] With regard to the rice replant, Respondent Adcock stated that he received a call from the agent, who stated that the producer had found additional tickets that would qualify him for a replant payment on his rice crop. (AR, Tab 11, p. 1).
[62] Respondent Adcock stated that when additional tickets were found, the company opens an additional claim record. (AR, Tab 11, p. 1).
[63] Respondent Adcock stated that his supervisor, Jandreau, told him to send a different loss adjuster to visit the producer. (AR, Tab 11, p. 1).
[64] Respondent Adcock stated that it's the loss adjuster who makes the field visit and determines whether the producer qualifies for a replant. (AR, Tab 11, p. 1).
[65] Respondent Adcock stated that he reviewed claims in excess of $20,000. Since the rice replant claim in question was under $20,000, he did not see or review either packet prepared by the first loss adjuster or Gwin. (AR, Tab 11, p. 2).
[66] Respondent Adcock stated that he never knowingly filed or approved any fraudulent claim. (AR, Tab 11, p. 2).
[67] Respondent Adcock submitted three letters from individuals in the crop insurance industry that supported him. (AR, Tab 11, pp. 3-5).

Discussion

[68] Regarding farmers' claims, I find that Respondent Adcock chose an approach to correct Smith's errors that would still yield the same bottom line, so as not to frustrate the farmers' expectations. Respondent Adcock states in his Reply that all 6 farmers had destroyed their crop, based on the initial appraisal by Smith.
[69] According to Respondent Adcock, Smith's initial appraisal was not only erroneous, but also obviously fabricated, based on all Smith's "counts" ending in zero. Even assuming that Respondent Adcock is absolutely correct about Smith's initial appraisal, Respondent Adcock's approach to correct Smith's errors is still unlawful and unacceptable.
[70] Respondent Adcock's appeal, filed February 5, 2004, states in part: "Victor Smith did not have to report what I had told him to do, because I called my supervisor, Bob Jandreau, within hours of my

conversation with Mr. Smith, telling him exactly what I told Smith. In September, I met with Mr. Ford, who was the head of compliance for American Agrisurance. I told him exactly what I had told Smith. My report to both of these men was the same and I was unaware that Mr. Smith had recorded our conversation."

[71] I conclude from these statements that Respondent Adcock is showing that he did not hide his actions that led to his debarment; that he, Respondent Adcock, never intended wrongdoing. My impression is confirmed by Respondent Adcock's Reply, received April 13, 2004. Respondent Adcock asserts that he never intended to defraud anyone.

[72] Respondent Adcock's Reply, reflecting on the impact of debarment, which keeps him from farming since he cannot have crop insurance, states: "And, it is especially cruel if the punishment is awarded to one who had no intention of doing any wrongdoing, or profiting himself in any way. If there was wrongdoing, it was only an honest effort to correct an error made against a farmer who himself had a loss through no fault of his own."

[73] Respondent Adcock was not justified in attempting to arrange overpayments to farmers, even though the farmers may have relied, to their detriment, on Smith's erroneous initial appraisal. Even if Respondent Adcock's intent may have been well-meaning with regard to protecting the farmers, his approach obviously works to the disadvantage of those who pay the crop insurance claims, potentially impacting upon the integrity of the Federal program. The Federal Crop Insurance Corporation federally reinsured the policies in question. *See* paragraph [16].

[74] Even if Respondent Adcock's motive was to benefit insured farmers, to prevent further financial harm to those farmers, and not to gain financial benefit for himself, by his actions he proved himself unreliable, and especially unreliable to process crop insurance claims. Respondent Adcock proved himself ready and willing to falsify appraisal and claim information so that farmers would receive the insurance payments they were expecting, even if the farmers were not entitled to those payments.

[75] Respondent Adcock's appeal states, "Punishment for this exceeds

the mistakes I made. I lost over $16,000 separation pay and have been out of work since January 10, 2003. This has placed a terrible hardship on my nine year old daughter, my wife, and myself. This ruling also keeps me from farming since I cannot have crop insurance. I am 61 years old. All I have done in my life is farm and work as a crop insurance adjuster." Respondent Adcock shows that the financial ramifications to him and his family have been severe. In his Reply, he indicates, "Respondent's life and those of his family are directly and dramatically affected by the case at hand. It does matter that a family is deprived of a livelihood by this decision. Lives are indeed affected." [76] While I have compassion for Respondent Adcock in these dire circumstances, I find that the Debarment Decision is properly balanced, with the debarment not to exceed two years taking Respondent Adcock into account, while protecting, as required, the public interest and the integrity of the Federal program.

Conclusions

[77] Respondent Adcock instructed Smith to correct Smith's erroneous initial appraisal by re-working the appraisal backwards, to achieve again the erroneous bottom line. *See*, Findings of Fact.

[78] The cause for debarment has been established by a preponderance of the evidence. 7 C.F.R. § 3017.850.

[79] The Federal Crop Insurance Corporation and Risk Management Agency Debarment Decision issued January 6, 2004, is fully supported by the evidence contained in the Administrative Record. AR, Tabs 1-13.

[80] That Debarment Decision was (a) in accordance with law; (b) based on the applicable standard of evidence; and (c) was not arbitrary, was not capricious, and was not an abuse of discretion. 7 C.F.R. § 3017.890.

[81] The Manager of the Federal Crop Insurance Corporation (FCIC) is the suspending official and the debarring official. 7 C.F.R. § 400.456(d). The Administrator of the Office of Risk Management also serves as Manager of the Federal Crop Insurance Corporation. 7 U.S.C. § 6933(c)(2). Ross J. Davidson, Jr., who serves both as the Manager of

the Federal Crop Insurance Corporation and the Administrator of the Risk Management Agency, is both the suspending official (7 C.F.R. § 3017.1010), and the debarring official (7 C.F.R. § 3017.935).

[82] The Federal Crop Insurance Corporation federally reinsured the policies in question. *See* paragraph [16].

[83] The actions and omissions of Respondent Adcock described in the Findings of Fact constitute a cause of so serious or compelling a nature that it affects the present responsibility of Respondent Adcock. 7 C.F.R. § 3017.800(d); formerly 7 C.F.R. § 3017.305(d).

[84] Debarment is not for the purposes of punishment. I find that the debarment on January 6, 2004, of Respondent Adcock for a period "not to exceed two years," is necessary and appropriate, to exclude from Federal programs a person who is not presently responsible and to protect the public interest. 7 C.F.R. § 3017.110.

Order

[85] The debarment of Arnold M. Adcock, also known as Arnold Adcock, Respondent, is affirmed, for a period not to exceed two years from January 6, 2004, that is, ending no later than January 5, 2006.

Administrative Finality

[86] This Decision is final and is not appealable within the United States Department of Agriculture. 7 C.F.R. § 3017.890.

Copies of this Decision shall be served by the Hearing Clerk upon each of the parties.

[This Decision and Order became final January 6, 2004.-Editor}

EQUAL ACCESS TO JUSTICE ACT

COURT DECISION

SELECT MILK PRODUCERS, INC., ET AL., v. USDA.
No. CIV.A. 01-60(RCL).
Filed February 23, 2004.

(Cite as: 304 F. Supp.2d 45).

EAJA - AMAA – TRO – Preliminary injunction – Prevailing party – Attorney fees, increased when specialized knowledge required – Benefit achieved – Substantial justification, when not shown – Change of legal relationship.

Plaintiffs brought an action under Equal Access To Justice Act (EAJA) to recover litigation expenses resulting from administrative actions taken by the USDA. USDA was under a legislative deadline to promulgate new marketing orders under the Federal Milk Marketing Orders (FMMO). A public hearing was held after a Notice of Hearing was issued which stated the topics for discussion in the new Milk Marketing Order. The marketing order issued by USDA included a "new category of Class III butterfat" which was not included in the Notice of Hearing and covered to only a minor extent in the public hearing. Plaintiffs requested a temporary restraining order (TRO) and a preliminary injunction contending that the Secretary's proposed rules would result in irreparable injury for which they could not recover. The Secretary conducted a new hearing de novo and re-issued the proposed rules which did not include the objectionable language. As a result of achieving their objective, plaintiffs abandoned their injunction action but brought a separate action under EAJA for litigation expenses. Plaintiffs where able to show that they were the "prevailing party," that the abandonment of an action "resulted in a change of a legal relationship," and that the agency's legal defense of their actions was "not substantially justified." Plaintiff further met their burden that higher than standard legal hourly rates for certain work done by their legal counsel was merited because of its specialized knowledge.

United States District Court,
District of Columbia

MEMORANDUM OPINION

LAMBERTH, District Judge.

This matter comes before the Court on plaintiffs' application for fees, expenses, and costs incurred in their prosecution of this action. Plaintiffs file for this award pursuant to 28 U.S.C. § 2412(a) and (d), the Equal Access to Justice Act, ("EAJA"). Upon consideration of plaintiffs' motion, the opposition thereto, the reply brief, and the applicable law: the Court shall grant plaintiffs' application for an award under the EAJA. The Court shall awards plaintiffs' fees, expenses, and costs in the amount of $101,266.83 to be paid by the United States Department of Agriculture.

BACKGROUND

The Federal Milk Marketing Orders ("FMMO") is a highly complex regulatory scheme governing the prices for milk and its component parts. The Agriculture Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq* ., ("AMAA") governs the process of amending the FMMO, among other things. In order to amend the FMMO the Secretary of Agriculture "shall give due notice of and an opportunity for a hearing upon a proposed order." 7 U.S.C. § 608c(3) (2003). The Secretary has established regulations for holding these hearings. 7 C.F.R. §§ 900.1-900.18 (2004). The regulations require that first a "Notice of Hearing" be issued that "shall define the scope of the hearings as specifically as may be practicable." 7 C.F.R. § 900.4(a). Further, the scope of the hearing is delineated by the specific proposals noticed for hearing and the Secretary identifies the sections of the FMMO that are subject to change in the rulemaking process. An Administrative Law Judge (ALJ) presides at the hearing and, as one of his duties, insures that the hearing is limited to the scope as defined in the Notice of Hearing. 7 C.F.R. § 900.6(b). At this point evidence is submitted on the matters in the notice of hearing, 7 C.F.R. § 900.8(c)(2), and witnesses testify under oath, 7 C.F.R. § 900.8(d)(1). At the close of the evidence parties may

file written arguments, 7 C.F.R. § 900.9(b), the ALJ certifies the hearing transcript, 7 C.F.R. § 900.10, and thereafter the Secretary issues a recommended decision, 7 C.F.R. § 900.12.

The amendments at issue in this case resulted from a congressionally mandated formal rulemaking process. *See* H.R. 3428, as part of Consolidated Appropriations Act, 2000, Pub.L. 106-113, Div. B, § 1000(a)(8) [§ 2], Nov. 29, 1999, 113 Stat. 1536, 1501A-518 ("2000 Act"). The 2000 Act ordered the Secretary to conduct emergency rulemaking, issue amended regulations by December 1, 2000, and implement the resulting formulas on January 1, 2001. 2000 Act Sec.2(c). In April 2000, after requesting proposals, the Secretary published the Notice of Hearing, 64 Fed.Reg. 20094-20104 (April 14, 2000), listing 31 proposals from industry and a standard proposal from the Secretary included in all hearing notices. There was no proposal to create a separate Class III Butterfat price. On the second day of the five day hearing in May 2000, a Dr. Barbano attempted to discuss his idea for a new Class III Butterfat price. The ALJ presiding over the hearing, with the explicit agreement of the Secretary's representative at the hearing, found that "Dr. Barbano's pricing formula is not one of the proposals being considered at this hearing." Mem. of P. & A. in Supp. of Pls.' Mot. For T.R.O. and/or Prelim. Inj. and for Expedited Hr'g at 16, (Jan. 19, 2001) (*citing* Hr'g Tr. at 790-91, dated May 9, 2000) ("Pls.' Mot. for Prelim. Inj.").

During the remainder of the hearing no participant testified or offered any evidence for the creation of a separate Class III butterfat price. After the hearing the record closed and on December 7, 2000 the Secretary issued a Tentative Final Decision at Fed.Reg. 76832. *See also* 65 Fed.Reg. 82832 (December 28, 2000). The Tentative Final Decision surprised all of the participants in the hearing because it created a separate Class III Butterfat price provision and made changes to numerous other parts of the FMMO to implement this change, taking up virtually all of the nine pages of amendments. The Secretary denied requests from several participants for an administrative stay of the

Tentative Final Decision and the regulation became effective on January 1, 2001. But because the price announcement for January 2001 takes place on February 2, 2001, plaintiffs were afforded a brief opportunity to seek equitable relief from this Court.

Plaintiffs sought a preliminary injunction on the grounds that the Secretary had unlawfully failed to comply with the appropriate procedural requirements for amending the Federal Milk Marketing Order System. On January 31, 2001 this Court entered a preliminary injunction that enjoined the Secretary of the Department of Agriculture from implementing a separate Class III Butterfat Price in the nation's Federal Milk Order System. *See* Order Granting Prelim. Inj., January 31, 2001. The Court noted that the "public interest will be served if the Court maintains the status quo with respect to the Class III Butterfat Price until it has resolved the underlying claims presented by the Milk Producers' Complaint." *Id.*

The amended regulations provided for a separate Class III Butterfat price and the Secretary intended to announce the new separate Class III Butterfat price on February 2, 2001. The new price would be retroactive to January 1, 2001 and would cause an immediate change in milk prices for January milk deliveries. The preliminary injunction prohibited the Secretary from implementing the provisions for the new Class III Butterfat price and directed the Secretary to make specific changes in the Tentative Final Decision appearing at 65 Fed.Reg. 82832 in order to return the regulations to the state that existed before the Tentative Final Decision became effective on January 1, 2001.

This Court found that plaintiffs met all of the requirements for a preliminary injunction. First, plaintiffs would suffer irreparable injury and would be unable to recover the immediate losses stemming from the implementation of the separate Class III Butterfat price by any means at law. Second, plaintiffs were likely to succeed on the merits of their claims. In fact during the hearing on the preliminary injunction this Court determined that "the Secretary ... had the right to make both

proposals and issues in her notice, but she ... clearly did not give fair notice to the industry." Tr. at 47-48. Third, the public interest would be served by the injunction. Fourth, the Secretary would not suffer harm if enjoined.

Following the entry of the preliminary injunction the Secretary had limited options. The 2000 Act mandated specific deadlines for the Secretary. If the Court struck down the Tentative Final Decision via a final judgment or permanent injunction, then the failure to undertake new rulemaking during the preliminary injunction would leave the Secretary in violation of the 2000 Act's January 1, 2001 deadline.[1] Either the case could be pursued to final judgment or the Secretary could remedy the underlying wrong and undertake new rulemaking during the preliminary injunction. As this Court clearly spelled out its opinion of the rulemaking process at issue during the hearing on the preliminary injunction, the Secretary chose the only viable option and conducted rulemaking afresh. This process resulted in the publication of a new final regulation that took effect on April 1, 2003. The new regulation did not include a separate Class III Butterfat price. But the Court does not rely on the fact that in the final rule, after adhering to the appropriate rulemaking procedure, the Secretary chose not to include a separate Class III Butterfat price because this suit was based upon the fact that the initial rulemaking process used by the Secretary was in violation of the AMAA and its related regulations. Plaintiffs dismissed the case because they obtained their desired result in the form of proper procedural process in the enactment of a new amended regulation--all of which was the result of the preliminary injunction. On May 30, 2003, plaintiffs moved for award of fees and costs pursuant to the Equal Access for Justice Act.

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[1]The 2000 Act states: "In the event that the Secretary of Agriculture is enjoined or otherwise restrained from by a court order from implementing a final decision within the time period specified in subsection (c), the length of time for which that injunction ... is effective shall be added to the time limitations specified in subsection (c) ..." 2000 Act See.2(d).

ANALYSIS

Plaintiffs request fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 (2003).[2] The Court must consider three separate issues: whether plaintiffs are prevailing parties, whether the Secretary's position was substantially justified, and what fees and costs submitted by the plaintiffs are allowable.

A. Plaintiffs Are A "Prevailing Party"

The analysis of plaintiffs' status as a prevailing party takes place in light of the Supreme Court's holding in *Buckhannon Bd. and Care Home Inc., v. W. Va. Dept. of Health and Human Res.,* 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001) ("*Buckhannon* ") and the D.C.

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[2]The relevant portions of 28 U.S.C. § 2412 states:

(a)(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation....

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award....

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Circuit's subsequent application of *Buckhannon* in *Thomas v. Nat'l Sci. Found.,* 330 F.3d 486 (D.C.Cir.2003) ("*Thomas* "). In *Buckhannon,* the plaintiffs operated assisted living residences in West Virginia and sued the state of West Virginia seeking relief that certain state laws violated provisions of the Fair Housing Amendments Act of 1988 ("FHAA"), 42 U.S.C. § 3601 *et seq* . and the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq* . While the case was pending and before the court had granted any relief of any kind, the West Virginia legislature enacted two bills eliminating the state law provisions at issue. Subsequently defendant moved to dismiss the case as moot and the court granted the motion. Plaintiffs then requested attorney's fees as the prevailing party under the FHAA. Plaintiffs argued they were entitled to fees under the catalyst theory, which asserts that a plaintiff is a prevailing party "if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Buckhannon,* 532 U.S. at 601, 121 S.Ct. 1835. The Supreme Court held the catalyst theory "is not a permissible basis for the award of attorney's fees under the FHAA and ADA" *Id.* at 598, 121 S.Ct. 1835. The seemingly limited scope of this holding is belied by its subsequent interpretation by the D.C. Circuit in *Thomas.* In *Thomas,* discussed further *infra,* the D.C. Circuit rejected the district court's understanding of *Buckhannon* as a rejection of the catalyst theory as "much too narrow" and concluded instead that "*Buckhannon* is, first and foremost, about the meaning of the term 'prevailing party' in civil litigation under certain fee-shifting statutes." *Thomas,* 330 F.3d at 492. Thus a closer examination of *Buckhannon* is required.

In *Buckhannon,* the Supreme Court surveyed its precedent on the issue of prevailing parties and made several determinations. First, the Court observed that the term "prevailing party" is a legal term of art and that in accordance with both its precedent and Black's Law Dictionary, a prevailing party "is one who has been awarded some relief by the court." *Buckhannon,* 532 U.S. at 603, 121 S.Ct. 1835. Second, the Supreme Court considered two particular forms of relief that qualified. The Court found that a plaintiff must "receive at least some relief on the

merits of his claim before he can be said to prevail." *Id.* at 604, 121 S.Ct. 1835 (*quoting Hewitt v. Helms,* 482 U.S. 755, 760, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987)). But "even an award of nominal damages suffices under this test." *Id.* (*citing Farrar v. Hobby,* 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992)). In contrast, the Court also noted that a settlement agreement enforced through a consent decree could serve as the basis for an award of attorney's fees. *Id.* (*citing Maher v. Gagne* 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980)). The Court observed the consent decree "does not always include an admission of liability by the defendant" but "it nonetheless is a court ordered change in the legal relationship between the plaintiffs and the defendant." *Id.* (*citing Texas State Teachers Assn. v. Garland Independent School Dist.,* 489 U.S. 782, 792, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989)). The Court combined these concepts stating: "These decisions, taken together, establish that enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." *Id.* (*quoting Texas State Teachers Assn.,* 489 U.S. at 792, 109 S.Ct. 1486). The Court further observed that the catalyst theory "falls on the other side of the line from these examples." *Id.* at 605, 121 S.Ct. 1835. Likewise, neither the reversal of a dismissal for failure to state a claim, nor the reversal of a directed verdict for the defendant was a sufficient success to make the plaintiff a prevailing party. At no point did the Court evaluate whether or not a preliminary injunction would be sufficient to make a party a prevailing party in order to obtain an award of fees and costs.

In *Thomas v. National Science Foundation,* the D.C. Circuit considered the effect of *Buckhannon* in a case where the district court awarded fees based on a preliminary injunction and partial summary judgment in favor of plaintiffs. Plaintiffs were a class of Internet Domain Name registrants who sued the National Science Foundation ("NSF") over a portion of Internet Domain Name registration fees that went to the NSF on the grounds that such fees constituted an unconstitutional tax. The district court entered a preliminary injunction prohibiting NSF from

spending any of the fees collected, but did not stop the collection of the fees. The district court also granted partial summary judgment to the plaintiffs finding the "tax" unconstitutional. But it did not award any damages to the plaintiffs, or otherwise order the NSF to divest the collected funds. Before the district court could render final judgment, Congress mooted the case by enacting legislation that approved the collection of the fees as a tax and did so retroactively. The district court then vacated the preliminary injunction and dismissed the case.

The *Thomas* plaintiffs then filed a request for fees under the EAJA on the grounds that they were prevailing parties because they had obtained a preliminary injunction and the court had entered partial summary judgment on the issue at the heart of the case. The district court found that the preliminary injunction and partial summary judgment were sufficient to make plaintiffs prevailing parties. *Id.* at 490. The D.C. Circuit rejected both of those grounds. It held that *Buckhannon* should be interpreted more broadly and set forth a discussion of those elements of the Supreme Court's opinion discussed *supra.* The D.C. Circuit stated that "neither the preliminary injunction nor the partial summary judgment changed the legal relationship between [plaintiffs] and NSF in a way that afforded [plaintiffs] the relief that they sought." *Id.* at 493.

The preliminary injunction in *Thomas* was not a sufficient ground for awarding fees because it served only to preserve the status quo pending final adjudication and "did not change the legal relationship between the parties in a way that afforded [plaintiffs] the relief they sought in the lawsuit." *Id.* The preliminary injunction in that case had the sole effect of "prevent [ing] NSF from appropriating any money already collected from the registration assessment." *Id.* The injunction did not stop NSF from collecting any additional monies from ongoing registrations. Thus a member of the plaintiff class who needed to reregister an Internet Domain Name after the entry of the preliminary injunction still had to pay the full registration fee, a portion of which would go to NSF, just as required before the preliminary injunction.

There are two separate reasons why *Thomas* does not require this Court to deny plaintiffs' prevailing party status because they only obtained a preliminary injunction. First, the preliminary injunction in this case did create a material alteration in the legal relationship between the parties as required under *Buckhannon* and *Thomas*. Second, the change in the parties' legal relationship that resulted from the preliminary injunction was the exact relief that plaintiffs sought. Further explanation is necessary.

This Court's use of the term "status quo" in its preliminary injunction incorrectly conveys the state of affairs after the entry of the injunction. Prior to the entry of the injunction the Secretary had affirmatively issued amended regulations that provided for a separate Class III Butterfat price. These regulations were fully in existence and effective as of January 1, 2001, *see* 2000 Act at Sec. 2(c), and only awaited the issuance of the price itself-- scheduled for February 2, 2001--to have a physical effect on the market. These newly issued amended regulations governed milk transactions taking place in January 2001, prior to the preliminary injunction, but awaited the price before the relevant parties could compute the payments for January 2001 deliveries. If the injunction had truly preserved the status quo it would have only enjoined the Secretary from dictating the price but left the newly amended regulations in place. Instead, the preliminary injunction enjoined the newly implemented amended regulations, made affirmative changes to the order language appearing at 65 Fed.Reg. 82832, and restored the pricing system in place prior to the implementation of the amended regulations. The fact that plaintiffs had yet to suffer monetary damages under the new system is irrelevant as one of the very purposes of the preliminary injunction is to prevent irreparable injury.

Second, the preliminary injunction is exactly the relief sought by plaintiffs. As the D.C. Circuit stated in *National Black Police Association v. District of Columbia Board of Elections and Ethics,* "[t]he relief they ultimately won was specifically the relief they requested." 168 F.3d 525, 529 (D.C.Cir.1999). Further, in *Farrar,* the

Supreme Court stated that "plaintiffs may be considered prevailing parties for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." *Farrar,* 506 U.S. at 109, 113 S.Ct. 566. In fact, a preliminary injunction was the only effective relief they could seek. The retroactive nature of the price announcement meant that on February 2, 2001, plaintiffs would be subject to an immediate loss of an estimated $5,000,000. Pls.' Mot. for Prelim. Inj. at 2. This loss is the result of third party transactions based on the issued price and is not recoupable as damages at law from the Secretary, who is protected by sovereign immunity. Thus no subsequent final judgment on the merits or consent decree could award plaintiffs effective relief. This Court's entry of a preliminary injunction was the only procedural device that represented victory for the plaintiffs.

Subsequent to the drafting of much of this opinion, the D.C. Circuit provided further guidance on the recovery of attorney fees under the EAJA in *Role Models America, Inc., v. Brownlee,* 353 F.3d 962 (D.C.Cir.2004). In *Role Models* plaintiffs applied for a preliminary injunction to prevent the Secretary of the Army from transferring a closed military installation called Fort Ritchie because the Secretary had failed to observe the procedural requirements for disposing of a closed military facility. Although the district court denied the request, the Court of Appeals reversed and ordered the district court to enter a " 'permanent injunction against conveyance of the Fort Ritchie property until the Government remedies the procedural errors' it had committed." 353 F.3d at 965 (*quoting Role Models Am. Inc., v. White,* 317 F.3d 327, 333-34 (D.C.Cir.2003)). Subsequently, the plaintiff applied directly to the Court of Appeals for attorneys' fees under the EAJA. In finding the plaintiff a prevailing party, the Court of Appeals stated that because "Role Models obtained not only a remand to correct procedural errors, but also an injunction barring the Secretary from transferring Fort Ritchie until he complied with applicable regulations" they obtained the sort of " 'change in someone's primary conduct in the real world ... [such as by the] imposition of a restriction on others' " that makes a party a prevailing

party. *Id.* at 966 (*quoting Waterman Steamship Corp. v. Maritime Subsidy Bd.,* 901 F.2d 1119 (D.C.Cir.1990)). The court's statement applies here as well. The preliminary injunction entered by this Court caused a change in the primary conduct of the Secretary. The Secretary was enjoined from implementing the regulations at issue and the changes to the regulations were entered by order of the Court.

The *Role Models* court further noted that even where an administrative agency reissues the same rule using correct procedures after a rule is vacated by a Court for failure to provide notice and comment, the plaintiff can still be a prevailing party because " '[i]n the real world of the APA ... an opportunity for comment ... is not to be denigrated.' " *Id.* at 966 (*quoting Environmental Defense Fund, Inc., v. Reilly,* 1 F.3d 1254 (D.C.Cir.1993)). Whether or not plaintiff obtains a favorable administrative outcome does not denigrate what plaintiff achieved through the preliminary injunction--"the functional equivalent of vacating the rule." *Id.* As applied to this case, this lends further support to this Court finding plaintiffs a prevailing party. Plaintiffs obtained both results, an injunction that effectively vacated the rule promulgated by the Secretary and a final rule that incorporated plaintiffs' comments. This Court finds plaintiffs to be prevailing parties.[3]

B. The Secretary's Position Was Not Substantially Justified

According to the statute, no award can be given if "the court finds that the position of the United States was substantially justified ..." 28 U.S.C. § 2412(d)(1)(A). The burden of proof of establishing substantial justification is on the Secretary. *Lundin v. Mecham,* 980 F.2d 1450,

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[3]Plaintiffs could also be considered prevailing parties because plaintiffs and defendant cooperated to draft the language in Attachment 1 to the Court's preliminary injunction. The subsequent use of that attachment in the Court's order could be conceived of as a consent decree. But such an approach only highlights the problem. When a flexible term is stiffened, often others are bent to shoehorn in those circumstances that have just been excluded.

1459 (D.C.Cir.1992). Substantial justification is present if the defendant's position was "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood,* 487 U.S. 552, 560, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988).

The Secretary's promulgation of a separate Class III Butterfat price was not substantially justified. First, the Notice of Hearing listing the proposals for consideration did not make it clear that the issue of a separate Class III Butterfat price would be part of the hearing. Second, to the extent that the language of the Notice of Hearing presented any ambiguity at all, the ruling of the ALJ closed off that area of discussion. As noted above, the Secretary's representative at the hearing affirmatively concurred with the ALJ that a separate Class III Butterfat price was not part of the proposals submitted for consideration. Dr. Barbano's testimony on the issue was determined by the ALJ and the Secretary's representative to be beyond the scope of the hearing and off limits to further discussion. The Secretary then published nine pages of amendments which dealt almost exclusively with the issue of a separate Class III Butterfat price.

Further, after the Secretary published the tentative final decision on December 7, 2000, numerous groups, including plaintiffs, requested an administrative stay from the Secretary on the grounds that the newly published decision was beyond the scope of the hearing and that they had been unlawfully denied an opportunity to comment and provide evidence on the issue. The Secretary was on notice that various groups found the amended regulations in violation of the procedural requirements of the AMAA and the APA. The Secretary denied these requests. This failure to confront these concerns and force plaintiffs to file suit is further evidence of a lack of substantial justification of the underlying acts. *See Lundin,* 980 F.2d at 1460-61.

C. The Fee Award

Plaintiffs request attorney's fees, expenses, and costs and submitted

a record of such to the Court. Plaintiffs bear the burden of establishing entitlement to fees sought. *Hensley v. Eckerhart,* 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). 28 U.S.C. 2412(d)(2)(A) sets the hourly rate available to attorneys, stating: "attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved justifies a higher fee." The parties concur in their respective briefs to the Court that the appropriate cost of living adjusted rates are as follows: $138.25 for 2000, $142.18 for 2001, $144.43 for 2002, and $147.13 for 2003. *See, e.g. Chen v. Slattery,* 842 F.Supp. 597 (D.D.C.1994) (explaining the appropriate formula for cost of living adjustments).

1. The Hourly Rate

Plaintiffs' fee application requests that the Court compensate plaintiffs' counsel at what appear to be the normal hourly rates each attorney charges private clients. Defendant sensibly objects to these hourly rates and asserts that the EAJA statutory cap should apply for all attorneys. Def.'s Opp'n to Pls.' Application for Fees, Costs, and Expenses at 9-10 (July 1, 2003) ("Def.'s Opp'n"). The Court does have the power to increase the rate where a "special factor" exists. 28 U.S.C. 2412(d)(2)(A). The Supreme Court interpreted this language to mean attorneys "having some distinctive knowledge or specialized skill needful for the litigation in question--as opposed to an extraordinary level of generally lawyerly knowledge and ability useful in all litigation." *Pierce v. Underwood,* 487 U.S. 552, 572, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988). Factors not to be considered included the difficulty of the issues, the ability of counsel, or the results obtained in the litigation. *Id.* at 573, 108 S.Ct. 2541.

The D.C. Circuit further elaborated on *Pierce* in *Truckers United For Safety v. Mead,* 329 F.3d 891 (D.C.Cir.2003). In *Truckers United,* the court "declined to construe EAJA's fee enhancement provision in a liberal fashion." 329 F.3d at 895. The court noted that according to its ruling in

F.J. Vollmer Co. v. Magaw, "nothing in EAJA or its legislative history indicates that the Congress intended to entitle 'all lawyers practicing administrative law in technical fields' to a fee enhancement" and thus the court refused to recognize " 'expertise acquired through practice' as a special factor warranting an enhanced fee." *Id.* (*quoting F.J. Vollmer Co. v. Magaw,* 102 F.3d 591, 598-99 (D.C.Cir.1996)). But the Court did not decide whether the attorney's expertise in the safety aspects of the trucking industry was a special factor and instead reversed the fee enhancement granted by the district court on the grounds that such specialized knowledge was not "needful for the litigation in question." *Id.* at 896 (*quoting Pierce,* 487 U.S. at 572, 108 S.Ct. 2541). Given that the underlying suit was over whether or not the Inspector General "lacked the legal authority to conduct investigations into motor carrier compliance" the court concluded that the specialized expertise in trucking safety was "at best [ ] tangential to the underlying litigation." *Id.* at 893, 896.

The Court must therefore undergo two analyses in the instant case: whether or not specialized knowledge of the FMMO and the AMAA is a special factor under the EAJA, and whether or not such specialized knowledge was "needful for the litigation in question." As to the first question, the Court finds that specialized knowledge of the FMMO and the AMAA is a special factor meriting an increased rate under the EAJA. The FMMO and the provisions of the AMAA are extremely complex. An attorney must have specialized skill to "traverse the labyrinth of the federal milk marketing regulation provisions." *Zuber v. Allen,* 396 U.S. 168, 172, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969). *See also Suntex Dairy v. Block,* 666 F.2d 158, 160 (5th Cir.1982) (describing federal milk regulations as "a highly complex scheme"). As observed in *Queensboro Farms Products v. Wickard*:

> The milk problem is exquisitely complicated. The city dweller or poet who regards the cow as a symbol of bucolic serenity is indeed naive.... The milk problem is so vast that fully to comprehend it would require an almost universal knowledge ranging from geology, biology, chemistry and medicine to the niceties of the legislative, judicial and administrative processes of government.

137 F.2d 969, 974 (2d Cir.1943).

However, that such knowledge is a special factor does not end the inquiry.

The second issue is whether or not this specialized knowledge is needful for the litigation. At first glance this case appears to be solely a dispute over the Secretary's failure to promulgate new milk regulations in accordance with the proper procedures required by statute, that the statute at issue is the AMAA rather than the APA does not change the fact that litigating over compliance with notice procedures is plain vanilla administrative practice. Where the specialized knowledge of the FMMO comes into play is in two specific areas. First, to obtain a preliminary injunction requires a showing of irreparable injury. As plaintiffs discussed at length in their motion for preliminary injunction, the impact of the challenged regulations would have been severe. Pls.' Mot. for Prelim. Inj. at 18. Plaintiffs carefully and thoroughly documented the ways that they and others would be affected when the regulations took effect, including a complex economic model that calculated the unrecoverable harm in dollars that plaintiffs would suffer. *Id.* at 22, 28. In fact, plaintiffs showed exactly how the Secretary's poor economic modeling overlooked important consequences of the new rule, failed to take all relevant information into account, and did not anticipate the harm to plaintiffs or other similarly situated parties. As an aside, the Court notes but does not rely upon the fact that the final rule, promulgated with the input of the industry, did not include the challenged provisions--a further testament to the validity of plaintiffs' analysis. Absent specialized knowledge of how the FMMO operates, plaintiffs' counsel could not have prepared the irreparable injury arguments or economic models necessary to obtain the preliminary injunction. Furthermore, plaintiffs' counsel also utilized specialized knowledge of the FMMO in drafting the attachment to the preliminary injunction that directed the Secretary to make specific itemized changes to the Interim Final Order. Even the most cursory glance at the attachment will reveal that it could not have been drafted without specialized knowledge far exceeding that which could be obtained by a "competent practicing attorney with access to a law library and other

accoutrements of modern legal practice." *In re Sealed Case,* 254 F.3d 233, 236 (D.C.Cir.2001). Actually, the alternative to using such specialized attorneys is the result in *Role Models* where "fourteen individuals logged a total of 1058 hours in connection with the appeal and with the preparation of its fee petition." 353 F.3d at 968.

The Court's careful analysis of plaintiffs' counsels' contemporaneous time records reveals that although these records are sufficient for purposes of generating and submitting a bill for clients, they are not sufficiently detailed to allow the Court to extract and compensate for those particular hours spent on aspects of the preliminary injunction that required the specialized skill. Instead, the Court undertook a thorough examination of plaintiffs' motion for preliminary injunction and related papers, considered the content and nature of the hearing, and reviewed all the facts and circumstances surrounding this litigation and determined that the Court will grant an enhanced fee for one third of the hours that attorneys with specialized knowledge spent towards obtaining the preliminary injunction. This award is intended to capture those hours where plaintiffs' counsels' specialized knowledge of the FMMO was "needful to the litigation in question." *Pierce,* 487 U.S. at 572, 108 S.Ct. 2541.

The Court must now identify the plaintiffs' attorneys that possessed the specialized knowledge of the FMMO and that used that knowledge in the relevant aspects of the litigation. Attorney Yale specializes in the representation of dairy farms and dairy cooperatives, worked in the dairy industry prior to becoming an attorney, and has the requisite distinctive knowledge of the FMMO and AMAA to qualify for a higher rate under the EAJA. *See* Pls.' Reply to Def.'s Opp'n to Pls.' Application for Fees, Costs, And Other Expenses, at 10 (July 18, 2003) ("Pls.' Reply"); Decl. of Benjamin F. Yale, Ex. B to Mem. in Supp. of Application for Fees, Costs, and Other Expenses (May 30, 2003). The Court will award fees for Attorney Yale at his requested rate of $325/hour for one third of the hours spent towards the preliminary injunction, less any travel hours, which will be compensated at the EAJA rate. Attorney Barnes has spent

over three decades representing dairy cooperatives on issues relating to the AMAA. Pls.' Reply at 10. Based on this and the expertise displayed at the hearing on the preliminary injunction, the Court will award fees for Attorney Barnes at his requested rate of $385/hour for one third of the hours spent towards the preliminary injunction. The Courts finds that no other attorneys possess specialized knowledge of the FMMO and the AMMA and thus all other attorneys will receive at a maximum the cost of living adjusted EAJA rates.

2. The Hours Spent

Defendant further objects to "hundreds of hours for two years when there were no court proceedings." Def.'s Opp'n at 1. But an examination of the time records submitted by plaintiffs in their motion reveals that the total of all hours billed by all attorneys from the day after the entry of the preliminary injunction to the dismissal of the case two years and three months later totals to a scant 39 hours. Mem. in Supp. of Application for Fees, Costs, and Other Expenses at Ex. C. The Court does not find this number of hours unreasonable given the complexity of the issues and the fact that approximately half of those hours were spent in the two weeks immediately following the entry of the preliminary injunction--a time when plaintiffs' attorneys could be expected to spend additional hours because the preliminary injunction made specific changes to the FMMO regulations and the attorneys could reasonably be expected to follow up to make sure the changes operated as intended. The remaining hours until the dismissal of the case were spent partly as a result of defendant's own litigation conduct. Defendant's tactics in the litigation resulted in ongoing Court involvement in the case and entry of several orders. Plaintiffs' counsel spent a minimal and otherwise acceptable amount of time on these matters.

The Court further notes defendant's objections to particular categories of hours. Defendant objects to time spent by plaintiffs' attorneys in December 2000 on the grounds that it is time spent on "administrative rulemaking proceedings." *NAACP v. Donovan,* 554 F.Supp. 715, 720

(D.D.C.1982) (finding that the legislative history of the EAJA intended to exclude rulemaking and other proceedings). In December 2000, following the publication of the Tentative Final Decision, plaintiffs filed a motion requesting an administrative stay of a portion of the Tentative Final Decision. *See* Ex. F to Pls.' Mot. for Prelim. Inj. Plaintiffs' filed the motion "pursuant to 7 C.F.R. part 900." *Id.* 7 C.F.R. part 900 provides the regulations that govern hearings held to amend regulations promulgated under the AMAA. Thus it appears to this Court that plaintiffs' motion to stay was submitted as part of the administrative rulemaking. Plaintiffs do not cite, and this Court has not found, any authority for the proposition that such a motion was part of an "adversary adjudication" under 28 U.S.C. 2412(d)(3). *See Indep. Bankers Ass'n of Georgia v. Bd. of Governors of Fed. Reserve Sys.,* 516 F.2d 1206 (D.C.Cir.1975) (noting that adjudicatory hearing procedures are used in individual cases where the outcome is dependent on the resolution of particular "adjudicative facts"). The Court finds that those hours billed in relation to the motion for a stay are not compensable as the motion for a stay was submitted pursuant to regulations governing administrative rulemaking procedures. The Court therefore makes a deduction of 24 hours from Attorney Yale's December 2000 hours.

Defendant makes relevant objections to attorney hours spent on a pro hac vice motion, conversing with the press, and filing and serving documents. In *Role Models,* the D.C. Circuit refused to compensate counsel for time spent: conversing with the press, working on application for admission to the D.C. bar, or filing briefs. 353 F.3d at 973. The time records supporting plaintiffs' fee request specifically indicate 6.75 hours spent on these tasks and 1 hour that was inadequately labeled. Several other entries include these tasks in entries that lump together multiple tasks. After examining these entries the Court will deduct an additional 5 hours to compensate for the objectionable tasks detailed in a single entry and for any other inadequate time records for a total reduction of 12.75 hours.

Defendant further requests a downward reduction of 25% on all of

plaintiffs' hours on the grounds that the hours are excessive and resulted in part from overstaffing. Def.'s Opp'n at 16. In this analysis the Court is guided by the D.C. Circuit's maxim in *Copeland v. Marshall* that "billing judgment" means only billing one's adversary for hours that one would bill to one's client. 641 F.2d 880, 891 (D.C.Cir.1980). In this regard, plaintiffs assert that all attorney hours claimed in their application have been billed to and paid for by the clients. Pls.' Reply at 16. Furthermore, given the complexity of the FMMO, see discussion *infra,* the Court finds that, subject to the specific deductions noted herein, the amount of hours submitted was reasonable.

3. Compensable Hours Calculations

In accordance with the prior analysis on enhanced fees the Court makes the following calculations. Attorney Yale's total time spent on the preliminary injunction was 218.3. This sum represents 11.9 hours in December 2000--the net remaining hours after the Court deducted 24 hours for work on administrative matters--plus 202.4 hours for January 2001. From this number the Court subtracts 36.1 hours for time spent in travel in January 2001 leaving 178.2 hours. The Court awards Attorney Yale his requested rate of $325/hour for 58.8 hours (one third of the total of 178.2 hours) for fees of $19,110. The remaining compensable hours will be paid at the appropriate EAJA rate. There are 7.9 hours in 2000 (two thirds of 11.9) paid at $138.25 per hour for a total of $1092.18. The total remaining compensable hours in 2001 equal 131.6. This represents the aforementioned 178.2 hours minus 58.8 hours (those paid at the higher rate) minus 7.9 hours (those paid at year 2000 EAJA rates) minus 2 hours (time spent talking to the press) plus 4 hours (time spent in February 2001) plus 18.1 hours (one half the hours spent in travel).[4] Applying the 2001 EAJA cost of living adjusted rate of

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[4]Travel time is compensated at one-half the appropriate hourly rate. *See Cooper v. U.S. Railroad Retirement Bd.,* 24 F.3d 1414, 1417 (D.C.Cir.1994). The Court finds no reason to pay for travel time, even reduced by half, at any rate other than the EAJA

(continued...)

$142.18 to the remaining 131.6 hours results in fees of $18,710.89. The grand total of Attorney Yale's compensation is then $38,913.06 ($19,110 + $1,092.18 + $18,710.89).

The Court awards Attorney Barnes an enhanced rate for one third of his hours expended toward the preliminary injunction. Attorney Barnes recorded 135 hours in 2001 before the entry of the preliminary injunction on January 31, 2001. Attorney Barnes requested enhanced rate is $385/hour, an amount the Court finds appropriate given his specialized knowledge. Awarding $385/hour for 45 hours (one third of 135) results in a fee of $17,325. The remaining 90 hours will be compensated at the appropriate EAJA rate.

No other attorney possessed expertise in FMMO and AMAA so all remaining hours will be compensated at the appropriate EAJA rates. Hours recorded in 2001 include 116.75 hours for Attorney Barnes (161.75 total hours in 2001 minus 45 hours at the enhanced rate) and 97.25 hours for Attorney Patterson for a total of 214 hours from which the Court deducts 4 hours.[5] The fee for the remaining 210 hours is $29,857.80 (210 x $142.18).

In 2003 Attorneys Barnes, Castro, Miltner, and Illingworth recorded a combined total of 83.5 hours. The 2003 rate under the EAJA is $147.13, an amount well below the requested billing rate of each attorney respectively. As there is no evidence of special factors, the Court will

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[4](...continued)
rate.

[5]Attorney Kehoe recorded 5 hours in 2001 but all five hours were spent performing secretarial type tasks and will not be compensated. S. Flores recorded 1.75 hours in 2001. But .75 hours were described as "Filing to Court" and an additional 1.0 hour was inadequately described as "research for Lowell Patterson." These hours will not be compensated. The Court has deducted 2.0 hours from Attorney Yale for conversations with the press, 6.75 for Attorney Kehoe and S. Flores and will deduct the remaining 4 hours from the time spent by Attorneys Barnes and Patterson.

award fees of $12,285.36 for these hours (83.5 x. $147.13).

The total fee award is then $98,381.22 ($38,913.06 + $17,325 + $29,857.80 + $12,285.36).[6]

D. Expenses and Costs

Plaintiffs request compensation for expenses and costs in the amount of $10,563.88. Pls.' Reply at 16. But the Court finds that only the filing fee, copying, transcripts, and research are compensable. *See Massachusetts Fair Share v. Law Enforcement Assistance Admin.,* 776 F.2d 1066, 1069 (D.C.Cir.1985) (stating that of duplication expenses, taxi fares, messenger services, travel expenses, telephone bills, and postage only duplication expenses were recoverable under the EAJA); 28 U.S.C. § 2412(d)(1)(A) (2003) (allowing an award of costs pursuant to subsection (a), which in turn references costs under 28 U.S.C. § 1920); *Nat'l Ass'n of Mfrs. v. U.S. Dep't of Labor,* 962 F.Supp. 191 (D.D.C.1997) (allowing legal research expenses to be recovered under the EAJA); *see, e.g. Action on Smoking and Health v. C.A.B.,* 724 F.2d 211, 224 (D.C.Cir.1984); and *Hirschey v. F.E.R.C.,* 777 F.2d 1, 6 (D.C.Cir.1985). All of plaintiffs' other requested expenses are denied. Thus plaintiffs are entitled to $150.00 filing fee, $2075.61 for transcripts and copying, and $660 for online legal research, for a total of $2885.61.

In total plaintiffs shall receive $98,381.22 in attorneys' fees and $2,885.61 in costs for a grand total of $101,266.83.

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[6]In response to Court order plaintiffs submitted their contemporaneous time records on January 20, 2004. The contemporaneous records showed additional hours expended by various attorneys in excess of those reported in plaintiffs' initial motion filed on May 30, 2003. Plaintiffs provided no explanation for why these hours, which accrued prior to filing the initial motion, were not included in the original motion. As plaintiffs bear the burden in this matter the Court will not crunch endless data to compensate for plaintiffs' lack of thoroughness and so ignores any hours in the detailed records that were not included in the summary records attached to plaintiffs' initial motion for fees.

CONCLUSION

Pursuant to 28 U.S.C. § 2412(a) and (d) and the reasons stated above this Court shall order the United States Department of Agriculture to pay the plaintiffs Select Milk Producers, Inc., Elite Milk Producers, Inc., Continental Dairy Products, Inc., a total of $101,266.83 in attorney's fees, expenses, and costs incurred in the course of this action. A separate order shall issue this date.

ORDER

In accordance with the Memorandum Opinion issued this date and upon consideration of plaintiffs' application for fees, expenses, and costs incurred in their prosecution of this action, the opposition thereto, the reply brief, and the applicable law: the Court hereby grants plaintiffs' application for an award under the Equal Access to Justice Act, 28 U.S.C. § 2412.

It is hereby ORDERED that the United States Department of Agriculture shall pay plaintiffs Select Milk Producers, Inc., Elite Milk Producers, Inc., and Continental Dairy Products, Inc., the sum of $101,266.83 in compensation for fees, expenses, and costs incurred in this action.

FARM CROP INSURANCE ACT

DEPARTMENTAL DECISION

In re: FIRST FRUITS ORGANIC FARMS, INC., AND KRIS KROPP, ROSS BLACKSTOCK, BLACKSTOCK ORCHARDS, INC.
FCIA Docket No. 02-0006, FCIA Docket No. 02-0007 and FCIA Docket No. 02-0008.
Filed May 17, 2004.

FCIA – Willful and intentional – False information – Share of crop, holder of note is not holder of – Producer, defined under act – County, must lie in political boundary of, to qualify.

Blackstock as seller and holder of mortgage note continued to take Federal Crop Insurance on the apple orchards it formerly owned in Delta County, Colorado and assigned the insurance benefits (proceeds of any crop loss proceeds) to First Fruits, the buyer. The buyer insured no apple orchards in Delta county. The seller as holder of a security interest did not thereby acquire a "share" interest under the Act. The knowledge and/or acquiescence of the insurance agent in the true ownership did not innoculate the buyer and seller from the sanctions under the act.

Donald Brittenham, Jr., for Complainant.
Respondent, Pro se (FCIA Docket No. 02-0006)
Lynn French, Respondents (FCIA Docket Nos. 02-0007 and 02-0008)
Decision and Order issued by Marc R. Hillson, Chief Administrative Law Judge.

DECISION

These three related actions were instituted on July 12, 2002 by Complaints issued by Ross J. Davidson, Jr., Manager, Federal Crop Insurance Corporation ("FCIC"). The Complaints filed--against First Fruits Organic Farms, Inc. and Kris Kropp (No. 02-0006), Ross Blackstock (No. 02-0007), and Blackstock Orchards, Inc. (No. 02-0008)--each charge that the Respondents "willfully and intentionally" provided false information regarding insurable interests for the purposes of certain crop insurance policies issued pursuant to the Federal Crop Insurance Act, 7 U.S.C. §§ 1501 *et seq* . (hereinafter "the Act"). In my decisions, I find that the Respondents committed the violations alleged, and I am imposing civil penalties of $10,000 jointly against First Fruits Organic Farms, Inc. and Kris Kropp, and $10,000 individually against Ross Blackstock, as well as injunctive relief against each of the Respondents. I am imposing no civil money penalty against Blackstock Orchards, Inc., because it has been dissolved.

PROCEDURAL HISTORY

Three separate complaints were issued in these matters. In Complaint FCIA 02-0006, First Fruit Organic Farms, Inc. (First Fruits) and Kris Kropp were alleged to have willfully and intentionally provided false information on their insurance application regarding the insurable interest of Blackstock Orchards. In that application, Blackstock Orchards, Inc. was represented to have an insurable interest in three orchards that were in fact no longer owned by them. The complaint alleges that First Fruits and Kropp knew that Blackstock Orchards, Inc. had no insurable interest on these three orchards, but continued to represent to the insurance agency that was writing the crop insurance policy that Blackstock Orchards had a 100 percent interest in the three orchards, in violation of the Act.

In complaint FCIA 02-0007 Ross Blackstock as an individual, was alleged to have (a) submitted various documents representing that

Blackstock Orchards, Inc. maintained crop insurance on the three orchards that it sold to First Fruits, even though it had no insurable interest in the orchards, (b) made such representations during the time when Blackstock Orchards, Inc. did not even have any assets, and (c) continued to represent that Blackstock Orchards, Inc. had a 100% interest in three orchards. As a result, Blackstock Orchards, Inc. was indemnified for crop losses. The complaint also alleges that Ross Blackstock "willfully and intentionally" provided false information, and requests that civil fines and disqualification from FCIA program participation be imposed.

Complaint FCIA 02-0008, against Blackstock Orchards, Inc., alleges that Ross Blackstock on behalf of his corporation, submitted similar false information by representing that it had a 100 percent interest in the three orchards that it had sold to First Fruits, even though Blackstock knew it had no such interest, allowing it to illegally maintain crop insurance coverage on these orchards, during a time period when it had no insurable interest and even when it had no assets. The complaint further requests that Blackstock Orchards, Inc. and "anyone with a substantial beneficial interest" in the company be disqualified from FCIA program participation.

All parties filed timely answers to the complaints. On March 5, 2003, former Chief Judge Hunt consolidated the Ross Blackstock and Blackstock Orchards, Inc. cases for hearing. All three cases were subsequently transferred to my docket. In two telephone conferences held the week before the hearing in October 2003, all parties agreed that all three cases should be consolidated for hearing purposes. On October 27, 2003, I held a consolidated hearing in all three cases in Grand Junction, Colorado.

FINDINGS OF FACT[1]

[1] The parties stipulated to many of the pertinent facts. The facts stipulated to by Ross Blackstock and Blackstock Orchards, Inc. were signed by their counsel, while the

(continued...)

1. Blackstock Orchards, Inc. was a Colorado Corporation that was established on November 18, 1971. SF 1.
2. Throughout the existence of Blackstock Orchards, Inc., Ross H. Blackstock served as its President. He was also on the corporation's Board of Directors. SF 2.
3. Blackstock Orchards, Inc was dissolved in May of 1998. SF 3. First Fruits Organic Farms, Inc. (First Fruits) is a Colorado Corporation that was established on March 13, 1995. The Corporation continues to operate and is registered with the State of Colorado Secretary of State. SF 4.
4. Kris A. Kropp has been the President and Registered Agent of First Fruits since its inception. SF 5.
5. On March 3, 1995, ten days before they established First Fruits as a corporation, brothers Kris and Alan Kropp entered into a "Commercial Contract to Buy and Sell Real Estate" with Blackstock Orchards, Inc. Ross and Virginia Blackstock signed on behalf of the seller, Blackstock Orchards, Inc. as its president and secretary, respectively. SF 6, CX4.
6. Under the terms of the contract, Blackstock Orchards, Inc. sold the Kropps real estate in Delta County Colorado, including apple orchards, as well as buildings, machinery and equipment. Blackstock Orchards, Inc., financed most of the sale, with the transaction secured by deeds of trust. SF 7-8, CX1-4.
7. The deeds of trust and a promissory note were signed by the parties on April 18, 1995 to complete the transaction. On the same day, warranty deeds were filed with the county to record the change in ownership. Documents filed on April 18th were in the name of First Fruits rather than the Kropps. CX1, SF9.
8. In 1994, Blackstock Orchards, Inc. possessed a continuous crop insurance policy that covered its apple orchards. The policy insured the crops that were on the land that was sold to the Kropps/First Fruits.

(...continued)
facts stipulated to by First Fruits Organic Farms and Kris Kropp were signed by Kris Kropp. Other than their captions and their signatories (both were signed by government counsel) the documents are identical, so I will simply cite to them as Stipulated Facts (SF).

9. Blackstock Orchards, Inc. did not have any crops that were insured on any other acreage. SF 12.

10. Blackstock Orchards, Inc. never cancelled the crop insurance policy once the land was sold in 1995, and the policy continued through crop year 2000, in the name of Blackstock Orchards, Inc., even though it no longer owned the orchards after the sale of the land. SF 13-14. Tr. 31, 148, 151-52.

11. Between 1995 and 2000, Ross Blackstock and Kris Kropp signed a number of crop insurance documents relating to the crop insurance policy on the property sold to First Fruits, and submitted these documents to the insurance provider through the crop insurance agent. These documents included acreage reports and production worksheets. SF 15, 16.

12. Each of the documents described in Finding 11 listed Blackstock Orchards, Inc. as the insured entity. SF 17.

13. Ross Blackstock signed and submitted, on behalf of Blackstock Orchards, Inc., a number of production worksheets, which listed the amount of production purportedly harvested by Blackstock Orchards, Inc., as the insured, during the respective crop year. Tr. 32, CX 8, 9, 10.5, 11.11, 13.9, 16.1. At hearing, Ross Blackstock admitted that by signing these and other documents he was certifying that Blackstock Orchards, Inc. had the acreage that was listed on these documents and produced the stated amount of crops. Tr. 153-54.

14. Once Blackstock Orchards, Inc. sold the orchards to First Fruits, it was no longer in the orchard business. After the transfer of land was effectuated, neither Blackstock Orchards, Inc., nor Ross Blackstock, has produced any apples or other agriculture commodities eligible for insurance by the FCIC. Tr. 151.

15. A letter written by Respondent's counsel on August 1, 1997, represented that Blackstock Orchards, Inc. had no assets. CX-12

16. Blackstock Orchards, Inc. was formally dissolved in May of 1998. SF3.

17. On or about April 1995, Ross Blackstock discussed the pending sale of the orchards with Myrna Murray, his FCIC insurance agent. Mr. Blackstock informed Ms. Murray that he wanted the land and orchards

he was selling to be insured. Ms. Murray knew that the purchasers had orchards in Delta County, Colorado that were not insured under the FCIA program, and that in order to be insured under that program, all property in Delta County, Colorado owned by the purchasers would have to be insured. Ms. Murray and Mr. Blackstock decided that because of Blackstock Orchard, Inc.'s financial interest in the property as the holder of the mortgage note, the insurance could remain in the name of Blackstock Orchard, Inc. Tr. 168-171.

18. Ms. Murray testified that if she knew that Blackstock Orchards, Inc. had dissolved in 1998, she would not have allowed them to insure under that name. Tr. 175-76. Between May 1998, when the corporation officially dissolved, and 2000, Ms. Murray was never advised by any of the respondents that Blackstone Orchards, Inc. was dissolved. Tr. 174.

19. Ross Blackstock maintained crop insurance on the orchards that he sold, in the name of Blackstock Orchards, Inc., until insurance coverage was denied in crop year 2000. During this time, he and/or Blackstock Orchards, Inc. were reimbursed by First Fruits for the insurance premiums. Blackstock Orchards, Inc. received insurance proceeds at least twice during this period, and in both instances the proceeds were forwarded to First Fruits. KX1, RX 1-4, Tr. 137-142.

20. Blackstock Orchards, Inc. did not produce any crops once it sold its orchards to First Fruits. Tr. 151-52.

21. Once it sold its orchards to First Fruits, Blackstock Orchards, Inc. did not own any shares (fractional interest) in agricultural commodities that would be eligible for insurance coverage under the FCIA. (CX 26 page 2 of 6 at Sec. 1(nn), CX 27 page 1 of 4 at Sec. 2c. *See* also Appendix B)

22. Even after it was dissolved, Respondents continued to use the Blackstock Orchards, Inc. corporate name and corporate employer identification number (EIN) for purposes of maintaining insurance on the orchards that were sold to First Fruits. Tr. 155.

23. During the crop years at issue, Fresh Fruits was the owner of orchards in Delta County, Colorado which were uninsured under the FCIA program and which were in addition to the orchards purchased from Blackstock Organic, Inc. Tr. 79-80, 168-71.

24. Kris Kropp signed FCIA program crop insurance related documents either on his on behalf, or on behalf of either Fresh Fruits Organic, Inc. or Blackstock Orchards, Inc., which indicated that Blackstock Orchard's, Inc. was the insurance applicant and/or producer of crops on the property owned by First Fruits. CX 11.4(1-2), CX 11.7 (1-2), CX 11.10, CX 11.11 (1-3), CX 12, CX 13.9, CX 16.3 (1-2), CX 16.4 CX16.5, 16.7, 16.8 (1-4), 16.9. 16.10 (1-4), 16.1, 16.12 (1-3), CX17, CX22 (1-3), 22.1, 22.2 (1-4), CX 22.3, CX 22.4 (1-5), CX 22.5, CX 22.6 (1-2).

25. The annual insurance premiums for First Fruits Organic, Inc. would be higher if they were required to insure all of their orchards in Delta County, Colorado with the FCIC. Tr. 71-73, 81-83.

CONCLUSIONS OF LAW

1. From the time it sold its orchards to First Fruits in April 1995, neither Ross Blackstock nor Blackstock Orchards, Inc. had any insurable interest in the orchards.

2. Only "producers" of agricultural commodities may be insured under the Act. Neither Ross Blackstock nor Blackstock Orchards, Inc., were producers of agricultural commodities from the time the orchards were sold to First Fruits.

3. The Apple Crop Insurance Policy and the Common Crop Insurance Policies, which between them covered apple crops from 1995 through 2000, each stated that in order to purchase insurance, the insured party must have a share in the insured crop. At no time after the sale to First Fruits did Ross Blackstock or Blackstock Orchards, Inc., have a share in any crop produced in any orchard.

4. Respondents, as participants in the federal crop insurance program, were required to know the terms of the Apple Crop Insurance Policy and the Common Crop Insurance Provisions.

5. Respondents knew that Blackstock Orchards, Inc. did not produce crops after it sold its orchards to First Fruits, and Respondents knew that Blackstock Orchards, Inc. had no shares in any of the production from these orchards after the sale. Nevertheless, Respondents reported a

number of times information representing that Blackstock Orchards, Inc. was a producer, owned shares, or was otherwise the insured party for orchards, which it no longer owned. This constitutes repeated intentional reporting of false and misleading information.

6. A financial interest in the note or mortgage securing the purchase of agricultural property is not a "share" under the Act.

DISCUSSION

The Act is designed to "promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance." 7 U.S.C. § 1502. The Crop Insurance program is administered by the FCIA, which imposes a number of conditions and restrictions governing eligibility for coverage. Among the conditions for coverage that are pertinent to resolution of these cases is the requirement that an insured be a "producer" with an "insurable share," and that the producer must obtain coverage for each crop in the county if he is to obtain coverage for any crop. The Act limits the FCIC's authority to insure crops to "producers of agricultural commodities grown in the United States," against losses from "drought, flood or other natural disaster." 7 U.S.C. § 1508(a)(1). As I discuss below, after April 1995 neither Ross Blackstock nor Blackstock Orchards, Inc., qualify as "producers" under the Act or the underlying regulations, nor did they own an "insurable share" in the crops at issue.

The Act provides penalties for the provision of false and inaccurate information to the FCIC, "or to any insurer with respect to an insurance plan or policy under this chapter" and subjects violators to "a civil fine not to exceed $10,000" and "disqualif[ication] from purchasing catastrophic risk protection or receiving noninsured assistance for a period of not to exceed 2 years, or from receiving any other benefit under this chapter for a period of not to exceed 10 years." 7 U.S.C. § 1506(n)(1). Any penalty assessment under these provisions "shall consider the gravity of the violation." *Id.*, at (n)(2).

Ross Blackstock and his wife Virginia Blackstock established Blackstock Orchards, Inc. as a Colorado Corporation in 1971. Mr. Blackstock served as its President until it was dissolved in May 1998. (Stipulated Facts). First Fruits Organic Farms, Inc., is a Colorado Corporation established on March 13, 1995. *Id.* Since its incorporation, Kris Kropp has been the President and Registered Agent of First Fruits. On March 3, 1995, Kris Kropp and his brother Kevin Kropp entered into an agreement with Blackstock Orchards to purchase land, including their apple orchards. CX4. The crop insurance policies for these orchards are the subject of these cases.

Blackstock Orchards financed the sale, receiving a down payment and holding a 20-year mortgage on the property. The agreement identified the Kropps as the buyers and Blackstock Orchards as the seller. Three ensuing groups of documents finalized and memorialized the transaction. These three documents—the Warranty Deeds, CX1, the Deed of Trust, CX2, and the Promissory Note—were executed on April 18, 1995, by which time the Kropps had incorporated and formed First Fruits Organic Farms, Inc., which is listed as the grantee of the orchards, with Blackstock Orchards, Inc. listed as the creditor on the note securing the properties.

One of the Additional Provisions in the contract (CX4) is the requirement that the seller maintain crop insurance on the property equal to the amount that the seller had when it owned the property, and that the buyer would reimburse the seller for the cost of the insurance. *Id.*, at p.5. Accordingly, Blackstock Orchards, Inc. never cancelled the continuous crop policy covering these apple orchards that it had purchased in 1994, even though it did not have any other crops insured on any other acreage. SF 12. Even though Blackstock Orchards, Inc. was not a producer of any agriculture commodities (crops) on this property once it was sold in 1995, it continued to represent itself as a producer in various documents filed with the FCIC between 1995 and 2000. Each of these documents listed Blackstock Orchards, Inc. as the insured entity, even after the company was dissolved.

Between the time of the sale in 1995 and 2000, First Fruits reimbursed Blackstock for the cost of the crop insurance. When claims for crop damage claims were filed under the policy, the checks from the insurance were made out to Blackstock Orchards, Inc. and were promptly endorsed over to First Fruits. RX1-3, KX1.

One of the requirements for apple insurance by the FCIC is that a producer insure all the apples grown in a particular county in which the producer has a share. CX 27.2 at, paragraph 6, Tr. 45-46, 71-72. This requirement is specifically imposed by the Act. 7 U.S.C. § 1508(b)(6). First Fruits was producing apples in other orchards in Delta County, Colorado on which it did not maintain insurance. KX1. Insuring only a portion of a producer's land would have an effect on the premium, based on the increase in the amount of acreage that would be covered as well as other factors, such as the actual production history of the land in question. Tr. 71-72.

There is no real dispute that First Fruits desired to insure the land that it had just purchased from Blackstock. Nor is there any dispute that Blackstock, as would any responsible lender holding a note on property, wanted the property that it was mortgaging to be fully insured so as to assure that it would maintain its value and that the promissory note would get paid off. The issue is whether a party holding a secured note may be insured as a "producer" under the FCIA, and whether representations to the FCIA and the company writing the insurance constitute violations of the Act and its regulations.

The matter is further complicated by the somewhat confusing and dubious roles played by the parties who wrote the insurance policies at issue. Thus Myrna Murray, the insurance agent who issued the insurance policy on the property involved in this case, testified that Ross Blackstock discussed the impending sale of his land with her, and indicated that he knew that the Kropps did not carry insurance on their other properties, and wanted to know if he could maintain the insurance even though he was selling the property. Tr. 168-171. She felt that Blackstock was "just

trying to protect his interest," (Tr. 171) and that she did not think it was dishonest. She further testified that she knew, as an insurance agent for 27 years, that " . . . if you carry crop insurance in the county you have to insure all the property that you own in the county" and that "the Kropps didn't carry insurance on other properties." Tr. 173. In spite of this knowledge, she felt that as the seller of the property, Blackstock Orchards, Inc. had enough of an interest to entitle him to coverage in its name, even though it was to the benefit of the Kropps. She further testified that she would not have let Blackstock Orchards, Inc. maintain the policy if she knew the corporation no longer existed. Tr. 175-176.

Neither Ross Blackstock nor Blackstock Orchards had an insurable interest, as contemplated under the Act and its regulations, in the property sold to the Kropps and First Fruit, from the time of the sale and transfer in March 1995. While Blackstock Orchards, Inc. and Ross Blackstock would have an interest in seeing that the property was insured, just as a bank requires that the purchaser of a home also must keep the property insured, this does not put them in the position to purchase insurance in their own right, particularly given the numerous restrictions imposed by the Act and the regulations. The Act, by its own terms, applies to "producers" of agricultural commodities, a qualification that neither Ross Blackstock nor Blackstock Orchards could meet once the land purchase was concluded. Indeed, Ross Blackstock testified that he was getting out of the business after more than two decades of involvement. Tr. 134-35. He not only sold the land, but also sold the machinery and equipment associated with the business. Tr. 148. Yet he repeatedly signed documents representing himself as the producer of the insurable crops, e.g., CX10, "Producer's Pre-acceptance Worksheet," even after his attorney represented that the corporation had no assets, (CX12) and even after the corporation was dissolved in May 1998. SF3. By signing the various crop insurance documents, Ross Blackstock was effectively certifying that Blackstock Orchards, Inc., which was named as the insured party, possessed the acreage in question, and that it produced and harvested apples as specified on the various forms. Tr. 154, CX 8, 9, 10.1, 10.5, 11.1, 11.11, 13, 13.9, 16.1, 22.2. In so doing, he was

willfully and intentionally providing false information as contemplated by the Act.

The fact that the parties agreed that Blackstock Corporation, Inc. would take out the insurance is of no moment. The fact that two parties to the purchase contract agreed that they would, in essence, submit false statements to secure insurance coverage, does not excuse or legalize their conduct. And while there is some discrepancy as to exactly who said what to whom, and how much knowledge each person had of the legality of their actions, participants in the FCIA program are charged with being knowledgeable of the law and the regulations governing their participation in the program. This is particularly true for Ross Blackstock, who not only had been in the orchard business for over two decades, but also had served on the Farm Service Agency County Committee, Tr. 144. As such, he was aware of the concept of what a "share" was, and is, and should have known that he had no "share" in the production of these orchards from the time of the sale, and accordingly had no insurable interest.

Likewise, Kris Kropp was an experienced orchardist, having been in the business since 1981. KX-1. He clearly knew of the requirement that crop insurance could only be purchased if all the apples in the county in which he had a share were insured, as specified, e.g., in the Apple Crop Insurance Provisions as revised in 1998, which were in effect for Crop Years 1999 and 2000. CX 27.2 at paragraph 6.

Further, anyone who participates in the FCIA program is presumed to be aware of the terms and conditions of the policies. The crop insurance "[r]egulations were binding on all who sought to come within the Federal Crop Insurance Act, regardless of what is in the [r]egulations or the hardship resulting from innocent ignorance." *FCIC v. Merrill*, 332 U.S. 380, 385 (1947).

I find it clear, if not manifestly obvious, that Kris Kropp, acting for First Fruits Organic, Inc, Ross Blackstock, acting on his own behalf and

as the owner of Blackstock Orchards, Inc., and Myrna Murray, the insurance agent, acted together to find a way for First Fruits to obtain crop insurance on the property it bought from Blackstock without having to insure all its apple orchards in the county. While Ross Blackstock had a legitimate business interest in having First Fruit insure the property it had purchased from him and his company, he could not legally further this interest by his misrepresentation that he or Blackstock Orchards, Inc. was a producer, owned a share, or had an ownership interest in these orchards. That these misrepresentations continued even after the corporation was represented as having no assets, and even after it was dissolved, compounds the egregiousness of the matter. Similarly, it is apparent that First Fruits desired to maintain no insurance on its other apple orchards in the county, and believed that by allowing Blackstock to falsely provide information indicating that it was the owner, producer, shareholder, etc., Fresh Fruits could reap the benefit of crop insurance for the property sold by Blackstock without paying the larger premium that would be required if all its orchards in the county were insured. And it is abundantly clear that Myrna Murray, the insurance agent, knew about and tried to accommodate the desires of First Fruits and Blackstock. Perhaps everyone thought that there was a legitimate loophole in the regulations governing insurance coverage, although this would require an extremely strained and utterly unreasonable interpretation of the law and facts, given the clear language of the statute, the regulations, the language of the policies in effect, and the actual knowledge of the participants.

SANCTIONS

As stated above, the Act provides for the assessment of a "civil fine" of up to $10,000 per violation, along with disqualification from program participation. The FCIA, and presumably the Administrative Law Judge, is required "to consider the gravity of the violation." There is an absence of specific guidance as to how to determine the gravity of a violation in the statute, the regulations, and the case law.

In my sanction determinations I considered that (1) the violations

continued over a period of six crop years, (2) the parties were aware that neither Blackstock Orchards, Inc., nor Ross Blackstock, had any ownership interest in the property after sale, other than as the secured holder of a mortgage, (3) there was no possible interpretation that would allow any respondent other than First Fruits or Kris Kropp to be listed as a producer or as an owner of a share in the crops, (4) all the parties knew that in order to insure crops under the FCIA that all crops in Delta County, Colorado owned by the producer had to be insured, (5) Kris Kropp and First Fruits benefited from these violations in that he was able to obtain insurance at a lower rate than if he had insured all his crops in Delta County, and that he in fact received insurance proceeds for losses during the policy period, and (6) Ross Blackstock benefitted from these violations in that his interests as the holder of the mortgage were made more secure. I am also aware that if the Respondents had received proper advice from the insurance agent, or that the agent had properly refused to insure the property after the sale, then there is a possibility that these violations would not have occurred.

Respondents willfully and intentionally provided inaccurate or false information to the FCIC beginning in April 1995 and extending into 2000. This is just the type of violation that the administrative sanctions authority under the Act is intended to curb. While Complainant is seeking the maximum penalty that can be imposed for a single violation of the Act in each of the three Complaints, the violation is sufficiently grave, particularly considering that Complainant likely could have sought sanctions for each individual crop year the violation occurred,[2] to warrant imposition of the maximum penalty. Thus, I order the following:

Docket No. 02-0006—A civil fine of $10,000 is imposed jointly on Respondent First Fruits Organic Farms, Inc. and Kris Kropp. Further, I am disqualifying First Fruits and Kris Kropp from purchasing catastrophic risk protection or receiving non-insured assistance for a

[2] Indeed, 7 C.F.R. § 400.458 would theoretically allow the FCIC the ability to seek "any and all benefits applicable to any crop year for which the scheme or device was adopted," when a person has supplied false information for the purpose of evading provisions of the FCIA.

period of two years, and from receiving any other benefit under the Act for a period of ten years.
Docket No. 02-0007—A civil fine of $10,000 is imposed on Ross Blackstock. Further, I am disqualifying Ross Blackstock from purchasing catastrophic risk protection or receiving non-insured assistance for a period of two years, and from receiving any other benefit under the Act for a period of ten years.

Docket No. 02-0008—A civil fine of $10,000 is imposed on Blackstock Orchards, Inc. However, I am staying the imposition of this fine because Blackstock Orchards, Inc. is dissolved. Further, I am disqualifying Blackstock Orchards, Inc. from purchasing catastrophic risk protection or receiving non-insured assistance for a period of two years, and from receiving any other benefit under the Act for a period of ten years. I am also staying the disqualification because of the present non-existence of Blackstock Orchards, Inc. This stay will continue unless Blackstock Orchards, Inc. reincorporates or otherwise resumes the conducting of business.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

* * *

APPENDIX A

UNITED STATES CODE

7 USC § 1508

TITLE 7 - AGRICULTURE

CHAPTER 36 - CROP INSURANCE

§ 1508. Crop insurance

…

(b) Catastrophic risk protection

. . .

(6) Participation requirement

A producer may obtain catastrophic risk coverage for a crop of the producer on land in the county **only if** the producer obtains the coverage for the crop on all insurable land of the producer in the county. [Emphasis added]

….

(f) Eligibility

(1) In general

To participate in catastrophic risk protection coverage under this section, a producer shall submit an application at the local office of the Department or to an approved insurance provider.

….

7 USC § 1518

TITLE 7 - AGRICULTURE

CHAPTER 36 - CROP INSURANCE

§ 1518. "Agricultural commodity" defined

"Agricultural commodity", as used in this chapter, means wheat, cotton, flax, corn, dry beans, oats, barley, rye, tobacco, rice, peanuts, soybeans, sugar beets, sugar cane, tomatoes, grain sorghum, sunflowers, raisins, oranges, sweet corn, dry peas, freezing and canning peas, forage, **apples**, grapes, potatoes, timber and forests, nursery crops, citrus, and other fruits and vegetables, nuts, tame hay, native grass, aquacultural

species(including, but not limited to, any species of finfish, mollusk, crustacean, or other aquatic invertebrate, amphibian, reptile, or aquatic plant propagated or reared in a controlled or selected environment), or any other agricultural commodity, excluding stored grain, determined by the Board, or any one or more of such commodities, as the context may indicate. [Emphasis added]

…

7 USC § 1520

TITLE 7 - AGRICULTURE

CHAPTER 36 - CROP INSURANCE

§ 1520. Producer eligibility

Except as otherwise provided in this chapter, a producer shall not be denied insurance under this chapter if -

(1) for purposes of catastrophic risk protection coverage, the producer is a "person" (as defined by the Secretary); and

(2) for purposes of any other plan of insurance, the producer is 18 years of age and has a bona fide insurable interest in a crop as an **owner-operator, landlord, tenant, or sharecropper**. [Emphasis added]

* * *

APPENDIX B

Code of Federal Regulations

[Title 7, Volume 6]

TITLE 7--AGRICULTURE

CHAPTER IV--FEDERAL CROP INSURANCE

CORPORATION, DEPARTMENT OF AGRICULTURE

PART 400 – GENERAL ADMINISTRATIVE REGULATIONS--

Subpart F Food Security Act of 1985, Implementation; Denial of Benefits

. . .

§ 400.46 Definitions.

For the purpose of this regulation and in addition to the definitions included at 7 CFR 12.2, the following definitions are applicable:

…

(b) Person means any producer, tenant, or landlord, insured under a policy of crop insurance issued by FCIC, or by a multi-peril insurance company whose crop insurance policy is reinsured by FCIC.

…

TITLE 7--AGRICULTURE

CHAPTER IV--FEDERAL CROP INSURANCE CORPORATION

DEPARTMENT OF AGRICULTURE

PART 402 -- CATASTROPHIC RISK PROTECTION ENDORSEMENT-

. . .

§ 402.4 Catastrophic Risk Protection Endorsement Provisions.

. . .

Terms and Conditions

1. Definitions

…

County. The political subdivision of a state listed in the actuarial table and designated on your accepted application, including land in an adjoining county, provided such land is part of a field that extends into the adjoining county and the county boundary is not readily discernable.

…

…

3. Unit Division

(b) For catastrophic risk protection coverage, a unit will be all insurable acreage of the insured crop in the county on the date coverage begins for the crop year:

(1) In which you have one hundred percent (100%) crop share; or

(2) Which is owned by one person and operated by another person on a
share basis.

(Example: If, in addition to the land you own, you rent land from five landlords, three on a crop share basis and two on a cash basis, you would be entitled to four units; one for each crop share lease and one that combines the two cash leases and the land you own.)

(c) Further division of the units described in paragraph (b) above is not allowed under this Endorsement.

. . .

5. Report of Acreage

(b) For the purpose of determining the amount of indemnity only, your share will not exceed your insurable interest at the earlier of the time of loss or the beginning of harvest. Unless the accepted application clearly indicates that insurance is requested for a partnership or joint venture, insurance will only cover the crop share of the person completing the application. The share will not extend to any other person having an

interest in the crop except as may otherwise be specifically allowed in this endorsement. Any acreage or interest reported by or for your spouse, child or any member of your household may be considered your share. A lease containing provisions for both a minimum payment (such as a specified amount of cash, bushels, pounds, etc.) and a crop share will be considered a crop share lease. A lease containing provisions for either a minimum payment (such as a specified amount of cash, bushels, pounds, etc.,) or a crop share will be considered a cash lease. Land rented for cash, a fixed commodity payment, or any consideration other than a share in the insured crop on such land will be considered as owned by the lessee.

…

TITLE 7--AGRICULTURE

CHAPTER IV--FEDERAL CROP INSURANCE CORPORATION, DEPARTMENT OF AGRICULTURE

PART 457-- COMMON CROP INSURANCE REGULATIONS

. . .

§ 457.158 Apple crop insurance provisions.

The Apple Crop Insurance Provisions for the 2001 and succeeding crop years are as follows:

FCIC Policies

United States Department of Agriculture

Federal Crop Insurance Corporation

…

6. Insured Crop

In accordance with section 8 of the Basic Provisions, the crop insured

will be all the apples in the county for which a premium rate is provided by the actuarial table:

(a) In which you have a share;

(b) That are grown on tree varieties that:

(1) Are adapted to the area;

(2) Are in area A and have produced at least an average of 10 bins per acre;

(3) Are in area B and have produced at least an average of 150 bushels per acre;

(4) Are in Area C [includes Colorado] and have produced at least an average of 200 bushels per acre; and

(c) That are grown in an orchard that, if inspected, is considered acceptable by us.

FOOD SECURITY ACT

COURT DECISION

HORN FARMS, INC. v. USDA.
No. 3:02 CV-0831 AS.
Filed May 20, 2004.

(Cite as: 319 F.Supp.2d 902).*

FSA – FACTA – Swampbuster – NAD – Penalties, proportionality not required –Penalties, when not impermissibly coercive – "Grandfathered," whether congressional intent – Due process, new level of bureaucracy violates.

The Food Security Act ("FSA") of 1985 (amended by the Food, Agriculture, Conservation and Trade Act ("FACTA") of 1990 with the anti "Swampbuster" provisions prohibited farmers from converting wetlands and then producing agricultural commodities on the converted wetlands. The 1990 amendments removed any formula for proportionality of loss of USDA benefits due to wetland conversion. Under the 1990 amendments, the farmer would lose all USDA benefits on all land the farmer controls until the wetlands are restored or the loss is mitigated. However, after an exhaustive fact analysis and by analyzing congressional intent, the Court determined that the agency had exceeded its authority under the meanings of "prior-converted cropland" and the case was remanded.

United States District Court,
N.D. Indiana,
South Bend Division

MEMORANDUM AND ORDER

ALLEN SHARP, District Judge.

This cause is before the Court on cross motions for summary

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*Food Security Act cases are not usually within the jurisdiction of the USDA Administrative Law Judges (*See* 7 C.F.R. § 1.131), however the case is included here to show how the Federal District Court evaluates claims of excessive sanctions. - Editor

judgment. The Plaintiffs brought suit under the Administrative Procedures Act, asking this Court to review the decision of the United States Department of Agriculture to terminate Horn Farms from a variety of farm subsidy programs. The parties have briefed the issues, and on March 3, 2004, this Court heard oral argument on the motions After considering the submissions of the parties and the oral arguments, the Court now rules as follows.

I. JURISDICTION

Jurisdiction is premised upon the Administrative Procedures Act (the "APA"), 5 U.S.C. §§ 706(1) & (2), which gives federal courts jurisdiction to review agency decisions, and federal question jurisdiction under 28 U.S.C. § 1331.

II. RELEVANT FACTS

The facts are not in dispute in this case. The Plaintiff, Horn Farms, Inc., ("Horn Farms") is owned and operated by Gene Horn, who currently owns and farms approximately 1400 acres in Fulton and Cass Counties in Indiana. Pl.'s Mem. in Supp. at 4. Some of this land was purchased in 1995, including the parcels at issue in this case. *Id.* at 5, n. 4,6. The purchased land included several small tracts that the Natural Resources Conservation Service (the "NRCS") later determined to be wetlands. After noticing pieces of broken drain tiles in the area, and speaking with neighbors, Mr. Horn determined that these tracts had previously been farmed, but had reverted to wetlands through lack of maintenance of the drain tile system. Admin. R. at p. 6. Therefore, in 1998, he cleared several tracts and restored the drain tile system. *Id.*

Up to that time, Gene Horn and Horn Farms were eligible to participate in various farm subsidy programs administered by the United States Department of Agriculture (the "USDA") which allowed them to receive various loans and payments. *Id.* As part of the eligibility requirements for participation in these programs, a representative for

Horn Farms executed Form AD-1026, agreeing not to grow crops on wetlands converted after 1985, and not to convert wetlands for the purpose of growing crops. Def.'s Mem. in Supp. at 1-2.

On January 28, 1999, Robert Baker, the operator of one of Plaintiff's farms, requested a wetland determination on certain property owned by Horn Farms. Pl.'s Mem. in Supp. at 2. On February 8, 1999, the Fulton County Farm Service Agency [1]office (the "FSA") requested that the NRCS[2] conduct a wetland spot check on two tracts owned by Horn Farms: tract 3713; and tract 13599. Def.s' Mem. in Supp. at 2. On March 22, 1999, NRCS representative Albert Tinsley conducted a site-assessment with Mr. Horn present in order to evaluate the wetland areas in question. *Id.*; Pl.'s Mem. in Supp. at 5.

The results of Tinsley's field visit formed the basis for the NRCS's determination, and will therefore be included in some detail. His field notes state that according to slides reviewed, six of the areas he looked at had been in trees from prior to 1981, and that one site had growing cat-tails and rushes due to continuing inundation and saturation. Admin. R. at p. 75. He said that five sites bore evidence of being converted wetlands, with actual saturation in spite of the new tile system and risers installed. *Id.* They also had the remnants of wetland plants in the form of twigs, sticks and root wads, and in some places, surviving plants. *Id.*

Tinsley's notes state that he did observe evidence of past drainage, in

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[1]The Farm Service Agency (FSA) was created in 1994 to replace the Agricultural Stabilization and Conservation Agency (the ASCS). *United States v. Dierckman,* 201 F.3d 915, 917, n. 4 (7th Cir.2000); *see also,* Public L. No. 103-354, § 226(1994)(codified at 7 U.S.C. § 6932) and 60 Fed.Reg. 56,392 (Nov. 8, 1995)(changing the name of the newly created Consolidated Farm Service Agency to the Farm Service Agency).

[2]The NRCS was also created in 1994, and took over the services formerly provided by the Soil Conversation Service (the "SCS"). *See, Dierckman,* 201 F.3d at 917, n. 3; and Pub.L. No. 103-354, § 246 (1994)(codified at 7 U.S.C. § 6962).

the form of tile chips and broken pieces, but "since these areas were all in mature trees prior to 1981, there is no evidence that the drainage systems were actually working during or prior to 1981." *Id.* He says, "The chronology of this field appears to be that it was drained many decades ago, the system stopped functioning, trees had returned sometime no later than in the 1970's and were not suitable for a determination of PC [prior-converted wetland] during the pertinent 1981-1985 time frame for purposes of the Farm Bill provisions or the 1993-1998 time frame for purposes of the Clean Water Act." *Id.*

The NRCS reviewed the results from the onsite assessment and remote images and determined that some of the tracts in question were wetlands converted after November 28, 1990. Pl.'s Mem. in Supp. at 2; Def.s' Mem. in Supp. at 7. This is significant in terms of wetlands conversion because a new, more stringent version of the Swampbuster provisions went into effect on that date. The NRCS determined that four wetlands were converted on Tract No. 13599, consisting of 0.4, 0.5, 1.8, and 2.1 acres. *Id.* The NRCS noted that these wetlands had been cleared of trees and vegetation, and drainage tiles installed in order to facilitate the production of agricultural products, but that no farming activities had yet occurred in these areas. *Id.* In addition, the NRCS stated that one wetland had been converted on Tract No. 980, consisting of 1.4 acres, for a total of 6.2 acres of converted wetlands. *Id.*

Plaintiff Gene Horn was notified by letter on May 5, 1999, that the NRCS had made "a preliminary technical determination" that he had converted 6.2 acres of wetlands in violation of the Food Security Act of 1985, as amended by the Food, Agriculture, Conservation, and Trade Act of 1990, and the Federal Agricultural Improvement and Reform Act of 1996. Admin. R. at p. 72. The letter informed Mr. Horn that the preliminary determination would become final within 30 days unless he appealed or asked for mediation. Admin. R. at pp. 72-3. On June 10, 1999, the FSA notified Mr. Horn that unless he took action to mitigate the loss of the converted wetlands, he would be ineligible for benefits under certain programs administered by the USDA. Def.'s Stmt. of Mat.

Facts at 4.[3] Based on the preliminary technical determination, Mr. Horn's benefits were terminated beginning with the 1999 crop year, and he remains ineligible until he either restores the wetlands or mitigates their loss before January 1 of the subsequent crop year. *Id.*

Mr. Horn asked for mediation, but there was a substantial delay in getting the session scheduled because of difficulties in the office of the Indiana Commissioner of Agriculture. Def.s' Reply at 4. During this time, on January 31, 2000, Tinsley sent a letter to Mr. Horn explaining his options, that he could choose not to participate in the USDA farm support programs, or he could restore the converted wetlands in place. Admin. R. at p. 55.

When the mediation was finally held on March 28, 2001, the discussion was primarily about the options the agency could offer Horn Farms to get back into compliance so that it could regain eligibility for program benefits. Banks Aff. at p. 1. The mediation failed to produce an agreement. On May 16, 2001, Tinsley sent another letter to Mr. Horn explaining the steps he would need to take if he chose to mitigate the loss of the converted wetlands. Admin. R. at p. 502. Mr. Horn's understanding of the mitigation plan was that it required him to set apart possibly as much as 32 acres of farmland and turn it into a wetland to offset the loss of the 6.2 acres that he cleared. Pl.'s Mem. in Supp. at p. 6; Admin. R. at 128.[4] Mr. Horn found this mitigation plan

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[3]The Defendant's factual statement says that this letter was sent, but there is no citation to the record. Although it is not required to do so, the Court has searched the record and is unable to find this letter. It is relevant on the issue of whether the Defendants offered the Plaintiff an opportunity to come into compliance before terminating his benefits.

[4]Tinsley's letter dated May 11, 2001, states that the Wetland Mitigation Ratio Key included in the record is only a sample, used as an example. Admin. R. at p. 126. Again, although it is not required to, the Court has searched the record and is unable to find anything that documents the amount of acreage Plaintiff would be required to put into a wetland in order to mitigate the loss of the 6.2 acres.

unacceptable, primarily due to the discrepancy between the amount of wetlands converted and the amount of acreage potentially required for restoration and mitigation. *Id.*

On May 25, 2001, Mr. Horn proposed an alternative wetlands conservation plan. Admin. R. at p. 512-13. He offered to set aside and permanently protect 40 acres of wetlands on his remaining farmland properties, in addition to a reduction in support payments proportional to the amount of wetlands he converted to farm use. *Id.* As long as Mr. Horn remains out of the USDA's farm subsidy programs, he is not under the Swampbuster restrictions that prevent the conversion of wetlands to farm use. *Id.* The Record does not indicate that the agency considered Mr. Horn's proposal.

After the failure of the mediation process, Mr. Horn filed an appeal with the Farm Service Agency County Committee in Fulton County, Indiana, pursuant to C.F.R. Part 780. Pl.'s Mem. in Supp. at p. 7. He presented evidence to support the following claims: (1) that the six acres in question fell within an exception to the Act for "prior-converted wetlands"; (2) that NRCS did not make a determination on the "good faith" issue; (3) that the termination of all benefits was inappropriate; and (4) that ignoring his settlement proposal was contrary to the public interest. Def.'s Mem. in Supp. at p. 4; Admin. R. at pp. 217-224.

The County Committee held an informal hearing on October 17, 2001, regarding Mr. Horn's administrative appeal, and the next day, the Committee issued its decision. Pl.'s Mem. in Supp. at p. 7-8. The County Committee "determined that merit could not be found in regards to making a recommendation the NRCS technical determination be reviewed by the Indiana NRCS State Conservationist." *Id.* at 8; Def.s' Mem in Supp. at 5. In addition, the County Committee determined that they did not have authority to reverse a technical determination by the NRCS, and denied his appeal in its entirety. *Id.* The Committee advised Horn Farms of its appeal rights, and advised it that it would forward Horn Farm's Good Faith Determination Forms to NRCS for processing.

Def.s' Mem. in Supp. at 5. The Committee advised that it lacked the authority to act on a settlement proposal, but that it could make a recommendation on the relief of penalties when the Good Faith Determination was returned by NRCS. *Id.*

Horn Farms appealed the Committee's decision and the underlying technical determination to the National Appeals Division, asking for a "record review". Pl.'s Mem. in Supp. at p. 8. The hearing officer, Michael E. Jacobs, issued a written decision stating that the National Appeals Division did not have subject-matter jurisdiction to conduct a record review because there exists "no authority to hold a hearing or review of the record on the denial of the Fulton County FSA Committee (COC) to seek a technical review by the Indiana NRCS State Conservationist". *Id.*; Admin. R. at p. 272. He further stated that the NAD had no jurisdiction in this matter because "an appeal of the Fulton County Committee to not seek the NRCS State Conservationist to review the technical determination is of general applicability and policy." *Id.*

Horn Farms asked for reconsideration of this determination, which was denied, then sought review by the Director of the National Appeals Division. Pl.'s Mem. in Supp. at p. 8. Review was denied because Mr. Horn's appeal was signed by counsel, and the agency's rules required Mr. Horn to personally sign the request. *Id.* at 8-9. When he resubmitted his appeal, it was late. His request for reconsideration was also denied. *Id.* After exhausting his administrative appeals, Mr. Horn filed this suit on November 18, 2002.

III. THE STATUTORY AND REGULATORY SCHEME

The loss of wetlands is a matter of growing national concern. According to studies prepared by the United States Fish and Wildlife Service, Indiana experienced an 87% loss of wetlands between the 1780's

and mid 1980's.[5] For the United States as a whole, the forty-eight conterminous states lost 53% of wetlands, with 2.5% of that loss taking place between the mid-1970's and the mid-1980's.[6] During those ten years, the United States was losing wetlands at the rate of about 290,000 acres per year.[7] At the same time, the values of wetlands to human society have become better known and documented.[8]

To help with the problem of conserving wetlands, Congress included a provision in the Food Security Act of 1985 (the "FSA"), called the "Swampbuster" provision, that prohibits farmers who participate in USDA programs from converting wetlands and then producing an

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[5]Dahl. T.E.1990, *Wetlands, Losses in the United States 1780's to 1980's,* U.S. Fish and Wildlife Service, Washington, D.C., available at < *http://www.n pwrc.usgs.gov/resouce/othrdata/wetloss/wetloss.htm*. This study is the first study in response to the Congressional requirement in the Emergency Wetlands Resources Act of 1986 that the Fish and Wildlife Service conduct status and trend studies and report the results to Congress every ten years. *Id.*

[6]*Id.*, Dahl, T.E., and C.E. Johnson, 1991, *Wetlands: Status and Trends in the Conterminous United States Mid-1970's to Mid-1980's,* U.S. Fish and Wildlife Service, Washington, D.C. This is the second of the two studies required by Congress to monitor the rate at which wetlands are disappearing. *Id.*

[7]The most recent study released by the Fish and Wildlife Service indicates that the rate of loss has slowed to about 58,000 acres per year, an 80% reduction in the rate of loss. Dahl, T.E., 2000, *Status and Trends of Wetlands in the Conterminous United States 1986 to 1997,* United States Fish and Wildlife Service. Washingto, D.C.

[8]Congress stated, in enacting the provision, that wetlands are a priceless resource whose contributions have long gone unrecognized. Some of the benefits include wildlife habitat, flood control, water quality, groundwater recharge, and recreation. H.R. Rep. 99-271(I), codified at 1985 U.S.C.C.A.N. 1103, 1188. *See also,* Noss, Reed F., et al., *Endangered Ecosystems of the United States: A Preliminary Assessment of Loss and Degradation* (stating that the great interest in wetlands by conservationists and agencies is most likely related to the widely recognized valued of wetlands to human society: habitat for waterfowl and other game, nurseries for fishes, controllers of floods, cleansers of water, and many other services), *citing,* Tiner, R.W., 1984, *Wetlands of the United States: Current Status and Recent Trends.,* U.S. Fish and Wildlife Service, Washington, D.C.

agricultural commodity on the converted wetlands. 16 U.S.C. § 3821(a) & (b). In 1990, Congress passed the Food, Agriculture, Conservation and Trade Act (FACTA), extending the prohibition such that a violation occurs when a wetland is converted for agricultural use, even if an agricultural commodity has not actually been produced. 16 U.S.C. § 3821(c). In addition, Congress added a stronger penalty for converting a wetland in the 1990 Statute. *Id.* Under the 1985 Statute, farming a converted wetland resulted in a proportional loss of benefits, but under the 1990 Statute, converting a wetland after November 28, 1990, would result in the loss of *all* USDA benefits on all land the farmer controls, until the wetland is restored or the loss is mitigated. 16 U.S.C. §§ 3821(c) & 3822(I).

The first thing the Court must determine is which provision of the statute Horn Farms is charged with violating, as it controls the outcome on one issue. The wetland certification notice issued to Gene Horn states that he had four tracts--field un2, un3, un4, and un5--that were classified as CW+1998. Admin. R. at p. 24. The explanatory comments state that CWyr means a wetland converted after 11/28/1990. *Id.* at p. 25. Other parcels examined at the same time were labeled PC/NW, which stands for Prior-converted Cropland/Non Wetland; NW, which stands for Non Wetland; and W, which stands for Wetland. *Id.* at p. 24. Since the four parcels found to be in violation are labeled CW+1998, they are wetlands converted after November 28, 1990, and fall under subsection (c). Subsection (a) does not apply to wetlands converted after November 28, 1990.

The specific statutory provision at issue, 16 U.S.C.A. § 3821(c), Wetland conversion, states:

> Except as provided in section 3822 of this title and notwithstanding any other provision of law, any person who in any crop year beginning after November 28, 1990, converts a wetland by draining, dredging, filling, leveling, or any other means for the purpose, or to have the effect, of making the production of an agricultural commodity possible on such converted wetland shall

be ineligible for those payments, loans, or programs specified in subsection (b) of this section for that crop year an all subsequent crop years.

Subsection (c) references subsection (b) in order to identify the particular payments, loans, or programs that a violator can no longer receive. This reference could create confusion, however, because the first paragraph of subsection (b) states, "If a person is determined to have committed a violation under subsection (a) of this section during the crop year, the Secretary shall determine which of, and the amount of, the following loans and payments for which the person shall be ineligible." 16 U.S.C.A. § 3821(b). Under subsection (a), the amount of loans or payments that the person is ineligible for is "to be proportionate to the severity of the violation." 16 U.S.C.A. § 3821(a)(2).

However, Horn Farms and Gene Horn were not charged with violating subsection (a), but rather subsection (c), which does not contain a proportionality requirement. A person who converts a wetland after 1990 is in violation of subsection (c), as noted above, and is ineligible for *all* payments, loans, or programs specified in subsection (b), for that crop year and *all* subsequent years.

The Statute does contain exemptions from ineligibility, however, including one for prior-converted wetlands if the original conversion of the wetland occurred prior to December 23, 1985, and the wetland characteristics returned after that date as a result of "(I) the lack of maintenance of drainage, dikes, levees, or similar structures; (ii) a lack of management of the lands containing the wetland; or (iii) circumstances beyond the control of the person." 16 U.S.C. § 3822(b)(2)(D).

The Statute also contains a "good faith exemption", which states, "The Secretary *may* waive a person's ineligibility under section 3821 of this title for program loans, payments, and benefits as the result of the conversion of a wetland subsequent to November 28, 1990, or the production of an agricultural commodity on a converted wetland, if the

Secretary determines that the person has acted in good faith and without intent to violate this subchapter." 16 U.S.C.A. § 3822(h)(1)(emphasis added). However, after a finding that the program participant acted in good faith and without intent to violate the Statute, the individual must, within one year, "implement the measures and practices necessary to be considered to (sic) actively restoring the subject wetland", in order to maintain eligibility. 16 U.S.C.A. § 3822(h)(2).

The Statute also contains a provision that for regaining eligibility if, prior to the beginning of the crop year, "the person has fully restored the characteristics of the converted wetland to its prior wetland state or has otherwise mitigated for the loss of wetland values, as determined by the Secretary, through the restoration, enhancement, or creation of wetland values in the same general area of the local watershed as the converted wetland." 16 U.S.C. § 3822(I).

The Statute and the Code of Federal Regulations divides responsibility for administering the "Swampbuster" provisions between two USDA agencies: the Natural Resources Conservation Service (the "NRCS"), and the Farm Service Agency (the "FSA"). The Statute requires the NRCS to make all technical determinations, restoration and mitigation plans, and to conduct monitoring activities pursuant. 16 U.S.C.A. § 3822(j). The Code of Federal Regulations assigns the following determinations to the NRCS:
(1) whether the land at issue was a wetland converted for the purpose of, or having the effect of, making the production of an agricultural commodity possible;
(2) whether a farmed wetland or farmed-wetland pasture is abandoned;
(3) whether the planting of an agricultural commodity on a wetland is possible under natural conditions;
(4) whether maintenance of existing drainage exceeds the scope and effect of the original drainage;
(5) whether a plan for the mitigation of a converted wetland will be approved and whether the mitigation of a converted wetland is accomplished according to the approved mitigation plan.

7 C.F.R. § 12.6(c)(2)(viii)-(xii). The NRCS also determines whether land is a prior-converted cropland and meets the definition of a prior-converted cropland as of the date of its wetland determination. 7 C.F.R. § 12.5(b)(1)(I).

The responsibilities of the Farm Services Agency include making the following determinations:
(1) ineligibility of benefits;
(2) whether conversion of a particular wetland was commenced before December 23, 1985, for the purposes of § 12.5(b)(3);
(3) whether the violations were made in good faith.
7 C.F.R. § 12.6(a); 7 C.F.R. § 12.6(b)(3)(vi) and (viii). In addition, appeals, including appeals of NRCS technical determinations, must be filed with the FSA County Committee. 7 C.F.R. § 12.6(c)(9); 7 C.F.R. § 12.12; 7 C.F.R. § 614.101(a)(2); and 7 C.F.R § 780.9. If the decision of the FSA County Committee is unfavorable, program participants *must* seek review before a Hearing Officer of the National Appeals Division, and *may* appeal to the Director of the NAD, before seeking judicial review. 7 C.F.R. § 11.2(b)(emphasis added).

IV. STANDARD OF REVIEW

Both parties in this action have moved for summary judgment pursuant to Fed.R.Civ.P. 56. The standards a court employs in reviewing a motion for summary judgment are well-established. Summary judgment is proper only if the record shows that there is no issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). To determine whether a genuine issue of material fact exists, the court must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party. *King v. Preferred Technical Group,* 166 F.3d 887, 890 (7th Cir.1999)(citing *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)).

Where cross-motions for summary judgment are involved, the court looks to the burden of proof that each party would bear on the issue at trial, requiring that party to go beyond the pleadings and affirmatively establish a genuine issue of material fact. *Santaella v. Metro. Life Ins. Co.,* 123 F.3d 456, 461 (7th Cir.1997). The court is not required to grant judgment as a matter of law for one side or the other. *Heublein, Inc. v. United States,* 996 F.2d 1455, 1461 (2d Cir.1993); *Judsen Rubber Works, Inc. v. Manufacturing, Prod. & Serv. Workers Union Local No. 24,* 889 F.Supp. 1057, 1060 (N.D.Ill.1995). Rather, the court must evaluate each party's motion on its own merits, resolving factual uncertainties and drawing all reasonable inferences against the party whose motion is under consideration. *Heublein,* 996 F.2d at 1461; *Judsen,* 889 F.Supp. at 1060; *Buttitta v. City of Chicago,* 803 F.Supp. 213, 217 (N.D.Ill.1992), *aff'd,* 9 F.3d 1198 (7th Cir.1993). In other words, the court must extend to each party the benefit of any factual doubt when considering the other's motion, a process that sometimes forces the denial of both motions. *Id.*

V. ANALYSIS

The Administrative Procedures Act provides multiple theories for individuals to challenge the actions of Federal agencies in Federal court. 5 U.S.C. § 706. The Court is instructed to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." *Id.* The Court is authorized to

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B)contrary to constitutional right, power, privilege, or immunity; or

(C) in excess of statutory jurisdiction, authority, or limitations or short of statutory right;

5 U.S.C. § 706(A)-(c).

The Plaintiff has asked this Court for injunctive and declaratory relief based on several theories under the APA. First, it claims that the Defendants actions violated the Due Process Clause found in the Fifth Amendment of the United States Constitution because they failed to provide a meaningful opportunity to be heard prior to terminating its benefits under the Farm Bill. Pl.'s Mem. in Supp. at 10. The Plaintiff also alleges that the statute at issue is a violation of the Spending Power of the United States Constitution because it amounts to impermissible coercion. *Id.* Finally, the Plaintiff challenges various decisions made by the USDA as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Id.*

The Defendants also filed a Motion to Dismiss in this case. In addition to addressing the three claims listed above, the Defendants addressed another issue in the Plaintiff's Complaint based on 5 U.S.C. § 558, requiring fair notice and a hearing before terminating a license. The Court will address these issues in the following order: first, whether the Plaintiff was afforded due process before the termination of his eligibility in various farm subsidy programs; second, whether the Swampbuster provisions exceed Congress's authority under the spending clause; third, whether the agencies' decisions were arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law; and finally, whether the provisions in 5 U.S.C. § 558 apply to this case.

A. Procedural Due Process Analysis

The basis of the Plaintiff's Due Process claim is its inability to get a review of the district conservationist's determinations that the areas at issue were converted wetlands, and that they did not qualify for an exemption as prior-converted wetlands. For a Due Process violation, the Plaintiff must establish that the government has deprived it of a protected interest in liberty or property, and that it was deprived of that interest without adequate process of law. *See, American Manufacturers Mutual*

Insurance Company v. Sullivan, 526 U.S. 40, 59, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999).

The Defendants in this case concede that the Plaintiff's eligibility to participate in various farm subsidy programs is a protected interest under the Fifth Amendment. Def.'s' Mem. in Supp. at p. 19. The Defendants assert, however, that the process afforded to the Plaintiff under the current regulatory system affords all the process that is constitutionally required. *Id.* In 1970, the Supreme Court of the United States held that the fundamental requisite of due process of law is an opportunity to be heard "at a meaningful time and in a meaningful manner." *Goldberg v. Kelly,* 397 U.S. 254, 267, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). In *Goldberg,* a case that has not been limited to its own facts,[9] the Court stated, "these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." *Id.* at 267-68, 90 S.Ct. 1011.

To assist in evaluating Procedural Due Process claims, the Supreme Court set forth a three-part balancing test in *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); a test that is still in use in this Circuit, *see, Doyle v. Camelot Care Centers, Inc.* 305 F.3d 603 (7th Cir.2002). This test requires consideration of (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probably value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or

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[9]*See, i.e., Atkins v. Parker,* 472 U.S. 115, 128, 105 S.Ct. 2520, 86 L.Ed.2d 81 (1985)(finding a protectable interest in food stamp benefits); *Goss v. Lopez,* 419 U.S. 565, 575-76, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975)(same, for the right to education at public school); *Mathews v. Eldridge,* 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)(same, for disability benefits); *Youakim v. McDonald,* 71 F.3d 1274, 1288-89 (7th Cir.1995)(same, for foster care benefits); and others.

substitute procedural requirement would entail. *Id.*

A survey of the caselaw applying the Swampbuster provisions in effect prior to 1996 reveals that program participants in danger of losing their eligibility in USDA farm programs had several levels of appeal on critical wetlands determinations. In 1995, the National Appeals Division Rules of Procedure changed, effective January 16, 1996. Under the new rules, program participants like Horn Farms cannot get any review of the district conservationist's technical determinations unless the FSA County Committee *agrees with* their appeal.[10] The question before the Court is whether the new regulations provide program participants with an opportunity to be heard at a meaningful time and in a meaningful manner, as required by the Due Process Clause of the Constitution of the United States. The Court could find no cases discussing the new regulations as a possible violation of the Due Process Clause.

Then, 7 C.F.R. § 12.12, states

> Any person who has been or who would be denied program benefits in accordances with § 12.4 as the result of any determination made in accordance with the provisions of this part may obtain a review of such determination in accordance with the administrative appeals procedures of the agency which rendered such determination. Agency appeal procedures are contained in the Code of Federal Regulations as follows: FSA, part 780 of this title; NRCS, part 614 of this title.

Since Horn Farms wishes to appeal a technical determination of the NRCS, the applicable regulation is 7 C.F.R. § 614.101(a)(2), which states, Once the technical determination is final, the landowner or

[10]The rules on appeals contain numerous cross-references on the issue of appealing the district conservationists' technical determinations, creating a regulatory maze that is difficult to follow. First, 7 C.F.R. § 12.6(c)(9) states, Persons who are adversely affected by a determination made under this section and believe that the requirements of this part were improperly applied may appeal, under § 12.12 of this part, any determination by NRCS.

program participant may appeal the technical determination to the FSA county or area committee pursuant to 7 CFR. part 780. Landowners or program participants wishing to appeal must exhaust any available appeal procedures through the FSA county committee prior to appealing to NAD. Judicial review is available only as specified in 7 CFR part 11.

Again, since Horn Farms is seeking judicial review, the next regulation in the maze is 7 C.F.R § 780.9, on appeals of NRCS technical determinations, which states,

(a) Notwithstanding any other provision of this part, a technical determination of NRCS issued to a participant pursuant to Title XII of the Food Security Act of 1985, as amended, including wetland determinations, may be appealed to a county committee in accordance with the procedures in this part.

(b) If the county committee hears the appeal *and agrees with* the participant's appeal, the county committee shall refer the case with its findings to the NRCS State Conservationist to review the matter and review the technical determination. The court or State committee decisions shall incorporate, and be based upon, the NRCS State Conservationist's technical determination. (emphasis added).

However, several cases discuss the review that was afforded under the old regulations, which the Court will include in some detail for the purpose of comparison. For example, in *Dierckman,* from the Seventh Circuit Court of Appeals, the farmer appealed from an unfavorable determination by the district conservationist, first to the area conservationist, then to the state conservationist. *United States v. Dierckman,* 201 F.3d 915, 920 (7th Cir.2000). Before affirming the determination of the area conservationist, members of the state conservationist's wetland appellate review team visited the farm and performed field tests. *Id.* He later appealed the wetland and conversion determinations to the state conservationist. *Id.* at 921.

Similarly, in a case from the Eight Circuit Court of Appeals, after the District Conservationist made his initial, unfavorable determination, the plaintiff appealed to the Area Conservationist. *Downer v. U.S. By and*

Through U.S. Dept. of Agriculture, 894 F.Supp. 1348 (D.S.D.1995); affirmed, 97 F.3d 999 (8th Cir.1996). A resource conservationist, an area engineer, a soil conservationist, and a soil specialist from the University of Minnesota conducted an on-site inspection, with the plaintiff and his attorney present. When he again received an unfavorable determination, the plaintiff appealed to the State Conservationist, and another on-site inspection was conducted, this time by a soil conservation engineer, a South Dakota Area III soil scientist, and a South Dakota biologist. Then, the plaintiff appealed to the Chief of the SCS, who returned it to the state level to supplement the record. An informal hearing was held, and the State Conservationist again determined that the areas in question were converted wetlands. The case then went to the Chief, SCS, where the supplemented administrative record was reviewed by a wildlife biologist, a drainage engineer and a soil scientist, who all agreed with the determination that the areas were converted wetlands. *Id.* After exhausting his appeals through the SCS, the plaintiff then appealed to the ASCS for reconsideration of the SCS determination, where it went through three levels of appeal. *Id.*

In this case, Albert Tinsley performed an on-site inspection in the presence of Gene Horn, the owner of Horn Farms. He made some field notes, and looked at "slides" of the area from 1981 to 1985. He noted that the field appeared to have been drained at some point in time, but that they system stopped functioning and trees returned at some time, no later than in the 1970's, and "were not suitable for a determination of PC during the pertinent 1981-1985 time frame for purposes of the Farm Bill provisions or the 1993-1998 time frame for purposes of the Clean Water Act." Admin. R. at p. 75. The letter informing the Plaintiff that he had violated the Swampbuster provisions by converting wetlands which was dated May 5, 1999, was signed "Daniel M. Rosswurm, Resource Conservationist". *Id.* at p. 72. The letter states, "I am making a preliminary technical determination" that the fields contain converted wetlands. *Id.* It appears from this language that Rosswurm actually made the technical determinations that the Plaintiff challenges, based on the field visit made by Tinsley.

Under the new regulations, the Plaintiff's only option was to appeal the NRCS technical determinations to the FSA County Committee, even though the County Committee did not have authority to review the technical determinations. The role of the FSA County Committee is simply to decide if it agrees with the Plaintiff's appeal, and if not, to make the eligibility decisions. In other words, in order to get review of the district conservationist's determinations that he converted 6.2 acres of wetlands, and that the exemption for prior-converted cropland did not apply, the Plaintiff had to convince the County Committee to *agree with* its appeal. If the County Committee does not agree with the appeal, the appeal is over, the Plaintiff cannot get review of the NRCS technical determinations that terminated its eligibility.

This is a high standard to require participants to meet, one that has the practical effect of eliminating most, if not all, review of the district conservationist's technical determinations. For example, in this case, the FSA County Committee determination was issued only one day after the hearing and simply stated that "merit could not be found in regards to making a recommendation the NRCS technical determination be reviewed by the Indiana NRCS State Conservationist." In other words, after considering the matter for one day, the County Committee issued a one line ruling that turned out to be unreviewable by the NAD, according to NAD hearing officer, Michael Jacobs.

Furthermore, the County Committee did not rule on the good faith issue, even though Congress assigned responsibility for that decision to the FSA. The good faith exemption allows the Agency to waive a person's ineligibility upon a finding that the person acted in good faith and without intent to violate the Swampbuster provisions. The person is then given one year to restore the wetland, without losing any benefits available under the Food Security Act. However, by the time the County Committee was presented with the Plaintiff's request for a good faith exemption, it was too late to provide the Plaintiff with any relief. Horn Farms lost its eligibility in 1999 and payments were terminated, but the hearing before the County Committee did not take place until 2001.

Although this provision is discretionary with the Agency--the statute says the Secretary *may* waive ineligibility--there is no evidence in the record that the Agency even considered Horn Farms application for the good faith exemption.

The Defendants assert, however, that Plaintiff's Due Process grievance is based on the fact that it was not provided with an adversarial type hearing. The Defendants are correct in pointing out that the Plaintiff was not entitled to an adversarial type hearing, but the Plaintiff's objections are not to the type of hearing, but to the limitations on its opportunity to get any review of the district conservationist's technical determinations.

By inserting a new level of bureaucracy in the process--the requirement that the FSA County Committee *agree with* Plaintiff's appeal--between the technical determination and any review of that determination, the Plaintiff was effectively denied any opportunity to be heard at a meaningful time and in a meaningful way on the issues at the heart of their appeal: the wetlands determination, and the denial of prior-converted farmland status. The Plaintiff was given a mediation hearing, but that was only for the purpose of determining how to get Horn Farms back into compliance with the statute. The unfavorable technical determination was not even on the agenda.

While the former process was lengthy and in all likelihood expensive, it protected the Due Process rights of farmers who participated in programs under the Farm Bills. The new regulatory process requiring that the FSA County Committee *agree with* the participant's appeal places an almost insurmountable obstacle in the way of participants seeking review of an unfavorable opinion by the district conservationist. The Court will therefore apply the *Mathews* balancing test to determine whether the new regulations violate Plaintiff's Due Process rights.

First, the Court finds that the participant's interest in remaining in federal farm programs is great. The economic climate is such that

eligibility in Farm Bill programs can make or break a farmer.[11] On the second factor, the risk of erroneous deprivation of the interest through the procedures used is fairly high, since the determination appears to be based on the opinion of just one district conservationist. Also, on the second factor, having additional review by experts would reduce the risk of an error. Finally, the burden of the additional procedures on the government is also fairly high, as illustrated by the lengthy review process in the two cases discussed above that were decided under the old regulations.

Although it is close, the importance to America's farmers of maintaining eligibility in farm programs administered by the USDA weighs heavily in favor of requiring additional process within the NRCS before issuing the final technical determination that terminates a farmer's eligibility to participate in all programs under the Food Security Act. Therefore, the Court concludes that the new regulatory scheme for appealing unfavorable technical determinations by the NRCS violates the Plaintiff's Due Process right to an opportunity to be heard at a meaningful time and in a meaningful manner. This does not mean that the entire process from the previous regulations must be reinstated, but simply that the Plaintiff is entitled to review of the NRCS technical determinations by someone at a higher level within the NRCS.

B. Spending Clause Analysis

The Plaintiff seeks to have the Swampbuster provisions invalidated as an improper exercise of Congressional authority under the Spending Clause, because they are impermissibly coercive. The Defendants argue that the Seventh Circuit considered this issue in *Dierckman,* and determined that the Statute was a valid exercise of Congressional authority under the Spending Clause. *See, Dierckman,* 201 F.3d at 922.

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[11] *See* the Plaintiff's arguments on the issue of impermissible coercion under the Spending Clause, Pl.'s Reply Mem. at 4-7. As of the end of 2003, the USDA had withheld approximately $154,961.36 in payments that Horn Farms would have received but for the determination that it violated the Swampbuster provisions. Pl.'s Ex. E.

Dierckman is directly on point. The Seventh Circuit stated, "Even though Congress may lack the authority to regulate directly a strictly intrastate wetland, the incentive provided by the Food Security Act is a valid exercise of the spending power." *Id.*

The Plaintiff argues that, nevertheless, the standard to determine impermissible government coercion for an individual citizen must be more relaxed, because most cases analyzing conditional federal spending arguably interfere with a state's autonomy. But that is precisely the reason that coercion is even being discussed in those cases, because the Constitution limits the power of Congress to force the states to carry out Congressional policy. *See, South Dakota v. Dole,* 483 U.S. 203, 206, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987). The Plaintiff has not explained how coercing farmers to protect wetland or risk losing their federal farm program benefits violates the Constitution.

The Court agrees that the Swampbuster provisions are coercive, in fact, they give the USDA a big club with which to protect wetlands. However, Congressional authority under the Spending Clause is only limited by other provisions in the Constitution, and establishing that Congress has placed "unconstitutional conditions" on the receipt of federal funding is an uphill battle. *See, South Dakota v. Dole,* 483 U.S. 203, 206, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987)(holding that the conditions were valid), *Rust v. Sullivan,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991)(same), and *United States v. American Library Ass'n,* 539 U.S. 194, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003)(same).[12]

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[12]Examples in which non-state plaintiffs have alleged unconstitutional conditions in Congressional appropriation requirements are *Rust v. Sullivan,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), and *United States v. American Library Ass'n,* 539 U.S. 194, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003). In *Rust,* the plaintiffs claimed that the government's refusal to fund abortion counseling violated their free speech rights. Plaintiffs also claimed that the requirement violated a woman's right to have an abortion. *Id.* The Supreme Court upheld the requirement as a valid under the Spending Clause. *Id.* In *American Library Ass'n,* plaintiffs challenged provisions in the Children's Internet Protection Act, which required public libraries to use Internet filters

(continued...)

See also, Pl.'s Reply at 5, citing *United Seniors Association, Inc. v. Shalala,* 2 F.Supp.2d 39, 42 (D.D.C.1998).

One of the modern realities is that conditioning of Congressional appropriations has become vastly important in the enunciation and enforcement of public policy on the States, and in this case, on American farmers.[13] It is a phenomenon that the writers and founders of the Constitution probably did not contemplate. But the reality is that Congress can condition appropriation in very important ways that permit the creation of public policy indirectly which sometimes could not be done directly. This may be such a case. It is likely that the limitations on the authority of Congress in the Commerce Clause, as interpreted by the Supreme Court of the United States in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,* 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001), would inhibit this particular regulation if done directly rather than as a condition found in an appropriation bill. As it is, Defendants' Motion for Summary Judgment on this issue must be **GRANTED.**

C. Arbitrary and Capricious Review

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[12](...continued)
as a condition for receipt of federal subsidies, claiming that the statute placed unconstitutional conditions on public libraries and violated their free speech rights. Again, the Supreme Court found it to be a valid exercise of Congressional power under the Spending Clause.

[13]The Plaintiff supports its argument with a citation to the 1936 Supreme Court decision in *United States v. Butler* 297 U.S. 1, 71, 56 S.Ct. 312, 80 L.Ed. 477(1936), which states that the power to confer or withhold unlimited benefits is the power to coerce or destroy. The Court in *Butler* struck down a funding condition similar to the one at issue in this case. *Butler,* 297 U.S. at 71, 56 S.Ct. 312. However, the reasoning in *Butler* has not been followed in any subsequent Supreme Court case, and "Federal courts of appeal have been similarly reluctant to invalidate funding conditions." *Kansas v. United States,* 214 F.3d 1196 (10th Cir.2000). "The coercion theory has been much discussed but infrequently in federal case law, and never in favor of the challenging party." *Nevada v. Skinner,* 884 F.2d 445, 448 (9th Cir.1989).

The Plaintiff also claim that two of the Defendants' decisions in this case were arbitrary, capricious, an abuse of discretion, and not in accordance with law, in violation of 5 U.S.C. § 706(A). The court must ask "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Highway J Citizens Group v. Mineta* 349 F.3d 938 (7th Cir.2003), citing *Marsh v. Oregon Natural Res. Council,* 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989) (internal quotations and citations omitted).

This is a highly deferential standard, but does not equate with no review at all. *See, Bagdonas v. Department of Treasury,* 93 F.3d 422, 425 (7th Cir.1996). "The inquiry must be thorough and probing." *Id.* at 426. The court must uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned, but the court may not supply a reasoned basis for the agency's action that the agency itself has not given. *Id.* (citations omitted). The agency is not required to include detailed findings of fact, but must inform the court and the petitioner of the grounds of the decision and the essential facts upon which the decision was made. *Dierckman,* 201 F.3d 915, 926 (7th Cir.2000) (citations omitted).

"To perform this review the court looks to whether the agency considered those factors Congress intended it to consider; whether the agency considered factors Congress did not intend it to consider; whether the agency failed entirely to consider an important aspect of the problem; whether the agency decision runs counter to the evidence before it; or whether there is such a lack of a rational connection between the facts found and the decision made that the disputed decision cannot 'be ascribed to a difference in view or the product of agency expertise.' " *Downer v. U.S. By and Through U.S. Dept. of Agriculture and Soil Conservation Service,* 97 F.3d 999, 1002 (8th Cir.1996), *quoting, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 2867, 77 L.Ed.2d 443 (1983).

1. The Challenged Agency Decisions

The two decisions that Plaintiff wants reviewed under this standard are the USDA's determination that the it unlawfully converted wetlands, by failing to recognize that the land at issue was a prior-converted wetland, and the USDA's failure to conduct the required proportionality analysis. Pl.'s Response at 6- 7. The Court has already considered the proportionality requirement and determined that the statutory provision that Plaintiff is accused of violating does not require a proportionality analysis. Therefore, Defendants' Motion for Summary Judgment on the proportionality issue is **GRANTED.**

2. The Prior-converted Wetland Issue

Resolving the prior-converted wetland issue requires a detailed analysis of the statute and implementing regulations. The specific statutory language on prior-converted wetlands states:

> (b) Exemptions
> No person shall become ineligible under section 3821 of this title for program loans or payments under the following circumstances:
> (2) For the conversion of the following:
> (D) A wetland previously identified as a converted wetland (if the original conversion of the wetland was commenced before December 23, 1985), but that the Secretary determines returned to wetland status after that date as a result of--
> (I) the lack of maintenance of drainage, dikes, levees, or similar structures;
> (ii) a lack of management of the lands containing the wetland; or
> (iii) circumstances beyond the control of the person.

16 U.S.C. § 3822(b)(2)(D).

The Government and Plaintiff agree that at some time the area at issue had a drainage system and was farmed. *See,* Admin. R. at p. 75. Tinsley's Field Trip Notes state,

> The chronology of this field appears to be that it was drained many decades ago, the system stopped functioning, trees had returned sometime no later than in the 1970's and were not suitable for a

> determination of PC during the pertinent 1981-1985 time frame for purposes of the Farm Bill provisions or the 1993-1998 time frame for purposes of the Clean Water Act.

Id.

The issue is whether the Plaintiff's 6.2 acres of converted wetland qualifies for the exemption as prior-converted wetland. The briefs by the parties indicate an ambiguity in section (D) of the statute, in the phrase "A wetland previously identified as a converted wetland (if the original conversion of the wetland was commenced before December 23, 1985), but that the Secretary determines returned to wetland status *after that date* as a result of ..." (emphasis added). Plaintiff claims that "after that date" means after the date that the wetland was originally converted. Defendants construe the "after that date" language as a reference to the effective date of the statute, December 23, 1985.

According to the Plaintiff's interpretation, the 6.2 acres are wetlands that were converted prior to 1985, they returned to wetland status at some time after the original conversion, as a result of lack of maintenance of the drainage system, therefore, the land qualifies. According to the Defendant's interpretation, the Plaintiff's 6.2 acres contained functioning drainage tiles at one point in time, but wetland conditions had already returned by December 23, 1985. Therefore, the Defendants assert that this exemption does not apply because the wetland status returned after the effective date of December 23, 1985.

The USDA has interpreted this provision of the statute in 7 C.F.R. § 12.5(b)(1)(I), which states that the exemption applies if the land is "a prior-converted cropland and meets the definition of a prior-converted cropland as of the date of a wetland determination by NRCS." The Regulations define prior-converted cropland in 7 C.F.R. § 12.2(8), which states,

Prior-converted cropland is a converted wetland where the conversion occurred prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and as of

December 23, 1985, the converted wetland did not support woody vegetation and met the following hydrologic criteria:

> (I) Inundation was less than 15 consecutive days during the growing season or 10 percent of the growing season, whichever is less ...

In his field visit notes, the district conservationist observed that the areas where he saw broken drain tiles had been in mature trees prior to 1981, and that the system had stopped functioning and trees had returned sometime no later than in the 1970's. Therefore, he concluded that it was not suitable for a determination of PC (prior-converted wetland). The field notes do not explain why the presence of mature trees makes the area unsuitable for a determination of prior-converted wetland. It is possible that Tinsley had in mind the definition of prior-converted cropland in 7 C.F.R. § 12.2(8), that as of December 23, 1985, the converted wetland did not support woody vegetation, but the field notes do not explain the connection between the presence of trees and the denial of "prior-converted cropland" status for these areas.

The Court must first determine if the USDA's interpretation of the statute is "reasonable", before getting to the issue of whether the Agency's decisions in this case were arbitrary and capricious. The analysis for USDA regulations under the Swampbuster provisions follows the framework established by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *Dierckman,* 201 F.3d at 923. The starting point of the analysis is the statutory language, and if "the plain meaning of the text of the statute either supports or opposes the regulation," the inquiry ends, and the court must apply the statute's plain meaning. *Id.* at 923, quoting *Solid Waste Agency v. U.S. Army Corps of Engineers,* 191 F.3d 845, 851 (7th Cir.1999). If the statute is silent or ambiguous, "the court must defer to the agency interpretation so long as it is based on a reasonable reading of the statute." *Id., see also, Hanson v. Espy,* 8 F.3d 469, 472-73 (7th Cir.1993).

As noted above, the statutory language is ambiguous. The Agency's interpretation is reasonable, and that would ordinarily end the analysis. However, the Plaintiff has cited to the Congressional Record, claiming that the discussion surrounding enactment of the Swampbuster Amendment indicates that it was the intent of Congress to grandfather land that was in production at any time in the past. Pl.'s Mem. in Supp. at 40, n. 23, *citing,* H.R. REP. 99-271, pt. 1, at 419, 99th Cong. (1st Sess.1985), *reprinted in* 1985 U.S.C.C.A.N. 1103, 1523. The discussion was between then Representative Tom Daschle, the sponsor of the Swampbuster Amendment, and other Representatives. Because it reflects the views of Congress on the Amendment, the entire discussion is set forth below.

Mr. Daschle was recognized to offer a clarifying amendment to the previously adopted Swampbuster provisions. Mr. Daschle briefly explained the provisions of the Amendment. Mr. Lewis offered an Amendment to the Amendment to clarify that the definition of wetlands would not include simply wet soils. Mr. Daschle said he would accept the Amendment. The Committee agreed to the Lewis Amendment by voice vote. Mr. Daschle and Mr. Lewis discussed the question of cropland that has been flooded and later reclaimed. Mr. Daschle stressed that the Amendment would not affect the use of this land because if production was underway at any time in the past, the land would be grandfathered.

Id.

The Amendment passed in the form of the legislation now before this Court for interpretation. The 6.2 acres at issue in this case were at one time drained and farmed. According to the author of the Swampbuster provisions, cropland like the Plaintiff's, land that was farmed, then flooded and later reclaimed, would be grandfathered if it was in production at any time in the past. Even though the language of the statute is ambiguous, it appears that Congress considered this issue, and the record supports the Plaintiff's position.

The Court is mindful that the Swampbuster provisions were strengthened in 1990, and altered again in 1996, and those changes must

be considered to determine if Congress spoke directly on the issue. The Plaintiff points out that a change in 1996 on abandonment favors their interpretation of the statute. Pl.'s Mem. in Supp. at 40.[14] Under the old regulations, prior-converted cropland that was not farmed for five years was deemed "abandoned" and lost its exempt status. *Id.* In order to retain exempt status, the farmer had to plow up the land every five years. *Id.* According to Warren Lee, the Director of the Watersheds and Wetlands Division of the NRCS,

> [I]f a landowner with a PC [prior-converted cropland] wishes to provide wetland functions and values to society by letting his land labeled PC revert back to a wetland, we should not make him plow it up every five years just so he can keep his designation. Even if he wishes to then turn it into a corn field fifteen years later, society received those benefits of the wetland for that time, and it doesn't seem right to penalize the producer by saying he just converted a wetland. That is not the intent of Swampbuster or abandonment.[15]

Based on the Agency's interpretation of the statute, if the Plaintiff's land was farmed in 1985, then allowed to return to a wetland, he could clear it and farm it without violating the statute. But, because farming ceased on these areas a few years earlier, in the late 1970's, and trees were growing on some of the tracts in 1985, the Plaintiff violated the Swampbuster provisions. Based on the Agency's interpretation of the statute, the 6.2 acres cleared were "not suitable for a PC determination" because they were not farmed in 1985 or the five years prior to 1985.

In light of Mr. Daschle's statements in the Congressional record, and

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[14]The NRCS summarized changes to the Swampbuster provisions in a factsheet available on their website at <*http://www.nrcs.usda.gov/programs/wetlands/ChngFact.html*>

[15]McBeth, Daryn, *Wetlands Conservation and Federal Regulation: Analysis of the Food Security Act's "Swampbuster" Provisions as Amended by the Federal Agriculture Improvement and Reform Act of 1996,* 21 Harv. Envtl. L.Rev. 201, 256 (1997).

the statutory change doing away with the concept of abandonment, the Court finds that the Agency's requirement that land be farmed in 1985 to qualify as prior-converted cropland is not a reasonable interpretation of the statute. In this case, society has had the benefit of wetlands on Plaintiff's 6.2 acres for more than twenty years, and, in the words of Warren Lee, "it doesn't seem right to penalize [Horn Farms] by saying [it] just converted a wetland."

This Court has here attempted to wade through a highly complicated and often convoluted series of federal regulations and procedures that often stretched and in this case, exceeded Congressional authority under the statute. The Court has literally plowing through this complex and complicated record, and finds that the issue comes down to the intent of Congress, another highly complicated concept, with complications upon complications. After minute consideration of the record and the regulations at issue in this case, the Court has come down on the side of effectuating the intent of Congress as expressed by a key sponsor of the legislation in that regard. Once that decision is made, the result here is easier to determine. After Congress changed the statute in 1996, overruling the Agency's regulations on abandonment, it is a small step for this Court to find that the Agency's definition of "prior-converted cropland", requiring that the land be in production in 1985 to qualify, exceeds the Agency's statutory authority and must also be overruled.

D. Applicability of 5 U.S.C. § 558

The Plaintiff's Complaint also asserts a claim under 5 U.S.C. § 558(c), for failure to give notice and an opportunity to demonstrate or achieve compliance before termination of its "license" to participate in the farm programs. The Defendants argue that this provision does not apply, claiming that it only applies to a license that is "required by law", and that participation in USDA farm programs is not required by law in order for the Plaintiff to farm. The Plaintiff counters that the "required by law" provision only applies to applications for licenses, it is not repeated in the second sentence addressing termination of licenses.

5 U.S.C. § 558(c) states:

> (c) When application is made for a license *required by law,* the agency ... shall set and complete proceedings required to be conducted in accordance with sections 556 or 557 of this title or other proceeding required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given--
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

5 U.S.C. § 558(c)(Emphasis added).

For this provision to apply, a license must be involved. A license is defined as "the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." 5 U.S.C. § 551(8). This definition is "extremely broad", as noted by the Ninth Circuit Court of Appeals in *Air North America v. Dept. of Transportation,* 937 F.2d 1427, 1437 (9th Cir.1991). At issue in *Air North America* was a certificate issued by the Department required for an airline to fly. The Court determined that the certificate, although not in itself sufficient to allow the airline to fly, nevertheless fit within the broad statutory language.

In other cases, courts have determined that the language was broad enough to cover a permit to graze on national forest land, *Anchustegui v. Dept. of Agriculture,* 257 F.3d 1124 (9th Cir.2001); to "specifically approved stockyard" status under the Cattle Contagious Diseases Act, *Moore v. Madigan,* 789 F.Supp. 1479 (W.D.Mo.1992), *affirmed,* 990 F.2d 375, *rehearing denied, cert. denied,* 510 U.S. 823, 114 S.Ct. 83, 126 L.Ed.2d 51; to veterinarian accreditation, *Charlene Hagus, D.V.M. v. Michael Espy, Secretary, USDA,* 53 Agric. Dec. 443, 1994 WL

733120 (U.S.D.A.); to designation by the Immigration and Naturalization Service of a facility as an approved laboratory for conducting medical examination, *New York Pathological & X-Ray Laboratories, Inc. v. Immigration and Naturalization Service,* 523 F.2d 79 (2d Cir.1975); and to approval granted to an institution of higher learning authorizing entry of nonimmigrant alien students for study, *Blackwell College of Business v. Attorney General,* 454 F.2d 928 (D.C.Cir.1971); among others.

In this case, the USDA's approval or permission is required for farmers to participate in various farm programs under the Food Security Act of 1985 and subsequent Farm Bills. Therefore, based on the broad definition of license to include agency "approval" or "other form of permission" the Court concludes that Plaintiff's eligibility to participate constitutes a "license" for purposes of section 558(c).

However, as already noted, the Defendants have a second argument, that even if the Plaintiff can establish that it has a "license" to participate in farm programs, that license is not "required by law." Def.'s Mem. in Supp. at p. 17. The Defendant asserts that the determinative issue is not "whether farmers who apply for certain USDA subsidy programs had to comply with the requirements of the Swampbuster provisions in order to receive those subsidies, but rather whether farmers are required by law to participate in USDA farm programs in order to farm." *Id.* The Court is not convinced.

The license at issue is the USDA's approval or permission to participate in various farm subsidy programs. In other words, the "license" is "required by law" in order to participate in the programs, just as a grazing permit is required to graze cattle in a national forest, or approval is required for an institute of higher learning to accept nonimmigrant alien students. *See, Anchustegui* 257 F.3d 1124; and *Blackwell College of Business,* 454 F.2d 928. The Government is correct that in some cases, the license requirement is broad, and failure to obtain a license forecloses all opportunity to work in a certain field, as

with the requirement that veterinarians be accredited, *Charlene Hagus, D.V.M.,* 53 Agric. Dec. 443, 1994 WL 733120, or the requirement that airlines have the certificate in order to fly, *Air North America,* 937 F.2d at 1437, but that is not always the case.

The Court concludes that the "license" at issue in this case is required by law for farmers to participate in various programs under the Farm Bill, triggering the provisions in section 558(c) of the APA. This provision does not create a right to a full adjudicatory hearing, but at a minimum requires that before termination of Plaintiff's "license", Defendants had to provide notice and an opportunity to demonstrate or achieve compliance with lawful requirements. *Gallagher & Ascher Co. v. Simon,* 687 F.2d 1067 (7th Cir.1982)(noting that the sole purpose of section 558(c) is to provide licensee threatened with termination of license an opportunity to correct its transgressions before actual suspension or revocation). The Plaintiff was given notice, but no opportunity to achieve compliance before termination of its eligibility. Therefore, summary judgment for the Plaintiff is appropriate on this issue.

The Court notes that this provision of the APA provides protection that is similar to, but greater than, the "good faith exemption" in the statute. Under the "good faith exemption", the Secretary has discretion to waive ineligibility and allow the person to implement measures to restore the wetland. 16 U.S.C.A. § 3822(h)(1) & (2). Under section 558(c), the agency must allow a reasonable opportunity for the licensee to demonstrate or achieve compliance before terminating the license. The record in this case does not indicate that the Defendants ever made a "good faith" determination. The Defendants could easily satisfy this provision of the APA by making the "good faith" determination early enough in the process to allow the Plaintiff to restore the wetland or mitigate the loss *before* terminating all benefits under the Act.

VI. CONCLUSION

For the foregoing reasons, the Defendants' Motion for Summary

Judgment is granted in part and denied in part. Defendants' Motion is **GRANTED** on Claim II, based on the Spending Clause, and **GRANTED** on the claim that the USDA was arbitrary and capricious for not reducing its payments in proportion to the severity of the violation. The Plaintiff's Motion is also granted in part and denied in part. The Motion is **GRANTED** on the issue that the USDA's decision denying the land at issue "prior converted cropland" status was arbitrary and capricious, **GRANTED** on the Due Process claim that the Agency failed to provide meaningful review of the NRCS technical decision, and **GRANTED** on the issue of compliance with the requirements of 5 U.S.C. § 558(c). This case is now remanded to the Agency for further action not inconsistent with this opinion.

IT IS SO ORDERED.

FOOD MEAT INSPECTION ACT

COURT DECISION

RANCHERS CATTLEMEN ACTION LEGAL FUND UNITED STOCKGROWERS OF AMERICA v. USDA.
No. 04-CV-51.
Filed April 26, 2004.

(Cite as: 2004 WL 1047837 (D.Mont.)).

FSIS* – APHIS – APA – TRO – BSE – Agency action, when final – Preliminary Injunction, when entitled to – Deference to agency action, when not entitled to.

The USDA Animal and Plant Inspection Service (APHIS) issued a memorandum lifting a ban on importation of Canadian edible bovine meat products (bone-in, boneless, ground meat, further processed) for human consumption. APHIS did not seek public comment before issuing the undated memorandum. The Plaintiff seeks a temporary restraining order (TRO) and preliminary Injunction of the implementation of APHIS's memorandum. After consideration of various factors, APHIS accepted applications for import permits of Canadian "boneless bovine meat from cows less than 30 months of age." APHIS contended that their action [the memorandum] was not appealable because it was not a "final" action as contemplated by the Administrative Procedures Act (APA). The court favorably cited *Montana Wilderness Ass'n v. USDA*, 314 F.3d 1146 for following criteria of determination of finality of agency action: (a) the action should mark the "consummation" of the agency's decision making process, and (b) the action must be one by which rights or obligations have been determined or from which "legal consequences will flow." Having found that the agency's action [the memorandum] was a final action, the court sought to balance the merits of the extra-ordinary action of a TRO. The court evaluated the merits of the TRO request citing *Los Angeles Mem'l Coliseum Comm'n v. N.F.L.,* 634 F. 2d 1197. The balance is: (a) a combination of the probable success on the merits and/or the possibility of irreparable injury, or (b) the plaintiff's papers raise"serious questions" on the merits and the balance of hardship tips sharply in its favor. While Plaintiff submitted declarations of experts in risk assessment that bone-in beef has a higher risk of carrying the BSE agent (the source of an incurable, fatal disease), USDA offered no cogent explanation of why

*Food Safety Inspection Service cases do not usually come before the Office of Administrative Law Judges (see 7 C.F.R. § 1.131). This case is included here because of the close relationship to the Federal Meat Inspection Act (FMIA).

the risk of importing BSE is acceptable. An agency's actions is not entitled to deference when it provides no data to support its assumptions and conclusions in the rule making record.

United States District Court,
D. Montana

TEMPORARY RESTRAINING ORDER

CEBULL, J.

BACKGROUND

In this action, filed on April 22, 2004, Plaintiff, Ranchers Cattlemen Action Legal Fund United Stockgrowers of America ("R-CALF USA"), seeks judicial review of a decision issued by the United States Department of Agriculture ("USDA"), Animal and Plant Health Inspection Service ("APHIS"), effective April 19, 2004. Before the Court is the Plaintiff's Motion for a Temporary Restraining Order prohibiting USDA from implementing a decision that would lift a ban on the importation of most kinds of bovine meat and other tissue from Canada for human consumption.

For some time, USDA regulations have generally prohibited the importation of ruminants and ruminant meat products from countries where bovine spongiform encephalopathy ("BSE"), commonly known as "Mad Cow Disease," is known to exist. BSE is a progressive, fatal neurological disorder of cattle that results from infection by an unconventional transmissable agent. Eating meat products contaminated with the agent for BSE is believed to cause variant Creutzfeldt-Jakob Disease ("vCJD") in humans, a fatal neurological disease for which there is no known cure. BSE is believed to have caused the deaths of as many as 140 people in the United Kingdom, with more deaths likely in the future.

Fears about Mad Cow Disease decimated the market for beef from the

United Kingdom in the 1990s. Beginning with the discovery of BSE in a native born cow in Canada last May, fears that consumption of beef from the United States carries a risk of contracting vCJD because of Canadian cattle and beef products imported into the United States have caused the largest consumers of American beef outside North America, Japan and South Korea, to restrict and eventually cut off most imports of beef from the United States.

In May 2003, BSE was confirmed in a native-born cow in Alberta, Canada. Accordingly, on May 29, 2003 APHIS added Canada to the list of countries from which importation of ruminants and ruminant meat products is prohibited. The import ban regulation allows exceptions in specific cases: "Provided, however, the Administrator may upon request in specific cases permit ruminants or products to be brought into or through the United States under such conditions as he or she may prescribe, when he or she determines in the specific case that such action will not endanger the livestock or poultry of the United States." 40 C.F.R. § 93.401(a). Subsequently, on December 23, 2003, BSE was discovered for the first time in the United States, in a Canadian-born dairy cow in Washington State that had been imported from Canada in 2001.

On August 8, 2003, Defendant Secretary Veneman announced that, after considering various factors, USDA "will begin immediately to accept applications for import permits for certain low-risk ruminant-derived products from Canada. Among the products that will be allowed under permit are: ... Boneless bovine meat from cows under 30 months of age." At the time of this decision, USDA explained that "whole muscle boneless cuts of beef" are very low risk because they "do not contain the types of nervous system tissues that could carry the BSE-infectious agent." At an August 8, 2003 press conference, USDA officials explained that the decision to allow importation of boneless beef would cover about 40 percent of the beef products normally imported from Canada and that the remaining 60 percent of beef products "will be subject to the rulemaking process" that USDA was commencing.

On November 4, 2003, USDA published notice of a proposed rule to amend its May 29, 2003 regulations to allow importation of live ruminants and ruminant products and byproducts from Canada, through the process of recognizing a category of regions that present a "minimal risk" of introducing BSE and adding Canada to this category. This included fresh meat from bovines less than 30 months of age, fresh bovine liver, and fresh bovine tongues. 68 Fed.Reg. 62,386, 62,394-95. USDA subsequently requested comment on a change in one aspect of the proposal, indicating that it no longer believes it is necessary to limit allowed imports to meat from bovines under 30 months of age, provided that measures are in place, equivalent to those in the United States, to ensure that "specified risk materials" ("SRMs")--skull, brain, vertebral column, spinal cord, and other neurological materials, plus the eyes, tonsils, and distal ileum of the small intestine--are removed when the animals are slaughtered, and that "such other measures as are necessary are in place." 69 Fed.Reg. 10,633 (March 8, 2004). The comment period for the proposed rulemaking ended April 7, 2004.

Plaintiffs bring this challenge to an undated memorandum to "U.S. Importers, Brokers and Other Interested Parties" from Karen A. James-Preston, Director, Technical Trade Services, National Center for Import and Export, a subdivision of APHIS (hereafter referred to as "the April 19, 2004 memorandum"). That memorandum states that, effective April 19, 2004, all existing permits to import beef from Canada "will be deemed to cover all edible bovine meat products (bone-in, boneless, ground meat, further processed)," provided each shipment is accompanied by a statement that the meat was processed in "establishments that are certified to FSIS [USDA Food Safety and Inspection Service] as eligible for export to the United States."

APHIS also published a table, dated April 19, 2004, entitled "Low Risk Canadian Products." That table lists products, such as "bovine meat and meat products including: boneless, bone-in, ground meat, and further processed bovine meat products," "bovine tongues," "bovine hearts, kidneys, and tripe," and "bovine lips." The table also lists "Required Risk

Mitigations," but the only measures required are that the meat not be for animal or pet food, and that the shipment be accompanied by an import permit and a Canadian certification form. That form, provided to the Court by counsel for USDA, requires that the meat products (other than liver) be from cattle under 30 months of age at slaughter and processed at a facility certified as meeting USDA FSIS criteria for facilities producing beef for export to the United States.

Plaintiff moved for a temporary restraining order on April 22, 2004. Notice was provided by telephone to the U.S. Attorney's Office. The Court heard from Plaintiff ex parte on April 22, 2004, the U.S. Attorney's Office having informed the Court that no one was available to participate at that time. An informal hearing was held in chambers on April 23, 2004. Plaintiff was represented there by Messrs. Edwards, Cook, Frye, and Miller; Defendants were represented by Assistant U.S. Attorney Marc Smith and by Thomas Walsh and Sheila Novak of the USDA General Counsel's office in Washington, D.C., who participated by telephone. William Bullard, Jr., CEO of R-CALF USA, was also present.

This order sets forth and analyzes the facts as they appear to the Court at this time, before having held an evidentiary hearing, based on the Verified Complaint, the declarations and other exhibits to Plaintiff's Memorandum of Points and Authorities in Support of Motion for Temporary Restraining Order and Preliminary Injunction, and information provided to the Court in the hearing on the temporary restraining order.

JURISDICTION

This Court has jurisdiction, under the Administrative Procedure Act ("APA"), to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of agency discretion, or otherwise not in accordance with the law," or that was taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(A) and (D). R-CALF

USA has standing to bring this action if its members would have standing on their own. *Friends of the Earth v. Laidlaw Environmental Services,* 528 U.S. 167, 181, 185-86, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 571, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). R-CALF USA's members are adversely affected or aggrieved by the agency action they challenge, under 5 U.S.C § 702, for the reasons described below. The Court has authority to enjoin agency action that was taken in violation of the APA. *Natural Resource Defense Council v. Houston,* 146 F.3d 1118, 1125 (9th Cir.1998); *Envtl. Protection Info. Ctr. v. The Simpson Timber Co.,* 255 F.3d 1073, 1078 (9th Cir.2001).

Defendants argue that there has been no "final agency action," and therefore judicial review is not available under the APA. Defendants imply that the only relevant final agency action was the May 29, 2003 emergency rule adding Canada to the list of countries where BSE has been found. According to Defendants, the August 8, 2003 notice that importation of boneless beef was no longer prohibited and the April 19, 2004 memorandum setting forth "New Criteria for the Importation of Edible Bovine Meat and Bovine Meat Products" were authorized by 40 C.F.R. § 93.401(a), the provision of its regulation establishing the ban on imports from countries with BSE that allows case-by-case exceptions, pursuant to permit.

USDA's August 8, 2003 and April 19, 2004 actions do not appear on their face to be the kind of case-by-case exception to the general ban on imports, determined on the facts of the specific case, that 40 C.F.R. § 93.401(a) authorizes. The August 8, 2003 action (which now appears to have been superceded by the April 19, 2004 action) stated that "USDA will no longer prohibit the importation of" certain types of meat, including "boneless bovine meat from cattle under 30 months of age." The April 19, 2004 memorandum purports to establish "New Criteria for the Importation of Edible Bovine Meat and Bovine Meat Products" and states that all existing import permits "will be deemed to cover all edible bovine meat products...." These actions appear to be across-the-board

relaxations of the ban on importation of Canadian beef established in the May 29, 2003 emergency rule, rather than case-specific exceptions to the ban. But even if they were case-by-case permit decisions authorized by 40 C.F .R. § 93.401(a), that would not mean that they are not "final agency action."

Two conditions must be met for agency action to be considered final in an administrative setting. *Montana Wilderness Ass'n, Inc. v. U.S. Forest Service,* 314 F.3d 1146, 1150 (9th Cir.2003). First, the action should Marc the "consummation" of the agency's decision-making process. *Bennett v. Spear,* 520 U.S. 154, 177-78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). Second, the action must be one by which rights or obligations have been determined, or from which "legal consequences will flow." *Id.,* 520 U.S. at 178.

The instant case is similar to *Croplife America v. EPA,* where the D.C. Circuit held that an EPA directive issued in a press release was judicially reviewable as a final agency action because EPA's changed position had an immediate effect, and thus was binding on the petitioners. 329 F.3d 876, 881-83 (2003). The court looked to the "clear and unequivocal language, which reflects an obvious change in established agency practice," in finding that the press release established new binding criteria for agency action and constituted "final agency action." *Id.* at 881. Similarly, when it found an EPA "guidance" document to be reviewable final agency action, the court based its decision "primarily on the text of the Document" which "on its face ... purports to bind both applicants and the Agency...." *General Electric Co. v. EPA,* 290 F.3d 377, 380 (D.C.Cir.2002); *see also Appalachian Power Co. v. EPA,* 208 F.3d 1015, 1022 (D.C.Cir.2000).

The April 19, 2004 memorandum on its face sets forth "new criteria" for importation of bovine meat products from Canada and states that all existing importation permits are now "deemed to cover all edible bovine meat products." It is clear that this constitutes a reviewable final agency

action. The August, 19, 2004 memorandum is a statement of general applicability covering all existing permits to import beef from Canada and governing any future permits. It is intended to affect individual rights and have the force of law. Thus, notice-and-comment rulemaking was required before its adoption. *See San Diego Air Sports Center, Inc. v. Federal Aviation Admin.,* 887 F.2d 966 (9th Cir.1989).

Defendants also imply that R-CALF USA members are not adversely affected by the April 19, 2004 memorandum because, according to counsel for USDA, almost all of the types of meat allowed to be imported under that memorandum (save bone-in cuts of meat) have already been authorized by previous USDA/APHIS actions. That may indeed be true (although Plaintiff stated its belief that imports of ground beef were not previously allowed, and it submitted a newspaper story indicating that a spokeswoman for the Canadian Trade Minister understood the April 19, 2004 action to be lifting a ban on imports of ground beef). But the decision to allow bone-in beef alone is a significant one, from the prospect of public health. And even if some importation of all bovine meat products, in addition to the boneless cuts of beef allowed by the August 8, 2003 action, has been authorized by individual permits, that still would not prevent the blanket authorizations in the April 19, 2004 memorandum from constituting final agency action.

ANALYSIS

In the Ninth Circuit, the moving party may show that it is entitled to a preliminary injunction by demonstrating either: (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that the plaintiff's papers raise "serious questions" on the merits and the balance of hardships tips sharply in its favor. *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League,* 634 F.2d 1197, 1201 (9th Cir.1980); *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush and Co., Inc.,* 240 F.3d 832, 840-41 (9th Cir.2001). These two schemes represent a sliding scale where the required degree of irreparable harm increases as the probability of success decreases. *Friends of the Clearwater v.*

McAllister, 214 F.Supp.2d 1083, 1086 (Dist.Mont.2002). A preliminary injunction is not a preliminary adjudication on the merits but rather "a device for preserving status quo and preventing irreparable loss of rights before judgment ." *Textile Unlimited, Inc. v. A.. BMH and Co., Inc.,* 240 F.3d 781, 786 (9th Cir.2001). The standard for issuing a temporary restraining order is substantially identical to the standard for issuing a preliminary injunction. *Stuhlbarg Int'l Sales,* 240 F.3d at 840 n. 7.

Under the APA, Plaintiff will succeed on the merits if it can show that the April 19, 2004 memorandum was issued without complying with required procedures or was "arbitrary, capricious, an abuse of agency discretion, or otherwise not in accordance with the law" or taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(A) and (D). It is undisputed that the April 19, 2004 memorandum was issued without complying with APA notice-and-comment rulemaking procedures. Having found that the memorandum was a "final agency action," it follows that it is likely Plaintiff will be able to demonstrate that Defendant violated the APA. *See General Electric,* 290 F.3d at 385; *Croplife America,* 329 F.3d at 885.

In fact, USDA did commence a rulemaking to consider, among other things, whether there should be a blanket relaxation, for Canada and other "minimal risk" regions, of USDA's existing general policy to prohibit all imports of ruminant meat products from a country known to have BSE. USDA's November 4, 2003 proposed regulation would allow the importation of certain live ruminants and ruminant products and byproducts from such regions under certain conditions. 68 Fed.Reg. 62,386. This proposed rule would allow imports of fresh meat from bovines less than 30 months of age, fresh bovine liver, and fresh bovine tongues. *Id.* at 62,394-95. USDA solicited public comment on these policy decisions. Indeed, the comment period ended only about a week before the April 19, 2004 memorandum was posted on the APHIS website, and counsel for USDA informed the Court that USDA is still in the process of reviewing the comments it received. It is troubling to the

Court how USDA could believe it is appropriate procedure to authorize all imports of bovine meat products from Canada, through the April 19, 2004 memorandum, at the very same time when USDA is in the middle of a rulemaking to determine whether to take such a step.

Moreover, the Court is concerned by the manner in which, according to counsel for USDA, USDA has been authorizing imports of virtually all edible bovine meat products, apparently through issuing individual permits, at a time when it was assuring the public that such authorization would take place through the rulemaking process. At the August 8, 2003 press conference announcing the decision to "no longer prohibit the importation of ... boneless bovine meat from cattle under 30 months of age," Secretary Veneman described these as "low-risk ruminant-derived products" and said that USDA would "continue to prohibit entry into the United States of certain other Canadian products ... until a rulemaking is completed." J.B. Penn, USDA Undersecretary for Farm and Foreign Agricultural Services, stated that "the products that are included in today's announcement would be about 40 percent of the beef products that we normally import." When asked about the other 60 percent, Dale Moore, Chief of Staff to Secretary Veneman, explained: "That will be subject to the rulemaking process, as I mentioned and the Secretary has mentioned ..., we are going to be working on those, continue working on those issues through our rulemaking process."

The preamble to the November 4, 2003 proposed regulation noted specifically that bone-in meat was not allowed by permit at that time, but would be "reestablished" by promulgation of the proposed rule. 68 Fed.Reg. at 62, 398. Likewise for bovine tongue. 68 Fed.Reg. at 62,399. Similarly, a question and answer document for the proposed rule that APHIS appears to have posted on its BSE website at the time the proposed rule was announced indicates that bone-in meat, tongue, and other products were not then permitted to be imported, but would be under the proposed rule. Certain products that EPA had announced on August 8, 2003 it would allow to enter the U.S. under permit could continue to be imported under permit "while the rulemaking process is

moving forward."

It is especially important, for an issue as important to human and animal health and to the agricultural economy as BSE, that USDA make and explain its decisions publicly, rather than confuse the public about what bovine product imports are being allowed.

Having found a probability that the April 19, 2004 memorandum was issued in violation of procedural requirements of the APA, it is not necessary to determine the likelihood of Plaintiff succeeding on its argument that the substance of the memorandum violated the APA. From the facts available to the Court at this time, however, it appears that Plaintiff is likely to demonstrate that the April 19, 2004 action was "arbitrary, capricious, an abuse of agency discretion, or otherwise not in accordance with the law" or "without observance of procedure required by law." USDA indicated, when it authorized importation of boneless cuts of meat in August, that it was authorizing the importation of low-risk products first, and that "boneless beef containing whole muscle cuts are [sic] very low risk" and "do not contain the types of nervous system tissues that could carry the BSE-infectious agent." Plaintiff submitted declarations of experts in risk assessment and veterinary medicine who similarly explained that other types of beef product, such as bone-in beef allowed by the April 19, 2004 memorandum, carry higher risk of carrying the BSE agent and therefore higher risk of causing vCJD in humans if consumed. *See* also 69 Fed.Reg. 1862, 1865, 1867 (Jan. 12, 2004) (bone-in cuts of beef present risk of human exposure to BSE agent). Yet USDA has offered no cogent explanation of why the risk of importing those higher-risk beef products from Canada is acceptable.

USDA counsel offered that the justification for USDA's April 19, 2004 action was the same as for the August 8, 2003 decision, but there is very little in the August 8th decision to explain what the risk of importing boneless cuts of beef is or why that risk is acceptable. Where increased risk to human health is at issue, it is particularly critical that

USDA be required to provide not only its conclusion that its action carries an acceptable risk to public health, but also the specific basis for that conclusion and the data on which each of the agency's critical assumptions is based. *See Harlan Land Co. v. U.S. Dept. of Agriculture,* 186 F.Supp.2d 1076, 1094-95 (E.D.Calif.2001). But even if the August 8th action was fully justified, in terms of a rational assessment of the risk of the action to human and animal health, that alone would not justify a USDA conclusion that other products, such as ground meat, bone-in meat and tongue, which admittedly have a higher risk of carrying the BSE agent, are acceptable for import. Nor is there any indication that USDA reassessed the August 8, 2003 action, or any case-by-case permits it issued thereafter, when an additional case of BSE in a Canadian-raised cow was discovered in December, 2003.

Defendants also argue that the April 19, 2004 action was justified by the January 12, 2004 decision of USDA's Food Safety Inspection Service not to require special precautions to prevent exposure to the BSE agent in cattle younger than 30 months. 69 Fed.Reg. 1862. That decision applies to U.S.- raised cattle and no BSE has been detected in native U.S. cattle. That decision therefore does not appear to demonstrate that the risk of meat from Canadian cattle less than 30 months of age is acceptable.

This Court is cognizant of the rule which requires great deference to governmental agency decisions. However, this argument does not apply to USDA's failure to follow appropriate rulemaking procedures for its actions. While it is true that a decision by the USDA is entitled to a presumption of regularity, that presumption is not shielded from a thorough, probing, in-depth review. *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), overruled on other grounds by *Califano v. Sanders,* 430 U.S. 99, 105, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). Where an agency provides no data to support its assumptions and its conclusions, its decision is not entitled to deference. *Ober v. Whitman,* 243 F.3d 1190, 1195 (9th Cir.2001). Where, as here, the agency action at issue is a relaxation of previously

promulgated safety standards, issued to implement a statutory directive to protect human and animal health, there should be a presumption against the action, unless it is supported by clear justification in the rulemaking record. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual,* 463 U.S. 29, 42, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (reviewing proposed relaxation of passive restraint requirements in cars). *Accord, Int'l Brotherhood of Teamsters v. United States,* 735 F.2d 1525, 1531 (D.C.Cir.1984).

In *Harlan Land Co. v. U.S. Dept. of Agriculture,* 186 F.Supp.2d 1076 (E.D.Calif.2001), the court suspended an APHIS rule allowing importation of citrus fruit from Argentina, because APHIS had failed to define what it meant when it concluded there was "negligible risk" from pests associated with the Argentine citrus and had conducted an inadequate risk assessment. Without better explanation of how it concluded that the risk was acceptable, that decision was not entitled to deference. *Id.* at 1084, 1086-87, 1095. The instant case appears, at this stage of the proceeding, similar to *Harlan Land Co.,* except that there at least APHIS had concluded a rulemaking before it authorized the Argentine imports.

The answer to the issue of whether there is a significant threat of irreparable injury is clear. The prevalence of BSE in Canadian cattle is not known, but two cases of BSE in Canadian-raised cows have been detected in the past 11 months, through very limited testing. If imported Canadian beef products contain the BSE agent, USDA's April 19, 2004 action may result in a fatal, non-curable disease in humans who consume those products.

In addition, unrestricted importation of Canadian beef products may result in adverse public perception of the safety of the American beef supply, both among domestic consumers and abroad. Already, foreign markets have been closed or restricted for U.S. beef products because of association with BSE in Canadian-bred cows. The demand and price for

Plaintiff's members' cattle would be adversely affected. If another case of BSE is discovered in Canadian cattle, which Plaintiff's risk assessment expert, Dr. Cox, has concluded is not unlikely, Dr. VanSickle, an expert in agricultural economics, believes the effect on demand for U.S. cattle could cripple the cattle growing industry. That appears to be a reasonable conclusion, given the effect that BSE had on the demand for U.K. beef products and, more recently, on demand for Canadian beef products. Dr. VanSickle's declaration predicts that the adverse impact on the business of R-CALF USA's members could be billions of dollars, and it would be substantially greater than the economic benefit of lower beef prices resulting from the greater supply.

Since there are no requirements that imports of Canadian beef products be labeled to indicate the country of origin, once those products cross the border they become virtually impossible to recover or segregate if additional cases of BSE are discovered in the Canadian herd. Moreover, U.S. consumers will not have the option to try to reduce their risk of exposure to BSE by eliminating consumption of Canadian beef products.

Defendants would not be harmed significantly by the temporary restraining order Plaintiff seeks. Its primary effect would be on Canadian beef exporters. Although the increased supply of beef attributable to Canadian imports may reduce the price of meat to consumers slightly, USDA's economic analysis for the November 4, 2003 proposed rule predicts that even a full resumption of previous levels of imports would only reduce the price of beef by $0.05-0.06 per pound. 68 Fed.Reg. at 62,399. Thus, the balance of harms clearly tilts in favor of Plaintiff.

Plaintiff has sustained its burden of establishing immediate, irreparable injury and supplied the requisite proof for the likelihood of success on the merits, and Plaintiff also has raised serious questions about USDA's action and shown that the balance of the harms tips strongly in Plaintiff's favor. A temporary restraining order would preserve the status quo and prevent irreparable injury to Plaintiff's members.

Accordingly,

IT IS HEREBY ORDERED that Plaintiff's motion for a temporary restraining order is GRANTED. Defendants are enjoined from permitting importation from Canada of all edible bovine meat products beyond those authorized by USDA's action of August 8, 2003 (boneless bovine meat, boneless Veal (meat), and bovine liver) from cattle under the age of 30 months until the conclusion of the hearing on the Preliminary Injunction.

Plaintiff shall immediately post a $500 surety with the Clerk of Court pursuant to Rule 65(c). As a non-profit organization attempting to further the public interest and the goals of the Animal Health Protection Act, R-CALF USA should only be required to post a minimal bond. Doing otherwise would effectively preclude review of USDA's actions and would not be in the public interest. *See, e.g., Friends of the Earth v. Brinegar,* 518 F.2d 322, 323 (9 th Cir.1975); *California ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency,* 766 F.2d 1319, 1325-26 (9th Cir.1985); *Davis v. Mineta,* 302 F.3d 1104, 1126 (10th Cir.2002). Moreover, Defendants are not at risk of financial harm as a result of this order, so there is little or no need to provide for possible compensation of an incorrectly enjoined defendant. *See Heather v. City of Mallard,* 887 F.Supp. 1249, 1268 (N.D.Iowa).

IT IS FURTHER ORDERED that a Hearing be held on Plaintiff's Application for Preliminary Injunction on Tuesday, May 11, 2004, at 9:00 a.m., in Courtroom I of the James F. Battin Federal Building, Billings, Montana. The Court finds, for good cause, that this hearing cannot be set during the week of May 3, 2004, due to a criminal trial scheduled on May 3, 2004 and a civil trial scheduled to begin on May 4, 2004, said case being three years old.

The Clerk of Court is directed to notify the parties of the making of this Order.

FOOD STAMP PROGRAM

COURT DECISION

SABER A. IDIAS, d/b/a NASHVILLE v. USDA.
No. 03-1619.
Filed: March 8, 2004.

(Cite as: 359 F.3d 695).

FSP – FNS – "Trafficking" – EBT – WIC – Pattern of suspicious activity, legislative criteria for determining.

Petitioner sought review of Food Nutrition Service ("FNS") determination to deny participation in the Food Stamp Program ("FSP"). Based upon a "pattern of suspicion transactions," the FNS determined that Petitioner had "trafficked" in food stamps - an offense which must result in denial of further participation. Under specific Congressional authority, FSP considered evidence obtained the electronic records from the Supermarket's Electronic Benefit Transfer ("EBT") [see 7 C.F.R. § 2021(a)] in making its determination to disqualify Petitioner. Petitioner was unable to provide an explanation of why there were thirty-one (31) dates where EBT transactions exceeded daily gross sales.

United States Court of Appeals,
Fourth Circuit

OPINION

WILKINSON, Circuit Judge:

Plaintiff Saber A. Idias owns and operates a grocery store that was disqualified from the federal Food Stamp Program by the Food and Nutrition Service (FNS) of the United States Department of Agriculture. The FNS had detected a pattern of suspicious activity in Idias's store, most importantly that Idias occasionally collected more in food stamp reimbursements than he reported in total sales. Idias was at a loss to explain these discrepancies to the district court, and it awarded summary

judgment to the United States. We now affirm the judgment.

I.

Idias runs the Nashville Supermarket ("Supermarket") in Nashville, North Carolina. On June 15, 2000, the FNS notified Idias that he was being charged with food stamp trafficking, which is "the buying or selling of coupons, ATP cards or other benefit instruments for cash or consideration other than eligible food." 7 C.F.R. § 271.2. The FNS's allegations were based on the Supermarket's Electronic Benefit Transfer (EBT) debits for the period from January to June 2000.

The EBT system is the modern replacement for traditional paper food stamps. Each food stamp recipient may purchase food stamp-eligible items by use of an EBT card with a magnetized strip, similar to an ATM or a debit card. A retailer simply totals a recipient's purchases, and then swipes the customer's EBT card through the retailer's point-of-sale device. The customer's food stamp account is then debited, and the retailer reimbursed, for the amount of the purchase. Because EBT debits are electronically recorded, the records can be scanned by various computer programs for irregularities and abnormalities.

According to the FNS, its analysis of the Supermarket's EBT records had "establish[ed] a clear and repetitive pattern of unusual, irregular, and/or inexplicable" food stamp sales. The FNS contended that the Supermarket had an excessive number of large transactions for its type of store, in addition to multiple transactions on the same cards within short time frames. Specifically, the FNS forwarded to Idias with its June 15 letter a list of eighty-eight such transactions that it considered irregular. In response, Idias submitted a statement from his accountant, but the FNS was unpersuaded, and on June 28, 2000, it permanently disqualified Idias's Supermarket from the Food Stamp Program. The FNS's decision was upheld on administrative review, and Idias then filed suit to challenge the administrative determination.

During discovery before the district court, Idias produced the summary tapes generated by the Supermarket's single cash register. The register tapes show information like the store's daily gross sales, the number of items sold, and the number of customer sales. In addition, each item sold is categorized as either Grocery, Hot Food, or Food Stamps, and the register tapes show sales information broken down by these categories. Idias testified that he used the Food Stamp category for all non-taxable items, including items purchased with food stamps and items purchased with Women, Infant, and Children vouchers issued by the state of North Carolina.

Margaret Davis, a certified public accountant, compiled reports that compared the register tapes to the EBT data collected by the FNS over the period from January to June 2000. Davis's reports revealed a number of irregularities. Most importantly, on three different days during that six-month span, the daily EBT debits exceeded gross sales as reflected on the register tapes. In other words, Idias rang up more on the EBT terminal in food stamp sales than he rang up on the register in total sales--even though total sales included purchases of items not eligible for food stamps.

In addition, on thirty-one different days, the EBT debits exceeded the register tape totals for transactions recorded in the Food Stamp category. All told between January and June 2000, the Supermarket processed more than $10,000 in EBT debits not reflected in sales recorded in the Food Stamp category on the register tapes. Finally, there were forty-nine purchases that the FNS deemed unusually large, and forty transactions in which multiple EBT debits were made using the same card within a matter of minutes.

Faced with this mound of circumstantial evidence, the district court found that the United States had presented a prima facie case that Idias had trafficked in food stamps. The district court further found that Idias had offered nothing more than speculation to explain many of the suspect transactions. For instance, as to how EBT debits possibly could have

exceeded gross sales, Idias merely mused that "there must have been EBT sales which were not entered in the cash register at all"--even though Idias and his accountant, Lawrence E. Alford, had already testified that all sales passed through the register. The district court concluded that Idias's surmise did not create any genuine issues of material fact, and it therefore granted summary judgment to the United States on its claim that Idias had trafficked in food stamps. Idias now appeals the district court's decision.

II.

The Food Stamp Program was established by Congress "to safe-guard the health and well-being of the Nation's population by raising levels of nutrition among low-income households." 7 U.S.C. § 2011 (2000). Given the importance of providing nutritional assistance for the needy, Congress has been quite firm in ensuring that food stamps are used only to purchase eligible food items, and are not exchanged for cash or other things of value. *See Traficanti v. United States,* 227 F.3d 170, 174-75 (4th Cir.2000) (discussing "strict liability regime" established by Congress to prevent food stamp fraud). In fact, a store that is caught trafficking in food stamps even one time must be permanently disqualified from the Food Stamp Program, unless the Secretary of Agriculture determines that the store had in place an effective anti-trafficking policy. *See* 7 U.S.C. § 2021(b)(3)(B); 7 C.F.R. § 278.6(e)(1)(I).

In the present case, the FNS imposed precisely the penalty required by Congress: based on a pattern of suspicious EBT activity, the FNS disqualified the Supermarket from participating in the Food Stamp Program. The FNS's decision was subsequently upheld on administrative review. Idias then sought judicial review of the FNS's decision, *see* 7 U.S.C. § 2023(a)(13), specifically, de novo review before the district court of the validity of the Supermarket's disqualification, *see id.* § 2023(a)(15).

There can be little question that the United States made a strong case

for food stamp trafficking before the district court. It presented evidence of a pattern of irregular and suspicious activity, including that (1) on several occasions, total food stamp debits exceeded the store's documented total sales; (2) total food stamp debits systematically exceeded the sales categorized as food stamp sales on the store's register tapes; and (3) large food stamp debits often occurred in quick succession, sometimes even using the same EBT card, despite the Supermarket's modest size.

There can also be little question that the United States was entitled to use this sort of documentary evidence to prove that Idias trafficked in food stamps. *See Kahin v. United States,* 101 F.Supp.2d 1299, 1303-04 (S.D.Cal.2000) (rejecting the notion that store personnel must be caught "red-handed" trafficking in food stamps). Congress expressly authorized the FNS to consider "evidence obtained through a transaction report under an electronic benefit system" in disqualifying food stores for food stamp trafficking. 7 U.S.C. § 2021(a). And the FNS has done exactly that, issuing regulations that permit a food store to be disqualified from the Food Stamp Program on the basis of "inconsistent redemption data" or "evidence obtained through [an EBT] transaction report." 7 C.F.R. § 278.6(a). Indeed, one of the advantages of replacing traditional paper food stamps with the EBT system was that it made it easier to detect trafficking, *see* 5 West's Fed. Admin. Prac. § 5785 (3d ed.), particularly in more closely-knit communities where undercover evidence can be difficult and costly to obtain.

Idias contends, however, that the quantum and types of documentary evidence presented by the United States were insufficient to prove food stamp trafficking. Certainly Idias managed to controvert some of the Government's evidence. For instance, Idias produced wholesale invoices demonstrating that the Supermarket carried a sufficient number of food stamp-eligible items to justify large purchases. Idias also introduced affidavits from some of the customers whose transactions had been flagged as questionable, each of whom denied ever having received cash in exchange for using an EBT card.

Yet what Idias struggled to explain before the district court was how food stamp debits ever could have exceeded the Supermarket's entire recorded gross sales for any given day. There are, of course, three possible explanations. The first is that the food stamp debits were accurate and the register tapes were not. Idias then was making actual sales, but not ringing them up on the register, in order to evade paying the proper taxes. The second is that the register tapes were accurate and the food stamp debits were not. Idias then was accepting food stamps for sales that never took place, while customers were receiving cash instead of merchandise. The final explanation is that both the register tapes and the food stamp debits were inaccurate, which would not conclusively have established which offense--tax evasion or food stamp trafficking--Idias had committed.

Idias, however, removed all doubt on this score. Idias testified that the amount listed daily on the register tapes as "gross sales" documented everything sold in the Supermarket. As Idias put it, "That's the bottom line for the day." Idias's accountant, Lawrence Alford, was even more explicit. When asked whether EBT debits could ever exceed gross sales for a given day, Alford replied, "No way." Alford explained, "First off, [Idias is] not gone [sic] have more sales than goes through the register. Secondly, I know that it's not gone [sic] be all food stamp people come in that day without somebody else coming in that's not eligible for ... food stamps or [Women, Infant, and Children vouchers]." Thus, according to Idias and Alford, all sales passed through the Supermarket's register and were recorded on the register tapes. By their own admissions, if food stamp debits exceeded gross sales, it was because Idias was exchanging food stamps for cash rather than merchandise.

Perhaps that is why Idias backpedaled before the district court, asserting that there simply must have been EBT sales that were not entered into the cash register at all. Yet Idias provided no evidence in support of his speculation, nor did he explain why he earlier had been mistaken to claim that all sales were recorded in the register. Then, at oral argument before this Court, Idias's counsel backpedaled even farther,

claiming that the discrepancies between the food stamp debits and gross sales were the deliberate result of Idias's attempted tax evasion. Again, counsel provided no evidence to substantiate his effort to trade one fraud charge for another.

At day's end, then, the United States supported the administrative decision to disqualify the Supermarket from the Food Stamp Program with extensive documentary evidence of a pattern of food stamp trafficking. In response to the United States's most incriminating evidence--that on three different days food stamp debits exceeded the Supermarket's recorded gross sales--Idias offered only an ever-shifting story that left him guilty of first one offense and then another. The district court properly concluded not simply that a preponderance of the evidence proved food stamp trafficking, but that Idias's weaving tale could not survive summary judgment, *see, e.g., Guinness PLC v. Ward,* 955 F.2d 875, 883, 901 (4th Cir.1992).

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

HASS AVOCADO PROMOTION, RESEARCH AND INFORMATION ACT

COURT DECISION

AVOCADOS PLUS INCORPORATED, ET AL., v. USDA.
No. 03-5086.
Filed June 18, 2004.

(Cite as: Cite as: 370 F.3d 1243).

HAPRIA – First ammendment – Administrative remedies, failure to exhaust – Jurisdictional (mandatory) exhaustion – Non-jurisdictional (permissive) exhaustion.

Relying on *United Foods, Inc.*, the case was initially brought under a constitutional claim of impermissible violation of First Amendment right of free speech by forcing the (importers of Hass avocados) to pay for speech which they disagreed. Acting under the Hass Avocado Promotion, Research, and Information Act (HAPRIA) ("Act"), the case was remanded to the lower court after discussing the nature of the jurisdictional exhaustion of remedies. Where the statute is not explicit as to the jurisdictional requirements, a reviewing court may impose a judicially created doctrine on non-jurisdictional exhaustion of remedies by conducting a inquiry as to whether certain tests are met under *EEOC v. Lutheran Soc. Servs*., 186 F. 3d 959, 963-64 (D.C. Cir. 1999). Alternately, if the statute requires exhaustion of remedies (jurisdictional), the court may not excuse it. The court found that the Act at 7 USC ¶ 7806 did not contain the explicit language requiring mandatory exhaustion of administrative remedies.

United States Court of Appeals,
District of Columbia Circuit.

Before: EDWARDS, RANDOLPH, and TATEL, Circuit Judges.

Opinion for the Court filed by Circuit Judge RANDOLPH.

RANDOLPH, Circuit Judge:

The Hass Avocado Promotion, Research, and Information Act, 7

U.S.C. §§ 7801-7813, authorizes the Department of Agriculture to collect assessments from avocado growers and importers and to transfer the assessments to a board charged with promoting domestic consumption of avocados of the Hass variety. Two importers of avocados and two importers of avocado products sued in district court alleging that the Act violated their First Amendment right to be free of compelled speech.[1] The district court dismissed the complaint because the importers had not exhausted the administrative remedies the Act provides.

I.

The Avocado Act, one of more than a dozen federal statutes aimed at promoting the sale of various agricultural commodities, requires the Secretary of Agriculture to issue an implementing order that takes effect if the majority of affected growers and importers approve it in a referendum. § 7805. The order establishes a Hass Avocado Board consisting of industry representatives. § 7804. The function of the Board is to "administer the order," § 7804(c)(1), "develop budgets for the implementation of the order," § 7804(c)(5), and "develop" and "implement plans and projects for Hass avocado promotion, industry information, consumer information, or related research [.]" § 7804(c)(5)-(6). The Board may not implement any budget, plan or project without the prior approval of the Secretary, but these are "deemed to be approved" if the Secretary does not act within 45 days. § 7804(d)(3).

The Act also requires the Secretary to impose assessments on growers and importers to pay for the Board's activities. § 7804(h). The Board must pay 85 percent of a grower's assessments to its state grower

[1]Two of the plaintiffs - Avo-King International, Inc. and Sunny Avocado, Ltd. - import only processed or frozen avocado products. The Secretary has not imposed assessments on such products, and it is not clear she ever will. We therefore affirm the dismissal of the complaint with respect to these plaintiffs on the ground that their claims are, so to speak, not ripe. *See Clean Air Implementation Project v. EPA,* 150 F.3d 1200 (D.C.Cir.1998). This opinion only concerns the remaining two importers - Avocados Plus, Inc. and LGS Specialty Sales Ltd.

organization, if such an organization exists. § 7804(h)(8). If an importer belongs to an importers' association, the Board must pay 85 percent of its assessment to that group. § 7804(h)(9). The Board must also reimburse the Secretary for expenses incurred conducting the referendum and supervising the Board. § 7804(I). The rest of the money pays for Board programs, although at least some of it must fund a promotion program conducted by the California Avocado Commission. *See* § 7804(e)(1) (requiring Board to enter contract with "avocado organization ... in a State with the majority of Hass avocado production in the United States"); § 7801(a)(2) (stating that "virtually all domestically produced avocados for the commercial market are grown in the State of California").

Under the § 7806 of the Act, any "person subject to an order" may file a petition with the Secretary "stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law; and ... requesting a modification of the order or an exemption from the order." § 7806(a)(1). The Secretary must rule on the petition after a hearing. § 7806(a)(3). The Act further provides that the "district courts of the United States ... shall have jurisdiction to review the ruling of the Secretary on the petition[,]" § 7806(b)(1), and must remand it if it "is not in accordance with law[.]" § 7806(b)(3).

Rather than invoking § 7806, the importers filed a complaint in district court claiming that the mandatory assessments were unconstitutional and seeking an injunction against enforcement of the Act.[2] The importers relied principally on *United States v. United Foods, Inc.,* 533 U.S. 405, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001), in which the Supreme Court ruled that an identical provision in the Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. §§ 6101-6112, violated the free speech rights of mushroom growers by forcing them to pay for speech with which they disagreed.

[2]It is unclear whether, if the importers can go forward with their suit, they should be relegated to an as-applied rather than a facial challenge to the Act.

The government had argued in *United Foods* that the mushroom promotion program was government speech, and that the government therefore could force growers to pay for it. The Supreme Court refused to consider the argument because the government had not raised it in the court of appeals. 533 U.S. at 416-17, 121 S.Ct. at 2340-41. *United Foods* triggered a series of challenges against other agricultural commodity promotion programs. In each case the government relied on the government speech defense and in each case the court of appeals rejected it. *See Cochran v. Veneman,* 359 F.3d 263 (3d Cir.2004) (dairy); *Michigan Pork Producers Ass'n v. Veneman,* 348 F.3d 157 (6th Cir.2003) (pork); *Livestock Mktg. Ass'n v. USDA,* 335 F.3d 711 (8th Cir.2003), *cert. granted,* 2004 WL 303634 (May 24, 2004) (beef); see also Pelts & Skins, LLC v. Landreneau, 365 F.3d 423 (5th Cir.2004) (striking down state alligator products promotion program); *but see Charter v. USDA,* 230 F.Supp.2d 1121 (D.Mont.2002) (sustaining beef program as government speech).

The avocado importers moved for a preliminary injunction. The government opposed the motion, arguing that the avocado program was government speech. The government also moved to dismiss the complaint for failure to exhaust administrative remedies. The district court initially addressed the importers' First Amendment claims, holding that they were not required to exhaust the administrative remedy provided in § 7806. Then, in response to a government motion, the court reconsidered its decision, ruled that importers must exhaust their administrative remedy, and dismissed the complaint for lack of subject matter jurisdiction.

II.

The word "exhaustion" now describes two distinct legal concepts. The first is a judicially created doctrine requiring parties who seek to challenge agency action to exhaust available administrative remedies before bringing their case to court. *See generally* 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 15.2 (4th ed.2002). We will call this doctrine "non-jurisdictional exhaustion."

Non-jurisdictional exhaustion serves three functions: "giving agencies the opportunity to correct their own errors, affording parties and courts the benefits of agencies' expertise, [and] compiling a record adequate for judicial review[.]" *Marine Mammal Conservancy, Inc. v. Dep't of Agric.,* 134 F.3d 409 (D.C.Cir.1998); *McCarthy v. Madigan,* 503 U.S. 140, 145-46, 112 S.Ct. 1081, 1086-87, 117 L.Ed.2d 291 (1992).

Occasionally, exhaustion will not fulfill these ends. There may be no facts in dispute, *see McKart v. United States,* 395 U.S. 185, 198 n. 15, 89 S.Ct. 1657, 1665 n. 15, 23 L.Ed.2d 194 (1969), the disputed issue may be outside the agency's expertise, *see id.* at 197-98, 89 S.Ct. at 1660-61, or the agency may not have the authority to change its decision in a way that would satisfy the challenger's objections, *see McCarthy,* 503 U.S. at 147-48, 112 S.Ct. at 1087-88. Also, requiring resort to the administrative process may prejudice the litigants' court action, *see id.* at 146-47, 112 S.Ct. at 1086- 87, or may be inadequate because of agency bias, *see id.* at 148-49, 112 S.Ct. at 1088. In these circumstances, the district court may, in its discretion, excuse exhaustion if "the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further." *Id*. at 146, 112 S.Ct. at 1086 (quoting *West v. Bergland,* 611 F.2d 710, 715 (8th Cir.1979)).

The second form of exhaustion arises when Congress requires resort to the administrative process as a predicate to judicial review. This "jurisdictional exhaustion" is rooted, not in prudential principles, but in Congress' power to control the jurisdiction of the federal courts. *See EEOC v. Lutheran Soc. Servs.,* 186 F.3d 959, 963-64 (D.C.Cir.1999). Whether a statute requires exhaustion is purely a question of statutory interpretation. *See McCarthy,* 503 U.S. at 144, 112 S.Ct. at 1085. If the statute does mandate exhaustion, a court cannot excuse it. *See Shalala v. Illinois Council on Long Term Care,* 529 U.S. 1, 13, 120 S.Ct. 1084,

1093, 146 L.Ed.2d 1 (2000).[3]

While the existence of an administrative remedy automatically triggers a non-jurisdictional exhaustion inquiry, jurisdictional exhaustion requires much more. In order to mandate exhaustion, a statute must contain " '[s]weeping and direct' statutory language indicating that there is no federal jurisdiction prior to exhaustion, or the exhaustion requirement is treated as an element of the underlying claim." *Weinberger v. Salfi,* 422 U.S. 749, 757, 95 S.Ct. 2457, 2462, 45 L.Ed.2d 522 (1975); 2 PIERCE, ADMINISTRATIVE LAW TREATISE § 15.3, at 986. We presume exhaustion is non-jurisdictional unless "Congress states in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision," *I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton Tri Indus.,* 727 F.2d 1204, 1208 (D.C.Cir.1984).

For example, the Supreme Court decided that the Social Security Act mandated exhaustion in light of this statutory language: "No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Commissioner of Social Security, or any officer or employer thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter." 42 U.S.C. § 405(h). *See Salfi,* 422 U.S. at 756-67, 95 S.Ct. at 2462-63. Similarly, we found jurisdictional exhaustion in the following language from the Federal Power Act: "No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.... No objection to the order of the Commission shall

[3] General federal question jurisdiction under 28 U.S.C. § 1331 does not empower the court to proceed to the merits in a jurisdictional exhaustion case. *See Heckler v. Ringer,* 466 U.S. 602, 616, 104 S.Ct. 2013, 2022, 80 L.Ed.2d 622 (1984). In a non-jurisdictional exhaustion case, if the court decides not to require exhaustion, the case may proceed under § 1331. If the court rules that the plaintiff must exhaust, and the plaintiff proceeds to do so, judicial review of the agency's decision will be under the relevant provision for review of that agency's action.

be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do." 16 U.S.C. § 825l. *See Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC,* 876 F.2d 109, 112-13 (D.C.Cir.1989).

The Avocado Act contains no comparable "sweeping and direct" language. It neither mentions exhaustion nor explicitly limits the jurisdiction of the courts. It merely creates an administrative procedure for challenging the Secretary's orders. In this respect, the Avocado Act is therefore more like the statute we considered in *Lutheran Social Services.* In that case, we excused a party challenging an EEOC subpoena from exhausting administrative remedies, even though the statute creating the subpoena power provided such a remedy. We rejected the EEOC's argument that exhaustion was jurisdictional, observing that "nowhere does [the statute] even imply, much less expressly state, that courts lack jurisdiction to hear objections not presented to the Commission." 186 F.3d at 963.

The government argues that *United States v. Ruzicka,* 329 U.S. 287, 67 S.Ct. 207, 91 L.Ed. 290 (1946), compels the opposite conclusion. In *Ruzicka,* the Supreme Court ruled that milk handlers challenging marketing orders issued pursuant to the Agricultural Marketing Agreement Act of 1937, ch. 296, 50 Stat. 246, must exhaust administrative remedies before coming to court. The relevant provisions of the AMAA are nearly identical to those in the Avocado Act. *Compare* 7 U.S.C. § 608c(6) & (15) *with* 7 U.S.C. §§ 7806-7807(a). To the government, it follows that the Avocado Act mandates exhaustion.

Two unstated premises are behind the government's argument. The first is that when Congress uses the language of one statute in another statute it usually intends both statutes to have the same meaning. *See Energy Research Found. v. Defense Nuclear Facilities Safety Bd.,* 917 F.2d 581, 582-83 (D.C.Cir.1990). The second is that Congress knew of the interpretation given the earlier statute in *Ruzicka.* For this

proposition, the government could have cited *Cannon v. Univ. of Chicago,* 441 U.S. 677, 694-98, 99 S.Ct. 1946, 1955-57, 60 L.Ed.2d 560 (1979), in which the Court endorsed the assumption that Congress knows "the law"- by which the Court meant judicial decisions. *See Miles v. Apex Marine Corp.,* 498 U.S. 19, 32, 111 S.Ct. 317, 325, 112 L.Ed.2d 275 (1990). The government's argument has some force but we believe there is an equally forceful argument on the other side. If we are to assume that Congress knew of the law handed down in *Ruzicka,* we should also assume that Congress knew of the law set forth in *Salfi, McCarthy, I.A.M.*, and other cases distinguishing non-jurisdictional and jurisdictional exhaustion. In other words, Congress' failure to include in § 7806 of the Avocado Act the sort of "sweeping and direct" language mandating exhaustion and thereby depriving the courts of jurisdiction tends to indicate that we are dealing here with non-jurisdictional exhaustion.

The most telling point against the government's position is that the *Ruzicka* Court did not find the exhaustion requirement in the text of the AMAA's provisions cited above and duplicated in § 7806. Standing alone that text was, as the Court saw it, inconclusive, which is why the Court stated that "Congress did not say in words" that exhaustion was mandatory. 329 U.S. at 292, 67 S.Ct. at 209. In nevertheless requiring exhaustion, the Court looked elsewhere, relying on the complex statutory enforcement scheme in the AMAA, a scheme Congress would not have wanted disrupted by "the contingencies and inevitable delays of litigation," *id.* at 292-93, 67 S.Ct. at 209-10. Unlike the AMAA, the Avocado Act does not provide for comprehensive market regulation that could be disrupted by ill-timed judicial interference. It simply transfers money from growers and importers to the Board. *Cf. United Foods,* 533 U.S. at 411-12, 121 S.Ct. at 2338-39 (distinguishing the AMAA, where "the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy," from the Mushroom Act, where "advertising itself ... is the principal object of the regulatory scheme"). One therefore cannot conclude much of anything about exhaustion from the apparent fact that Congress decided to use the

language of the AMAA review provisions as a model for the Avocado Act.

We also question the Secretary's characterization of *Ruzicka* as a case in which the statutory language made exhaustion jurisdictional. Certainly, under the modern precedents discussed above, the AMAA's lack of anything close to explicit jurisdictional language would render any exhaustion requirement non-jurisdictional. The fact that *Ruzicka* focused on congressional intent tells us little, for even in non-jurisdictional exhaustion cases courts owe "appropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court." *McCarthy,* 503 U.S. at 144, 112 S.Ct. at 1085. The *Ruzicka* Court did not distinguish between jurisdictional and non-jurisdictional exhaustion because the current doctrinal framework did not exist at the time. The Court itself recognized the limited precedential effect of its holding: "Certainly the recent growth of administrative law counsels against generalizations regarding what is compendiously called judicial review of administrative action. And so we deem it desirable, in a case like this, to hug the shore of the precise problem before us in relation to the provisions of the particular Act immediately relevant." 329 U.S. at 295, 67 S.Ct. at 210.

The district court relied primarily on *Gallo Cattle Co. v. USDA,* 159 F.3d 1194 (9th Cir.1998), which construed language in the Dairy and Tobacco Adjustment Act of 1983, 7 U.S.C. § 4509 ("the Dairy Act"), identical in all relevant respects to § 7806. The court of appeals found that the language mandated exhaustion and that the district court had no jurisdiction to consider the plaintiff's challenge until it exhausted administrative remedies. 159 F.3d at 1197-98. Despite the Ninth Circuit's terminology, *Gallo Cattle* was not so much an exhaustion case as a case about finality. *See* 2 PIERCE, ADMINISTRATIVE LAW TREATISE § 15.1, at 966 ("Finality and exhaustion are particularly difficult to distinguish."). The plaintiffs had already filed a petition with the Secretary challenging the order. A judicial officer had denied the petition, and the plaintiffs were asking the court for interim relief pending

their appeal to the Secretary. Under the statute, only the Secretary's ruling was final and subject to judicial review. *See* 7 U.S.C. § 4509(a)-(b). The court therefore ruled that there was no jurisdiction to consider the challenge to the judicial officer's ruling *pursuant to § 4509*. 159 F.3d at 1198. This does not necessarily mean exhaustion would be jurisdictional if the plaintiffs had brought their challenge directly to district court. True, the *Gallo Cattle* court stated in dicta that the Dairy Act mandated exhaustion, citing a Ninth Circuit case interpreting the AMAA. *Id.* at 1197 (citing *Rasmussen v. Hardin,* 461 F.2d 595, 597-98 (9th Cir.1972)). But that case, like *Ruzicka,* did not say whether the AMAA exhaustion requirement was jurisdictional or non-jurisdictional.

While the matter is not free from doubt, we therefore hold - particularly in light of our decision in *Lutheran Social Services* - that the language of the Avocado Act does not make exhaustion jurisdictional.

III.

Our precedent demands that we review non-jurisdictional exhaustion decisions for abuse of discretion. *See Ogden v. Zuckert,* 298 F.2d 312, 317 (D.C.Cir.1961). Whether in this case the district court thought it had discretion is not so clear. The first part of the court's analysis clearly states that the Avocado Act "mandates exhaustion," and that "Congress has given the Court *jurisdiction* over only 'the ruling of the Secretary.' " J.A. 107-08 (italics added, underline in the original). Having concluded that the Avocado Act mandated exhaustion, the court could have stopped there, but did not. In the next section of its opinion, the court - responding to the importers' argument that the constitutional nature of their claim should excuse exhaustion - explained how requiring exhaustion would serve the policies underlying the doctrine. In doing so, the court applied a portion of the non-jurisdictional exhaustion analysis. This would have been unnecessary if the court believed the statute mandated exhaustion as a jurisdictional matter. *See Salfi,* 422 U.S. at 762-64, 95 S.Ct. at 2465-66 (applying jurisdictional exhaustion to constitutional claim). One could argue, therefore, that notwithstanding the district court's earlier

absolute language, and its dismissal of the complaint for lack of subject matter jurisdiction, it was requiring exhaustion as a matter of discretion.

Despite these uncertainties we believe the district court thought it had no power to excuse exhaustion. Otherwise there is no explaining why the court did not complete the non-jurisdictional exhaustion analysis by "balanc[ing] the interest of the individual in retaining prompt access to a federal judicial forum against the countervailing institutional interests favoring exhaustion." *McCarthy,* 503 U.S. at 147, 112 S.Ct. at 1087. "Application of this balancing principle is intensely practical ... because attention is directed to both the nature of the claim presented and the characteristics of the particular administrative remedy." *Id.* (quotation marks and citations omitted). We see no signs the district court attempted to make either of these inquiries.

"[T]he district court was entitled to determine, in the first instance, whether exhaustion was required and, if so, whether, in its discretion, it should retain jurisdiction pending exhaustion. Because the district [court] was apparently unaware that these decisions were open to [it], we find it appropriate to vacate [its] order dismissing the action and to remand the case so that [the court] may address them." *Montgomery v. Rumsfeld,* 572 F.2d 250, 254 (9th Cir.1978). *See also Ogden,* 298 F.2d at 317.[4]

The importers in this case are fortunate. The time limit in §

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[4]In many cases the time limits for challenging an order before the agency may be relatively short. In non-jurisdictional (and jurisdictional) exhaustion cases, those who bypass administrative remedies and bring an action in court therefore run a substantial risk. If the court decides that the plaintiff had to exhaust, by then it may be too late for the plaintiff to seek relief from the agency. While unusual circumstances may warrant dispensing with exhaustion when the time limits have run, *see Bowen v. City of New York,* 476 U.S. 467, 482-86, 106 S.Ct. 2022, 2030-33, 90 L.Ed.2d 462 (1986), we held in *American Federation of Government Employees v. Loy,* 367 F.3d 932, 936 (D.C.Cir.2004), that the court will not "excuse non-compliance with the requirement that one must exhaust administrative remedies on the basis that the party failed to comply." *See Steadman v. Governor, U.S. Soldiers' & Airmen's Home,* 918 F.2d 963, 968 (D.C.Cir.1990).

7806(a)(4) of the Avocado Act is generous. They have until early September 2004 to file a petition with the Secretary challenging the order. *See* § 7806(a)(4). They should be allowed to do so without prejudicing their right to argue to the district court that exhaustion should be excused.

So ordered

INSPECTION AND GRADING

DEPARTMENTAL DECISIONS

In re: LION RAISINS, INC., A CALIFORNIA CORPORATION FORMERLY KNOWN AS LION ENTERPRISES, INC.; LION RAISIN COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; LION PACKING COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; AL LION, JR., AN INDIVIDUAL; DAN LION, AN INDIVIDUAL; JEFF LION, AN INDIVIDUAL; and BRUCE LION, AN INDIVIDUAL.
I & G Docket No. 03-0001.
Decision and Order.
Filed May 24, 2004.

I&G – AMAA – Failure to file answer – Default, appeal of.

The Judicial Officer (JO) issued a Default Decision finding Respondents violated the Agricultural Marketing Act and the regulations governing the inspection and certification of processed fruits and vegetables (7 C.F.R. pt. 52). The JO concluded Respondents had not filed a timely answer to the Complaint. Respondents objected to Complainant's motion for default decision on the ground that Respondents' motion to dismiss constituted a timely response to the Complaint. The JO found Respondents' objection lacked merit stating a motion to dismiss is not a responsive pleading and Respondents' motion to dismiss did not meet the requirements for an answer under 7 C.F.R. § 1.136(b). The JO further stated, under 7 C.F.R. § 1.143(b)(1), a motion to dismiss cannot be entertained.

Colleen A. Carroll, for Complainant.
Brian C. Leighton, for Respondents.
Ruling issued by Jill S. Clifton, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Kenneth C. Clayton, Associate Administrator, Agricultural Marketing

Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on October 11, 2002. Complainant instituted the proceeding under the Agricultural Marketing Act of 1946, as amended (7 U.S.C. §§ 1621-1632 (1994)) [hereinafter the Agricultural Marketing Act]; the regulations and standards governing the inspection and certification of processed fruits and vegetables (7 C.F.R. pt. 52) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) and the Rules of Practice Governing Withdrawal of Inspection and Grading Services (7 C.F.R. pt. 50) [hereinafter the Rules of Practice].

Complainant alleges that on or about August 26, 1997, Lion Raisins, Inc.; Lion Raisin Company; Lion Packing Company; Al Lion, Jr.; Dan Lion; Jeff Lion; and Bruce Lion [hereinafter Respondents] violated the Agricultural Marketing Act and the Regulations (Compl. ¶¶ 8-10).

The Hearing Clerk served Respondents with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter dated October 11, 2002, during the period October 22, 2002, through November 5, 2002.[1] The Rules of Practice require that an answer must be filed with the

[1]The Hearing Clerk served the Complaint, the Rules of Practice, and the October 11, 2002, service letter on: (1) Respondent Lion Raisins, Inc., on October 30, 2002 (memorandum of RA Paris, Office of the Hearing Clerk, dated October 30, 2002); (2) Respondent Lion Raisin Company on October 23, 2002 (United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8985 0676); (3) Respondent Lion Packing Company on October 22, 2002 (United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8985 0669); (4) Respondent Al Lion, Jr., on October 22, 2002 (United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8985 0690); (5) Respondent Jeff Lion on October 22, 2002 (United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8985 0683); (6) Respondent Bruce Lion on October 23, 2002 (United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8985 0713); and (7) Brian C. Leighton, attorney for Respondents, on November 5, 2002 (United States Postal Service Domestic Return Receipt for Article Number 7099 3400 0014 4581 8175).

Hearing Clerk within 20 days after service of the complaint.[2] On October 29, 2002, Respondents filed a request for an extension of time to December 24, 2002, to respond to the Complaint.[3] Chief Administrative Law Judge James W. Hunt granted Respondents' request for an extension of time.[4]

On December 20, 2002, Respondents filed "Respondents' Motion to Dismiss Complaint." On December 26, 2002, Complainant filed a "Motion for Adoption of Proposed Decision and Order" [hereinafter Motion for Default Decision] and a "Proposed Decision and Order Upon Admission of Facts by Reason of Default" [hereinafter Proposed Default Decision]. Complainant contends Respondents failed to file an answer to the Complaint within the time prescribed by Chief Administrative Law Judge James W. Hunt.[5]

The Hearing Clerk served Respondents with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on January 3, 2003.[6] On January 8, 2003, Respondents filed "Respondents' Opposition to Complainant's Motion for Adoption of Proposed Decision and Order Upon Admission of Facts by Reason of Default" in which Respondents contend Complainant's Motion for Default Decision should be denied because Respondents' Motion to Dismiss Complaint, filed

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[2]7 C.F.R. § 1.136(a).

[3]"Respondents' Motion to Continue Respondents' Time to Respond to the Complaint to December 24, 2002;" and "Declaration of Brian C. Leighton in Support of Respondents' Motion to Continue Respondents' Time to Respond to the Complaint to December 24, 2002."

[4]"Order Extending Time to File Answer to Complaint" filed December 24, 2002
.

[5]Complainant's Motion for Default Decision at 2.

[6]United States Postal Service Domestic Return Receipt for Article Number 7099 3400 0014 4581 6461.

December 20, 2002, constitutes a timely response to the Complaint.[7] On January 21, 2003, Complainant filed "Complainant's Reply to Respondents' Opposition to Complainant's Motion for Decision and Order by Reasons of Default." Complainant reiterates his contention that Respondents failed to file a timely answer to the Complaint and contends Respondents' Motion to Dismiss Complaint is not an answer to the Complaint.[8]

On February 12, 2003, Respondents filed "Respondents' Request to File Its Answer to Complaint" and "Respondents' Answer to Complaint." On November 28, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] denied Complainant's Motion for Default Decision, granted Respondents' request to file Respondents' Answer to Complaint, and accepted Respondents' Answer to Complaint for filing as of February 12, 2003.[9]

On December 3, 2003, Complainant filed "Complainant's Appeal Petition" requesting that: (1) I reverse the ALJ's ruling denying Complainant's Motion for Default Decision; or (2) I vacate the ALJ's ruling denying Complainant's Motion for Default Decision and remand the proceeding to the ALJ for issuance of a decision in accordance with the Rules of Practice. On December 23, 2003, Respondents filed "Respondents' Response Complainant's Appeal Petition." On December 24, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

On February 9, 2004, I vacated the ALJ's denial of Complainant's Motion for Default Decision and remanded the proceeding to the ALJ to

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[7]Respondents' Opposition to Complainant's Motion for Adoption of Proposed Decision and Order Upon Admission of Facts by Reason of Default at 2-3.

[8]Complainant's Reply to Respondents' Opposition to Complainant's Motion for Decision and Order by Reasons of Default at 1-3.

[9]"Ruling Denying Complainant's Motion for Adoption of a Default Decision; and Order to Show Cause Why Case Should Not Be Dismissed, Based on Respondents' Third Affirmative Defense re: Statutes of Limitations."

issue a decision in accordance with the Rules of Practice.[10] On remand, the ALJ: (1) ruled Respondents filed meritorious objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision; (2) denied Complainant's Motion for Default Decision and Complainant's Proposed Default Decision; (3) granted Respondents' request to file their answer to the Complaint; and (4) accepted for filing Respondents' Answer to Complaint filed February 12, 2003.[11]

On April 16, 2004, Complainant filed "Complainant's Appeal Petition." On May 12, 2004, Respondents filed "Respondents' Response to Complainant's Appeal Petition." On May 14, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I disagree with the ALJ's determination that Respondents filed meritorious objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. Therefore, I: (1) reverse the ALJ's February 27, 2004, rulings (a) denying Complainant's Motion for Default Decision and Complainant's Proposed Default Decision, (b) granting Respondents' request to file their answer to the Complaint, and (c) accepting for filing Respondents' Answer to Complaint filed February 12, 2003; and (2) issue this Decision and Order based upon Respondents' failure to file a timely answer to the Complaint.

APPLICABLE STATUTES AND REGULATIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 38—DISTRIBUTION AND MARKETING OF

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[10]*In re Lion Raisins, Inc.*, 63 Agric. Dec. ___ (Feb. 9, 2004) (Order Vacating the ALJ's Denial of Complaint's Motion for Default Decision and Remand Order).

[11]"Ruling Denying Stay; Ruling on Remand from the Judicial Officer; and Ruling Granting Respondents' Request to File an Answer."

AGRICULTURAL PRODUCTS

. . . .

§ 1622. Duties of Secretary relating to agricultural products

The Secretary of Agriculture is directed and authorized:

. . . .

(h) Inspection and certification of products in interstate commerce; credit and future availability of funds; investment; certificates as evidence; penalties

To inspect, certify, and identify the class, quality, quantity, and condition of agricultural products when shipped or received in interstate commerce, under such rules and regulations as the Secretary of Agriculture may prescribe[.]

7 U.S.C. § 1622(h) (1994).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER I—AGRICULTURAL MARKETING SERVICE (STANDARDS, INSPECTIONS, MARKETING PRACTICES), DEPARTMENT OF AGRICULTURE

. . . .

SUBCHAPTER C—REGULATIONS AND STANDARDS UNDER THE AGRICULTURAL MARKETING ACT OF 1946

. . . .

PART 52—PROCESSED FRUITS AND VEGETABLES, PROCESSED PRODUCTS THEREOF, AND CERTAIN OTHER PROCESSED FOOD PRODUCTS

SUBPART—REGULATIONS GOVERNING INSPECTION AND CERTIFICATION

. . . .

MISCELLANEOUS

. . . .

§ 52.54 Debarment of service.

(a) The following acts or practices, or the causing thereof, may be deemed sufficient cause for the debarment, by the Administrator, of any person, including any agents, officers, subsidiaries, or affiliates of such person, from any or all benefits of the Act for a specified period. The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes set forth in §§ 1.130 through 1.151 of this title and the Supplemental Rules of Practice in part 50 of this chapter shall be applicable to such debarment action.

(1) *Fraud or misrepresentation*. Any misrepresentation or deceptive or fraudulent practice or act found to be made or committed in connection with:

(I) The making or filing of an application for any inspection service;

(ii) The submission of samples for inspection;

(iii) The use of any inspection report or any inspection certificate, or appeal inspection certificate issued under the regulations in this part;

(iv) The use of the words "Packed under continuous inspection of the U.S. Department of Agriculture," any legend signifying that

the product has been officially inspected, any statement of grade or words of similar import in the labeling or advertising of any processed product;

(v) The use of a facsimile form which simulates in whole or in part any official U.S. certificate for the purpose of purporting to evidence the U.S. grade of any processed product.

(2) *Wilful violation of the regulations in this subpart.* Wilful violation of the provisions of this part of the Act.

(3) *Interfering with an inspector, inspector's aid, or licensed sampler.* Any interference with, obstruction of, or attempted interference with, or attempted obstruction of any inspector, inspector's aide, or licensed sampler in the performance of his duties by intimidation, threat, assault, bribery, or any other means–real or imagined.

7 C.F.R. § 52.54.

DECISION

Statement of the Case

Respondents failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) and the failure to deny or otherwise respond to an allegation of the complaint shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Lion Raisins, Inc., is a California corporation formerly known as Lion Enterprises, Inc., and doing business as a producer, packer, and seller of processed raisins. On September 13, 1999, Lion Enterprises, Inc., changed its registered name to Lion Raisins, Inc., by filing a Certificate of Amendment (Amendment No. AO532208) with the California Secretary of State. Respondent Lion Raisins, Inc.'s principal place of business is and was 3310 E. California Avenue, Fresno, California 93702. Respondent Lion Raisins, Inc.'s agent for service of process is Al Lion, 3310 E. California Avenue, Fresno, California 93702.

2. Respondent Lion Raisin Company is a partnership or unincorporated association doing business as a producer, packer, and seller of processed raisins, and located at 9500 South DeWolf Avenue, Selma, California 93662. Respondent Al Lion, Jr., Respondent Dan Lion, Respondent Bruce Lion, and Respondent Jeff Lion are principals of Respondent Lion Raisin Company.

3. Respondent Lion Packing Company is a partnership or unincorporated association doing business as a producer, packer, and seller of processed raisins, and located at 9500 South DeWolf Avenue, Selma, California 93662. Respondent Al Lion, Jr., Respondent Dan Lion, Respondent Bruce Lion, and Respondent Jeff Lion are principals of Respondent Lion Packing Company.

4. Respondent Al Lion, Jr., is an individual whose business mailing address is 9500 South DeWolf Avenue, Selma, California 93662. At all times material to this proceeding, Respondent Al Lion, Jr., was president of Respondent Lion Raisins, Inc., and a partner in, or principal of, Respondent Lion Raisin Company and Respondent Lion Packing Company.

5. Respondent Dan Lion is an individual whose business mailing address is 9500 South DeWolf Avenue, Selma, California 93662. At all times material to this proceeding, Respondent Dan Lion was a vice president of Respondent Lion Raisins, Inc., and a partner in, or principal of, Respondent Lion Raisin Company and Respondent Lion Packing Company.

6. Respondent Jeff Lion is an individual whose business mailing

address is 9500 South DeWolf Avenue, Selma, California 93662. At all times material to this proceeding, Respondent Jeff Lion was a vice president of Respondent Lion Raisins, Inc., and a partner in, or principal of, Respondent Lion Raisin Company and Respondent Lion Packing Company.

7. Respondent Bruce Lion is an individual whose business mailing address is 9500 South DeWolf Avenue, Selma, California 93662. At all times material to this proceeding, Respondent Bruce Lion was a vice president of Respondent Lion Raisins, Inc., and a partner in, or principal of, Respondent Lion Raisin Company and Respondent Lion Packing Company.

8. On or about August 26, 1997, Respondents caused the issuance of a false inspection certificate (Certificate of Quality and Condition) with respect to raisins sold by Respondents to purchaser Ka Vo Mao, Iec Cong Si, in Macau, by altering, or causing to be altered, the moisture content reading as determined by a United States Department of Agriculture inspector, in willful violation of section 203(h) of the Agricultural Marketing Act (7 U.S.C. § 1622(h)) and section 52.54(a)(2) of the Regulations (7 C.F.R. § 52.54(a)(2)).

9. On or about August 26, 1997, Respondents caused the issuance and use of a facsimile form which simulated an official U.S. inspection certificate (Certificate of Quality and Condition (Processed Foods)), and which falsely purported to evidence the quality and moisture content of raisins sold by Respondents to purchaser Ka Vo Mao, Iec Cong Si, in Macau, as having been determined by a United States Department of Agriculture inspector, in willful violation of section 203(h) of the Agricultural Marketing Act (7 U.S.C. § 1622(h)) and section 52.54(a)(2) of the Regulations (7 C.F.R. § 52.54(a)(2)).

10. On or about August 26, 1997, Respondents engaged in misrepresentation or deceptive or fraudulent practices or acts in connection with the use of at least one inspection certificate, in violation of section 52.54(a)(1)(iii) of the Regulations (7 C.F.R. § 52.54(a)(1)(iii)).

11. The acts and practices of Respondents, described in findings of fact numbers 8, 9, and 10, constitute sufficient cause for the debarment of each Respondent from the benefits of the Agricultural Marketing Act,

including inspection and grading services, for a specified period, in accordance with section 52.54(a) of the Regulations (7 C.F.R. § 52.54(a)).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. By reason of the facts set forth in the findings of fact, Respondents violated section 203(h) of the Agricultural Marketing Act (7 U.S.C. § 1622(h)) and section 52.54(a) of the Regulations (7 C.F.R. § 52.54(a)).

COMPLAINANT'S APPEAL PETITION

Complainant appeals the ALJ's February 27, 2004, ruling: (1) finding Respondents filed meritorious objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision; (2) denying Complainant's Motion for Default Decision and Complainant's Proposed Default Decision; (3) granting Respondents' request to file their answer to Complaint; and (4) accepting for filing Respondents' Answer to Complaint filed February 12, 2003.

Respondents objected to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on the ground that Respondents' Motion to Dismiss Complaint, filed December 20, 2002, constitutes a timely response to the Complaint.[12] I find the ALJ erroneously found Respondents' objection meritorious and erroneously denied Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.

On October 11, 2002, Complainant filed a Complaint alleging Respondents violated the Agricultural Marketing Act and the Regulations. The Hearing Clerk served Respondents with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter dated October 11, 2002, during the period October 22, 2002, through

[12]Respondents' Opposition to Complainant's Motion for Adoption of Proposed Decision and Order Upon Admission of Facts by Reason of Default at 2.

November 5, 2002.[13] The Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

§ 1.136 Answer.

(a) *Filing and service*. Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . . .

. . . .

(c) *Default*. Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further

[13]*See* note 1.

procedure or hearing.

§ 1.141 Procedure for hearing.

(a) *Request for hearing*. Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint informs Respondents of the consequences of failing to file a timely answer, as follows:

WHEREFORE, it is hereby ordered that for the purpose of determining whether respondents have in fact violated the Regulations, this complaint shall be served upon said respondents, each of whom shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing this proceeding, 7 C.F.R. §§ 1.130-1.151 and §§ 50.1-50.40. The failure to file an answer to this complaint constitutes an admission of all of the material allegations contained therein.

Compl. at 4.

Similarly, the Hearing Clerk, in the October 11, 2002, service letter, informed Respondents that a timely answer must be filed pursuant to the Rules of Practice and that failure to file a timely answer to any allegation in the Complaint would constitute an admission of that allegation, as follows:

October 11, 2002

Mr. Al Lion,
Lion Raisins, Inc.,
3310 E. California Street,

Fresno, California 93702

Lion Raisin Company
Lion Packing Company
9500 South DeWolf Avenue
Selma, California 93662

Mr. Al Lion, Jr.
Mr. Dan Lion
Mr. Bruce Lion
Mr. Jeff Lion
9500 South DeWolf Avenue
Selma, California 93662

Gentlemen:

Subject: In re Lion Raisins, Inc., a California corporation formerly known as Lion Enterprises, Inc.; Lion Raisin Company, a partnership or unincorporated association; Lion Packing Company, a partnership or unincorporated association; Al Lion, Jr. an individual; Dan Lion, an individual; Jeff Lion, an individual; and Bruce Lion, an individual, Respondents
I&G Docket No. 03-0001

Enclosed is a copy of a Complaint, which has been filed with this office under the Agricultural Marketing Act, as amended.

Also enclosed is a copy of the rules of practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in

your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have **20 days from the receipt of this letter to file with the Hearing Clerk an original and four copies of your written and signed answer to the complaint**. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding, should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case should be directed to the attorney whose name and telephone number appear on the last page of the complaint.

Sincerely,
/s/
Joyce A. Dawson

Hearing Clerk

Respondents failed to file a timely answer, and, instead, filed Respondents' Motion to Dismiss Complaint. The Rules of Practice provide that an answer must contain the following:

> **§ 1.136 Answer.**
>
> . . . .
>
> (b) *Contents*. The answer shall:
>
> (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defenses asserted by the respondent; or
>
> (2) State that respondent admits all the facts alleged in the complaint; or
>
> (3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

7 C.F.R. § 1.136(b).

Generally, a motion to dismiss is not considered to be a responsive pleading[14] and Respondents' Motion to Dismiss Complaint does not meet the requirements in section 1.136(b) of the Rules of Practice (7 C.F.R. § 1.136(b)) for an answer. Moreover, under the Rules of Practice,

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[14]*Shaver v. Operating Engineers Local 428 Pension Trust Fund*, 332 F.3d 1198, 1201 (9th Cir. 2003) (stating a motion to dismiss is not a responsive pleading within the meaning of Fed. R. Civ. P. 15(a)); *In re Republic of the Philippines*, 309 F.3d 1143, 1151 (9th Cir. 2002) (stating a motion to dismiss is not a responsive pleading); *Crum v. Circus Circus Enterprises*, 231 F.3d 1129, 1130 n.3 (9th Cir. 2000) (stating a motion to dismiss is not a responsive pleading within the meaning of Fed. R. Civ. P. 15); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764, 788 (9th Cir. 2000) (stating a motion to dismiss is not a pleading), *aff'd*, 535 U.S. 302 (2002); *Miles v. Department of the Army*, 881 F.2d 777, 781 (9th Cir. 1989) (stating a motion to dismiss the complaint is not a responsive pleading).

Respondents' Motion to Dismiss Complaint cannot be entertained.[15]

Respondents filed a request to file an answer to the Complaint and Respondents' Answer to Complaint on February 12, 2003, 50 days after Respondents' answer was due. Respondents' failure to file a timely answer to the Complaint is deemed, for purposes of this proceeding, an admission of the allegations in the Complaint and constitutes a waiver of hearing.[16]

Accordingly, there are no issues of fact on which a meaningful hearing could be held in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondents of rights under the due process clause of the Fifth Amendment to the Constitution of the United States.[17]

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[15]7 C.F.R. § 1.143(b)(1). *In re Judie Hansen*, 57 Agric. Dec. 1072, 1074-75 (1998) (stating under the Rules of Practice any motion will be entertained other than a motion to dismiss on the pleading), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam), *printed in* 59 Agric. Dec. 533 (2000); *In re Lindsay Foods, Inc.*, 56 Agric. Dec. 1643, 1650 (1997) (Remand Order) (stating 7 C.F.R. § 1.143(b)(1) prohibits administrative law judges and the judicial officer from entertaining a motion to dismiss on the pleading); *In re Far West Meats*, 55 Agric. Dec. 1045, 1049 (Clarification of Ruling on Certified Questions) (stating 7 C.F.R. § 1.143(b)(1) prohibits an administrative law judge from entertaining a motion to dismiss on the pleading); *In re All-Airtransport, Inc.*, 50 Agric. Dec. 412, 414 (1991) (Remand Order) (holding the administrative law judge erred in dismissing the complaint since the judicial officer and the administrative law judge are bound by the Rules of Practice which provide that any motion will be entertained other than a motion to dismiss on the pleading); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (Ruling on Certified Question) (stating the judicial officer, as well as the administrative law judge, is bound by the Rules of Practice, and under the Rules of Practice, the judicial officer has no discretion to entertain a motion to dismiss on the pleading). *Cf. In re Don Van Liere*, 34 Agric. Dec. 1641 (1975) (Order of Dismissal) (stating the purpose of 9 C.F.R. § 202.10(b), which provides that, in proceedings under the Packers and Stockyards Act, 1921, as amended and supplemented, any motion will be entertained "except a motion to dismiss on the pleadings," is to prevent a respondent from filing a motion to dismiss on the pleadings).

[16]7 C.F.R. §§ 1.136(c), .139, .141(a).

[17]*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding that a hearing was not required under the Fifth Amendment to the

(continued...)

For the foregoing reasons, the following Order should be issued.

ORDER

Respondents, their agents, officers, subsidiaries, and affiliates, directly or indirectly through any corporate or other device, are debarred for 1 year from receiving inspection services under the Agricultural Marketing Act.

This Order shall become effective 30 days after service of this Order on Respondents.

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[17](...continued)
Constitution of the United States where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating that due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

ORGANIC FOOD PRODUCTION ACT

COURT DECISIONS

ARTHUR HARVEY v. USDA.
No. CIV. 02-216-P-H.
Filed January 7, 2004.

(Cite as : 297 F.Supp.2d 334)

OFPA – Wild crops – Organic status – Prohibited substances – Carry forward requirements – "Area," definition of.

On appeal, Court rejected Respondent's position that the Organic Food Production Act (OFPA) prohibited a producer from crop rotation practices where "wild" crops are periodically rotated with "non-wild" crops. Respondent urged that OFPA required producers to follow land management practices which prevented contact between "wild" crops with prohibited substances (presumably non-organically raised crops).

United States District Court,
D. Maine

ORDER AFFIRMING IN PART AND REJECTING IN PART RECOMMENDED DECISION OF THE MAGISTRATE JUDGE

HORNBY, District Judge.

The United States Magistrate Judge filed with the court on October 10, 2003, with copies to the parties, her Recommended Decision on Cross Motions for Summary Judgment. Both parties filed objections to the Recommended Decision on November 10, 2003.[1] I have reviewed and

[1]The plaintiff also filed a motion to narrow the scope of Counts Three and Five of the Complaint on December 8, 2003. (Docket Item 54). The defendant responded that (continued...)

considered the Recommended Decision, together with the entire record; I have made a *de novo* determination of all matters adjudicated by the Recommended Decision; and, with regard to Counts One through Eight of the Complaint, I concur with the recommendations of the United States Magistrate Judge for the reasons set forth in her Recommended Decision, and determine that no further proceeding is necessary. For the reasons that follow, I reject the Magistrate Judge's resolution of Count Nine.

In Count Nine of his Complaint, Arthur Harvey contends that the Secretary failed to implement a provision in the Federal Organic Foods Production Act of 1990 ("OFPA"), 7 U.S.C. §§ 6501-6522 (1999). The specific provision is section 6513(f)(4), which provides that an organic plan for the harvesting of wild crops must include, among other things, "provisions that no prohibited substances will be applied by the producer." The regulation that Harvey claims fails to implement this section is 7 C.F.R. § 205.207 (2003). Section 205.207 does not address organic plans, however; it provides the standards for wild crop harvesting. The regulation dealing with the content of organic plans is 7 C.F.R. § 205.201. It provides, in part, that an organic production plan for agricultural products must contain "[a] description of the management practices and physical barriers established ... to prevent contact of organic production and handling operations and products with prohibited substances." By requiring that organic plans contain assurances that prohibited substances will not be applied, 7 C.F.R. § 205.201 implements section 6513(f)(4) of the statute.

Harvey urges a different reading of 7 U.S.C. § 6513(f)(4) and argues that it operates to "carry forward" the requirement that no prohibited substances be applied to the land. He maintains that the provision prevents producers from rotating wild crop lands in and out of organic

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[1](...continued)
she had "no objection to Plaintiff withdrawing ... any of his claims." (Docket Item 55). Accordingly, the plaintiff's motion is **GRANTED**.

status. But there simply is nothing in the statute to support this reading of the provision.

In her Recommended Decision sending the regulation back to the Secretary, the Magistrate Judge focuses on the statute's use of the word "area." The geographic breadth of the prohibition was never argued, however, and so is not before the court. I therefore reject the Magistrate Judge's recommendation regarding Count Nine of the Complaint.

It is therefore **ORDERED** that the Recommended Decision of the Magistrate Judge is hereby **ADOPTED IN PART** and **REJECTED IN PART**. The plaintiff's motion for summary judgment is **DENIED** and the defendant's motion for summary judgment is **GRANTED**.

SO ORDERED.

ARTHUR HARVEY v. USDA.
No. CIV.02-216-P-H.
Filed April 1, 2004.

(Cite as: 222 F.R.D. 213).

OFPA – Intervene, motion to, when timely filed – Remand, request for post-judgment.

Court denied the application to intervene by various organizations and individuals after judgement was entered in favor of the Secretary. The Court favorably cited *Banco Popular de Puerto Rico*, 964 F. 2d. 1227, 1231 for the caselaw relating to determination of timeliness of a motion to intervene.

United States District Court,
D. Maine

ORDER ON MOTIONS TO INTERVENE

HORNBY, District Judge.

The issue here is whether a post-judgment application to intervene is timely under Federal Rule of Civil Procedure 24 and whether I should request a remand from the Court of Appeals so that I can rule on the intervention application. I conclude that the intervention is not timely and that I should not request a remand.

PROCEDURAL BACKGROUND

In this case a pro se litigant, Arthur Harvey, challenged regulations adopted by the United States Department of Agriculture. He filed his lawsuit on October 23, 2002. On October 10, 2003, the Magistrate Judge issued a Report and Recommended Decision on cross-motions for summary judgment. After briefing of objections to the Recommended Decision, I affirmed in part and rejected in part the recommended decision by Order dated January 7 and filed January 8, 2004. Judgment entered January 8, 2004, in favor of the Secretary of Agriculture. On February 25, 2004, lawyers entered their appearance on behalf of the previously pro se plaintiff. Between February 25, 2004 and March 5, 2004, three organizations (Organic Consumers Association; Beyond Pesticides/National Coalition Against the Misuse of Pesticides; Northeast Organic Farming Association/Massachusetts Chapter, Inc.) and three individuals (John Clark; Merrill Clark; Anne Mendenhall) sought to intervene. The same local and D.C. counsel represent them all, including the previously pro se plaintiff. On March 8, 2004, the plaintiff filed his notice of appeal from the January 8 judgment.

The Secretary of Agriculture resists the application to intervene. One organization, Beyond Pesticides/National Coalition Against the Misuse of Pesticides, has changed its mind and has withdrawn its application to intervene, preferring to proceed in the court of appeals as amicus curiae. The remaining would-be intervenors, uncertain of jurisdiction following the filing of Harvey's notice of appeal, Reply Mem. at 2-3, suggest that I request a remand from the court of appeals, following the procedure of

Jusino v. Zayas, 875 F.2d 986 (1st Cir.1989), so that I can rule on their application. I decline to do so. Federal Rules of Civil Procedure 24(a) and (b) both require that an intervention application be "timely." This one is not. "If the motion was not timely, there is no need for the court to address the other factors that enter into an intervention analysis." *Associated Builders & Contractors, Inc. v. Herman,* 166 F.3d 1248, 1257 (D.D.C.1999).

ANALYSIS

Generally, postjudgment applications to intervene are disfavored. *Associated Builders,* 166 F.3d at 1257 ("A motion for 'intervention after judgment will usually be denied where a clear opportunity for pre-judgment intervention was not taken.' ") (citation omitted); *Banco Popular de Puerto Rico v. Greenblatt,* 964 F.2d 1227, 1231 (1st Cir.1992) ("[C]ourts have historically viewed post-judgment intervention with a jaundiced eye in situations where the applicant had a reasonable basis for knowing, before final judgment, that its interest was at risk"). The rule is not absolute, however. *Public Citizen v. Liggett Group Inc.,* 858 F.2d 775, 784 (1st Cir.1988) ("not altogether rare"); *Fiandaca v. Cunningham,* 827 F.2d 825, 833 (1st Cir.1987).

In deciding whether an application is timely, the First Circuit caselaw directs me to consider the following: (1) how long the applicant knew or reasonably should have known that its interests were imperiled; (2) foreseeable prejudice to the applicant if intervention is denied; (3) foreseeable prejudice to the parties if intervention is allowed; and (4) any exceptional circumstances. *Banco Popular de Puerto Rico,* 964 F.2d at 1231.

Treating the factors in reverse order, I find first that there are no exceptional circumstances.

Second, the prejudice to the applicants in denying intervention seems minimal. They are not parties, and therefore collateral estoppel does not

stop them from litigating the issues (here, the validity of certain USDA regulations) on their own. There may be some stare decisis effect from an appellate decision in this case, although in a succeeding lawsuit these nonparties could seek to minimize the effect of any precedent by the same arguments they make here about Harvey's ability to proceed pro se.[1] Indeed, if I permit them to become parties, they will be bound by whatever waivers or concessions pro se litigant Harvey may already have committed in the trial court, and res judicata may prevent them in the future from raising all issues raised or that could have been raised, *Bay State HMO Mgmt., Inc. v. Tingley Sys.,* 181 F.3d 174, 177 (1st Cir.1999), unlike the situation if they remain nonparties.

Third, I do not see any prejudice to the current parties in allowing intervention. This case was decided on summary judgment, and was not the product of a negotiated settlement or consent decree. *See Banco Popular de Puerto Rico,* 964 F.2d at 1232; *Culbreath v. Dukakis,* 630 F.2d 15, 22 (1st Cir.1980). Having more parties appeal my decision is attractive to the plaintiff but does not harm the Secretary.

Fourth, the would-be intervenors admit that they "were aware shortly before this suit was filed in October, 2002, that Harvey was going to file a suit challenging some of the USDA regulations." Mot. to Intervene at 3 (Docket item 61). They did nothing to follow up on this knowledge. They state that they "were unaware of the specifics of the suit, and of its progress, until they were contacted by Harvey after the order and judgment of January 8, 2004." *Id.* "[I]t is not the simple fact of knowing that a litigation exists that triggers the obligation to file a timely application for intervention. Rather, the appropriate inquiry is when the

[1]I am assuming from the nature of the arguments that the legal representation Harvey now has on appeal will disappear if the applications to intervene are denied. That does not necessarily follow. Now that the lawyers have appeared on his behalf, it will be up to the First Circuit to decide whether to allow them to withdraw. Perhaps Harvey will continue to have legal representation on appeal even if the interventions are denied. That would reduce even further any prejudice to the applicants, who focus primarily on Harvey's inability to pursue the matter on his own.

intervenor became aware that its interest in the case would no longer be adequately protected by the parties." *Public Citizen v. Liggett Group Inc.,* 858 F.2d 775, 785 (1st Cir.1988). But "the law contemplates that a party must move to protect its interest no later than when it gains some actual knowledge that a measurable risk exists." *Banco Popular de Puerto Rico,* 964 F.2d at 1231. The applicants here simply shed no light on this important issue. They have not, for example, told me that they were unaware that Harvey was proceeding without a lawyer. Instead, they have suggested absolutely no reason for their failure to show interest earlier in the progress of Harvey's lawsuit.[2] The court's case files are public; indeed, since October 1, 2003, they have been available electronically.

Looking therefore at the four factors, I conclude that three have very little effect, but that one, the applicants' knowledge that they should have done something earlier, cuts strongly in favor of denying intervention under both 24(a) and (b). To permit intervention here on this weak showing would allow any individual or organization to sit by idly and watch litigation in which it has an interest, then intervene only if the judgment turns out different from what it had hoped.

Of course, the whole purpose of the applications for intervention in this case is to affect the appeal, not activity in this court, which is over.

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[2]This case is therefore unlike *Fiandaca v. Cunningham,* 827 F.2d 825 (1st Cir.1987), where the applicants' interest was created by a new development on the eve of trial, or *United Airlines Inc. v. McDonald,* 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977), where "the would-be intervenor found out only after final judgment that the plaintiffs did not plan to appeal the denial of class certification," or *Dimond v. District of Columbia,* 792 F.2d 179 (D.D.C.1986), where "the potential inadequacy of [the existing parties'] representation came into existence only at the appellate stage." *Associated Builders,* 166 F.3d at 1257.

The First Circuit, therefore, may choose to take a different view of the matter, if asked.

I decline to request a remand to rule on the motions to intervene.

SO ORDERED.

GENERAL

MISCELLANEOUS ORDERS

In re: LION RAISINS, INC., A CALIFORNIA CORPORATION.
2002 AMA Docket No. F&V 989-1.
Second Remand Order.
Filed January 22, 2004.

AMAA – Raisin Order – Petition contents – Motion to Dismiss.

The Judicial Officer (JO) affirmed Administrative Law Judge Leslie B. Holt's Order denying Respondent's Motion to Dismiss Amended Petition. The JO rejected Respondent's contention that Petitioner's Amended Petition did not comply with the requirements in 7 C.F.R. § 900.52(b)(3)-(5). The JO found that Petitioner's Amended Petition substantially complied in form and content with the requirements in 7 C.F.R. § 900.52(b).

Colleen A. Carroll, for Respondent.
Brian C. Leighton, for Petitioner.
Order issued by Leslie B. Holt, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Lion Raisins, Inc., a California corporation [hereinafter Petitioner], instituted this proceeding by filing a Petition[1] on August 5, 2002. Petitioner instituted the proceeding under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA]; the federal marketing order regulating the handling of "Raisins Produced From Grapes Grown In California" (7 C.F.R. pt. 989) [hereinafter the Raisin Order]; and the Rules of Practice Governing Proceedings on Petitions To

[1]Petitioner entitles its Petition "Petition to Modify Raisin Marketing Order Provisions/Regulations and/or Petition to the Secretary of Agriculture to Set Aside Reserve Percentages of Other Seedless Raisins Pursuant to 7 C.F.R. § 989.1 *Et Seq*. and to Exempt Petitioner from Various Provisions of the Raisin Marketing Order and/or Any Obligations Imposed in Connection Therewith That Are Not in Accordance with Law" [hereinafter Petition].

Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice].

The Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a "Motion to Dismiss Petition," and on May 14, 2003, Administrative Law Judge Jill S. Clifton dismissed the Petition.

On May 16, 2003, Petitioner filed an Amended Petition.[2] On August 1, 2003, Respondent filed a "Motion to Dismiss Amended Petition." On November 3, 2003, Petitioner filed "Petitioner's Opposition to Respondent's Motion to Dismiss Amended Petition." On November 6, 2003, Administrative Law Judge Leslie B. Holt [hereinafter the ALJ] issued an "Order" denying Respondent's Motion to Dismiss Amended Petition.

On December 5, 2003, Respondent appealed to the Judicial Officer. On December 31, 2003, Petitioner filed "Petitioner's Response to Respondent's Second Appeal Petition." On January 13, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the ALJ's November 6, 2003, Order denying Respondent's Motion to Dismiss Amended Petition.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE—7 AGRICULTURE

. . . .

CHAPTER 26—AGRICULTURAL ADJUSTMENT

[2]Petitioner entitles its Amended Petition "Amended Petition to Modify Raisin Marketing Order Provisions/Regulations and/or Petition to the Secretary of Agriculture to Set Aside Reserve Percentages of Other Seedless Raisins Pursuant to 7 C.F.R. § 989.1 *Et Seq*. and to Exempt Petitioner from Various Provisions of the Raisin Marketing Order and/or Any Obligations Imposed in Connection Therewith That Are Not in Accordance with Law" [hereinafter Amended Petition].

. . . .

SUBCHAPTER III—COMMODITY BENEFITS

. . . .

§ 608c. Orders regulating handling of commodity

. . . .

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

7 U.S.C. § 608c(15)(A).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER IX—AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; FRUITS, VEGETABLES, NUTS), DEPARTMENT OF AGRICULTURE

PART 900—GENERAL REGULATIONS

. . . .

SUBPART—RULES OF PRACTICE GOVERNING PROCEEDINGS ON PETITIONS TO MODIFY OR TO BE EXEMPTED FROM MARKETING ORDERS

. . . .

§ 900.52 Institution of proceeding.

(a) *Filing and service of petition*. Any handler desiring to complain that any marketing order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law, shall file with the hearing clerk, in quadruplicate, a petition in writing addressed to the Secretary. Promptly upon receipt of the petition, the hearing clerk shall transmit a true copy thereof to the Administrator and the General Counsel, respectively.

(b) *Contents of petition*. A petition shall contain:

(1) The correct name, address, and principal place of business of the petitioner. If petitioner is a corporation, such fact shall be stated, together with the name of the State of incorporation, the date of incorporation, and the names, addresses, and respective positions held by its officers; if an unincorporated association, the names and addresses of its officers, and the respective positions held by them; if a partnership, the name and address of each partner;

(2) Reference to the specific terms or provisions of the marketing order, or the interpretation or application thereof, which are complained of;

(3) A full statement of the facts (avoiding a mere repetition of detailed evidence) upon which the petition is based, and which it is desired that the Secretary consider, setting forth clearly and concisely the nature of the petitioner's business and the manner in which petitioner claims to be affected by the terms or provisions of the marketing order, or the interpretation or application thereof,

which are complained of;

(4) A statement of the grounds on which the terms or provisions of the marketing order, or the interpretation or application thereof, which are complained of, are challenged as not in accordance with law;

(5) Prayers for the specific relief which the petitioner desires the Secretary to grant;

(6) An affidavit by the petitioner, or, if the petitioner is not an individual, by an officer of the petitioner having knowledge of the facts stated in the petition, verifying the petition and stating that it is filed in good faith and not for purposes of delay.

(c) *Motion to dismiss petition*–(1) *Filing, contents, and responses thereto*. If the Administrator is of the opinion that the petition, or any portion thereof, does not substantially comply, in form or content, with the act or with the requirements of paragraph (b) of this section, or is not filed in good faith, or is filed for purposes of delay, the Administrator may, within thirty days after the service of the petition, file with the Hearing Clerk a motion to dismiss the petition, or any portion thereof, on one or more of the grounds stated in this paragraph. Such motion shall specify the grounds of objection to the petition and if based, in whole or in part, on an allegation of fact not appearing on the face of the petition, shall be accompanied by appropriate affidavits or documentary evidence substantiating such allegations of fact. The motion may be accompanied by a memorandum of law. Upon receipt of such motion, the Hearing Clerk shall cause a copy thereof to be served upon the petitioner, together with a notice stating that all papers to be submitted in opposition to such motion including any memorandum of law, must be filed by the petitioner with the hearing clerk not later than 20 days after the service of such notice upon the petitioner. Upon the expiration of the time specified in such notice, or upon receipt of such papers from the petitioner, the hearing clerk shall transmit all papers which have been filed in connection with the motion to the Judge for consideration.

> (2) *Decision by the Judge*. The Judge, after due consideration, shall render a decision upon the motion stating the reasons for his action. Such decision shall be in the form of an order and shall be filed with the hearing clerk who shall cause a copy thereof to be served upon the petitioner and a copy thereof to be transmitted to the Administrator. Any such order shall be final unless appealed pursuant to § 900.65: *Provided*, That within 20 days following the service upon the petitioner of a copy of the order of the Judge dismissing the petition, or any portion thereof, on the ground that it does not substantially comply in form and content with the act or with paragraph (b) of this section, the petitioner shall be permitted to file an amended petition.

7 C.F.R. § 900.52(a)-(c)(2).

CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises three issues in "Respondent's Second Appeal Petition." First, Respondent contends the ALJ's finding that the Amended Petition contains a full statement of the facts, including the manner in which Petitioner claims to be affected by the Raisin Order, is error (Respondent's Second Appeal Pet. at 4-7).

Section 900.52(b)(3) of the Rules of Practice (7 C.F.R. § 900.52(b)(3)) provides that a petition must contain a full statement of facts upon which the petition is based, including the manner in which the petitioner claims to be affected by the provisions of the marketing order about which the petitioner complains. The ALJ, quoting paragraph 11 of the Amended Petition, concluded that the Amended Petition contains a full statement of facts upon which the Amended Petition is based, including the manner in which Petitioner claims to be affected by the provisions of the Raisin Order about which Petitioner complains (Order dated November 6, 2003, at 1). Based upon a careful review of the Amended Petition, I agree with the ALJ's conclusion that the Amended Petition contains a full statement of facts upon which the Amended Petition is based, including the manner in which Petitioner claims to be

affected by the provisions of the Raisin Order about which Petitioner complains.

Second, Respondent contends the ALJ's finding that the Amended Petition contains the statement required by section 900.52(b)(4) of the Rules of Practice (7 C.F.R. § 900.52(b)(4)), is error (Respondent's Second Appeal Pet. at 8-9).

Section 900.52(b)(4) of the Rules of Practice (7 C.F.R. § 900.52(b)(4)) provides that a petition must contain a statement of the grounds on which the petitioner challenges the provisions of the marketing order about which the petitioner complains, as not in accordance with law. The ALJ, citing Petitioner's allegations in paragraph 14 of the Amended Petition, concluded that the Amended Petition contains a statement of the grounds on which Petitioner challenges the provisions of the Raisin Order about which Petitioner complains, as not in accordance with law (Order dated November 6, 2003, at 1). Based upon a careful review of the Amended Petition, I agree with the ALJ's conclusion that the Amended Petition contains a statement of the grounds on which Petitioner challenges the provisions of the Raisin Order about which Petitioner complains, as not in accordance with law.

Third, Respondent contends the ALJ erroneously concluded that section 900.52(b)(5) of the Rules of Practice (7 C.F.R. § 900.52(b)(5)) requires that a petition state grounds upon which relief can be granted and that the Amended Petition meets this requirement (Respondent's Second Appeal Pet. at 9).

Section 900.52(b)(5) of the Rules of Practice (7 C.F.R. § 900.52(b)(5)) provides that a petition must contain prayers for the specific relief which the petitioner desires the Secretary of Agriculture to grant. The ALJ erroneously concluded section 900.52(b)(5) of the Rules of Practice (7 C.F.R. § 900.52(b)(5)) requires that a petition state "grounds upon which relief can be granted" (Order dated November 6, 2003, at 2). I find the ALJ's error harmless. Paragraph 18 of the Amended Petition sets forth prayers for the specific relief that Petitioner desires the Secretary of Agriculture to grant, as required by section 900.52(b)(5) of the Rules of Practice (7 C.F.R. § 900.52(b)(5)).

I conclude that the Amended Petition substantially complies in form and content with section 900.52(b) of the Rules of Practice (7 C.F.R. § 900.52(b)).

For the foregoing reasons, the following Order should be issued.

ORDER

1. The ALJ's Order dated November 6, 2003, denying Respondent's Motion to Dismiss Amended Petition is affirmed.

2. The proceeding is remanded to the ALJ to conduct proceedings in accordance with the Rules of Practice.

In re: PROCACCI BROTHERS SALES CORPORATION, GARGIULO, INC., AND AG MART, INC., a/k/a SANTA SWEETS, INC.
2004 AMA Docket No. F&V 966-1.
Order Denying Interim Relief.
Filed March 2, 2004.

AMAA – Agricultural Marketing Agreement Act – Tomatoes grown in Florida – Interim relief.

The Judicial Officer (JO) denied Petitioners' application for interim relief based upon established precedent. The JO stated he has consistently denied applications for interim relief from marketing orders because interim relief would work in opposition to the purposes of the marketing order from which interim relief is sought and the act under which the marketing order is issued, and could harm the public interest if provisions of the marketing order were, in effect, suddenly terminated by granting interim relief to the applicant and others who plan to file similar applications for interim relief.

Frank Martin, Jr., for Respondent.
Nathan E. Kase, Abbe F. Fletman, and Andrew C. Curley, for Petitioners.
Order issued by William G. Jenson, Judicial Officer.

On January 6, 2004, Procacci Brothers Sales Corporation, Gargiulo,

Inc., and Ag Mart, Inc., n/k/a Santa Sweets, Inc. [hereinafter Petitioners], instituted this proceeding by filing "Petition of Procacci Brothers Sales Corporation, Gargiulo, Inc. and Ag Mart, Inc." [hereinafter Petition]. Petitioners instituted the proceeding under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA]; the federal order regulating the handling of tomatoes grown in Florida (7 C.F.R. pt. 966) [hereinafter the Florida Tomato Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted from Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice]. Petitioners seek an order granting a permanent exemption for heirloom variety tomatoes from the grade requirements of the Florida Tomato Order (Pet. ¶ 34).

On January 6, 2004, Petitioners also filed an application for interim relief in which Petitioners seek an immediate, interim order granting a certificate of privilege exempting UglyRipe™ tomatoes from the grade requirements of the Florida Tomato Order (Application for Interim Relief at 7). On January 23, 2004, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed "Opposition to Application for Interim Relief." On February 5, 2004, Petitioners filed "Petitioners' Response to the Opposition to the Applications for Interim Relief." On February 27, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Petitioners' application for interim relief.

Petitioners' application for interim relief is denied based upon established precedent. The Judicial Officer has consistently denied applications for interim relief from marketing orders because interim relief would work directly in opposition to the purposes of the marketing order from which interim relief is sought and the act under which the marketing order is issued, and could harm the public interest if provisions of the marketing order were, in effect, suddenly terminated by granting interim relief to the applicant and others who plan to file similar applications for interim relief.[1]

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[1]*In re Cal–Almond*, 55 Agric. Dec. 1027 (1996); *In re Cal–Almond, Inc.*, 53 Agric. Dec. 527 (1994); *In re Dole DF&N, Inc.*, 53 Agric. Dec. 527 (1994); *In re Gerawan*
(continued...)

For the foregoing reasons, the following Order should be issued.

ORDER

Petitioners' application for interim relief filed January 6, 2004, is denied.

In re: BOB KLASSEN.
AMAA Docket No. 03-0005.
Order Dismissing Case.
Filed March 16, 2004.

Sharlene Deskins, for Complainant.
Respondent, Pro se.
Order issued by Marc R. Hillson, Administrative Law Judge.

Complainant's Motion to Dismiss without prejudice is GRANTED. Accordingly, this case is DISMISSED.

In re: PROCACCI BROTHERS SALES CORPORATION, GARGIULO, INC., AND AG MART, INC., a/k/a SANTA

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[1](...continued)
Farming, Inc., 52 Agric. Dec. 925 (1993); *In re Independent Handlers*, 51 Agric. Dec. 122 (1992); *In re Cal–Almond, Inc.*, 50 Agric. Dec. 670 (1991); *In re Saulsbury Orchards & Almond Processing, Inc.*, 49 Agric. Dec. 836 (1990); *In re Lansing Dairy, Inc.*, 48 Agric. Dec. 867 (1989); *In re Gerawan Co.*, 48 Agric. Dec. 79 (1989); *In re Cal–Almond, Inc.*, 48 Agric. Dec. 15 (1989); *In re Wileman Bros. & Elliott, Inc.*, 47 Agric. Dec. 1109 (1988), *reconsideration denied*, 47 Agric. Dec. 1263 (1988); *In re Wileman Bros. & Elliott, Inc.*, 46 Agric. Dec. 765 (1987), *reconsideration denied*, 46 Agric. Dec. 765 (1987); *In re Saulsbury Orchards & Almond Processing, Inc.*, 46 Agric. Dec. 561 (1987); *In re Borden, Inc.*, 44 Agric. Dec. 661 (1985); *In re Sequoia Orange Co.*, 43 Agric. Dec. 1719 (1984); *In re Dean Foods Co.*, 42 Agric. Dec. 1048 (1983).

SWEETS, INC.
2004 AMA Docket No. F&V 966-1.
Order Dismissing Case.
Filed April 20, 2004.

Frank Martin, Jr., for Respondent.
Nathan E. Kase, for Petitioners.
Order Dismissing Case issued by Marc R. Hillson, Administrative Law Judge.

Petitioners request, pursuant to 9 CFR § 900.53, to withdraw their Petition is **GRANTED**, and this matter is hereby **DISMISSED**.

In re: ERICA NICOLE MASHBURN AND JAMES MASHBURN, d/b/a LIVING LEGEND KENNEL.
AWA Docket No. 03-0010.
Order Dismissing Interlocutory Appeal as to James Mashburn and Remanding the Proceeding to the ALJ.
Filed January 15, 2004.

AWA – Premature appeal – Interlocutory appeal.

The Judicial Officer (JO) dismissed Complainant's appeal from an order by Administrative Law Judge Jill S. Clifton denying Complainant's motion for a default decision. The JO found that Complainant's appeal was interlocutory and held that Complainant's interlocutory appeal must be dismissed because the Rules of Practice (7 C.F.R. §§ 1.130-.151) do not permit interlocutory appeals.

Bernadette R. Juarez, for Complainant.
Respondent James Mashburn, d/b/a Living Legend Kennel, Pro se.
Order issued by Jill S. Clifton, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant],

instituted this disciplinary administrative proceeding by filing a "Complaint" on January 10, 2003. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice]. On March 18, 2003, Complainant filed an "Amended Complaint."

Complainant alleges Erica Nicole Mashburn, d/b/a Living Legend Kennel, and James Mashburn, d/b/a Living Legend Kennel [hereinafter Respondents], committed willful violations of the Animal Welfare Act and the Regulations and Standards (Amended Compl. ¶¶ II-IV).

The Hearing Clerk served Respondent James Mashburn, d/b/a Living Legend Kennel [hereinafter Respondent James Mashburn], with the Amended Complaint on March 22, 2003.[1] The Rules of Practice require that, within 20 days after the service of an amended complaint, an answer must be filed with the Hearing Clerk.[2] Chief Administrative Law Judge James W. Hunt extended Respondents' time to file an answer to the Amended Complaint to May 2, 2003.[3] Respondent James Mashburn failed to file an answer to the Amended Complaint within the time prescribed by Chief Administrative Law Judge James W. Hunt.

On September 3, 2003, Complainant filed a "Motion for Adoption of Decision and Order as to James Mashburn Upon Admission of Facts by Reason of Default" [hereinafter Motion for Default Decision] and a proposed "Decision and Order as to James Mashburn Upon Admission of Facts by Reason of Default" [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondent James Mashburn with

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[1]United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 898 7241.

[2]*See* 7 C.F.R. § 1.136(a).

[3]Order Extending Time to File Answer filed April 17, 2003.

Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on September 11, 2003.[4] Respondent James Mashburn failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service as required by the Rules of Practice.[5]

On October 14, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued an "Order Denying APHIS' Motion re: James Mashburn" denying Complainant's Motion for Default Decision. On November 13, 2003, Complainant filed "Complainant's Appeal of Order Denying APHIS' Motion Re: James Mashburn" [hereinafter Appeal Petition]. The Hearing Clerk served Respondent James Mashburn with Complainant's Appeal Petition on November 26, 2003.[6] Respondent James Mashburn failed to file a response to Complainant's Appeal Petition within 20 days after service as required by the Rules of Practice.[7] On January 12, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

CONCLUSIONS BY THE JUDICIAL OFFICER

Section 1.145(a) of the Rules of Practice provides that a party may appeal after receiving service of an administrative law judge's written decision, as follows:

> **§ 1.145 Appeal to Judicial Officer.**
>
> (a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a

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[4]United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0310

[5]*See* 7 C.F.R. § 1.139.

[6]States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0310 3897.

[7]*See* 7 C.F.R. § 1.145(b).

> written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. . . .

7 C.F.R. § 1.145(a).

Section 1.132 of the Rules of Practice defines the word *decision*, as follows:

> **1.132 Definitions.**
>
> As used in this subpart, the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:
> . . . .
> *Decision* means: (1) The Judge's initial decision made in accordance with the provisions of 5 U.S.C. 556 and 557, and includes the Judge's (I) findings and conclusions and the reasons or basis therefor on all material issues of fact, law or discretion, (ii) order, and (iii) rulings on proposed findings, conclusions and orders submitted by the parties; and
> (2) The decision and order by the Judicial Officer upon appeal of the Judge's decision.

7 C.F.R. § 1.132.

The ALJ has not issued an initial decision in the instant proceeding in accordance with 5 U.S.C. §§ 556 and 557. Moreover, the Rules of

Practice do not permit interlocutory appeals.[8] Therefore, Complainant's Appeal Petition must be rejected as premature.

For the foregoing reasons, the following Order should be issued.

ORDER

Complainant's interlocutory appeal filed November 13, 2003, is dismissed.

The proceeding is remanded to the ALJ to conduct the proceeding in accordance with the Rules of Practice.

In re: ERICA NICOLE MASHBURN AND JAMES MASHBURN, d/b/a LIVING LEGEND KENNEL.
AWA Docket No. 03-0010.
Order Vacating Order Dismissing Interlocutory Appeal as to James Mashburn.
Filed January 21, 2004.

AWA – Appeal of denial of motion for default.

The Judicial Officer (JO) vacated the January 15, 2004, Order Dismissing Interlocutory Appeal as to James Mashburn and Remanding the Proceeding to the ALJ in which the JO held that Complainant's appeal of an order by Administrative Law Judge Jill S. Clifton denying Complainant's motion for a default decision was premature. The JO held that 7 C.F.R. § 1.139 provides that a complainant may appeal an administrative law judge's denial of a motion for a default decision to the JO.

Bernadette R. Juarez, for Complainant.
Respondent James Mashburn, d/b/a Living Legend Kennel, Pro se.

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[8] *In re Velasam Veal Connection*, 55 Agric. Dec. 300, 304 (1996) (Order Dismissing Appeal); *In re L. P. Feuerstein*, 48 Agric. Dec. 896 (1989) (Order Dismissing Appeal); *In re Landmark Beef Processors, Inc.*, 43 Agric. Dec. 1541 (1984) (Order Dismissing Appeal); *In re Orie S. LeaVell*, 40 Agric. Dec. 783 (1980) (Order Dismissing Appeal by Respondent Spencer Livestock, Inc.).

Order issued by Jill S. Clifton, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on January 10, 2003. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice]. On March 18, 2003, Complainant filed an "Amended Complaint."

Complainant alleges Erica Nicole Mashburn, d/b/a Living Legend Kennel, and James Mashburn, d/b/a Living Legend Kennel [hereinafter Respondents], violated the Animal Welfare Act and the Regulations and Standards (Amended Compl. ¶¶ II-IV).

The Hearing Clerk served Respondent James Mashburn, d/b/a Living Legend Kennel [hereinafter Respondent James Mashburn], with the Amended Complaint on March 22, 2003.[1] The Rules of Practice require that, within 20 days after the service of an amended complaint, an answer must be filed with the Hearing Clerk.[2] Chief Administrative Law Judge James W. Hunt extended Respondents' time to file an answer to the Amended Complaint to May 2, 2003.[3] Respondent James Mashburn failed to file an answer to the Amended Complaint within the time prescribed by Chief Administrative Law Judge James W. Hunt.

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[1]United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8982 7241.

[2]*See* 7 C.F.R. § 1.136(a).

[3]Order Extending Time to File Answer filed April 17, 2003.

On September 3, 2003, Complainant filed a "Motion for Adoption of Decision and Order as to James Mashburn Upon Admission of Facts by Reason of Default" [hereinafter Motion for Default Decision] and a proposed "Decision and Order as to James Mashburn Upon Admission of Facts by Reason of Default" [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondent James Mashburn with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on September 11, 2003.[4] Respondent James Mashburn failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service as required by the Rules of Practice[5].

On October 14, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued an "Order Denying APHIS' Motion re: James Mashburn" denying Complainant's Motion for Default Decision. On November 13, 2003, Complainant filed "Complainant's Appeal of Order Denying APHIS' Motion Re: James Mashburn" [hereinafter Appeal Petition]. The Hearing Clerk served Respondent James Mashburn with Complainant's Appeal Petition on November 26, 2003.[6] Respondent James Mashburn failed to file a response to Complainant's Appeal Petition within 20 days after service as required by the Rules of Practice.[7] On January 12, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

On January 15, 2004, I issued an "Order Dismissing Interlocutory Appeal as to James Mashburn and Remanding the Proceeding to the ALJ" erroneously concluding that Complainant's Appeal Petition must be rejected as premature. Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) provides that an administrative law judge's denial of

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[4]United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0310 3491.

[5]*See* 7 C.F.R. § 1.139.

[6]United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0310 3897.

[7]*See* 7 C.F.R. § 1.145(b).

a motion for a default decision may be appealed to the Judicial Officer pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

For the foregoing reasons, the following Order should be issued.

ORDER

The Judicial Officer's Order Dismissing Interlocutory Appeal as to James Mashburn and Remanding the Proceeding to the ALJ filed January 15, 2004, is vacated.

In re: ERICA NICOLE MASHBURN AND JAMES MASHBURN, d/b/a LIVING LEGEND KENNEL.
AWA Docket No. 03-0010.
Order Vacating the ALJ's Denial of Complainant's Motion for Default Decision and Remand Order as to James Mashburn.
Filed February 3, 2004.

AWA – Failure to file answer – Default.

The Judicial Officer (JO) vacated Administrative Law Judge Jill S. Clifton's (ALJ) Order denying Complainant's motion for a default decision as to Respondent James Mashburn. The JO found that Respondent James Mashburn failed to file an answer to Complainant's Amended Complaint and failed to file objections to Complainant's motion for a default decision. The JO concluded that under the circumstances, the ALJ was required, pursuant to 7 C.F.R. § 1.139, to issue a decision as to Respondent James Mashburn without further procedure or hearing. The JO remanded the proceeding to the ALJ to issue a decision as to Respondent James Mashburn in accordance with the Rules of Practice.

Bernadette R. Juarez, for Complainant.
Respondent James Mashburn, d/b/a Living Legend Kennel, Pro se.
Order issued by Jill S. Clifton, Administrative Law Judge.
Order as to James Mashburn issued by William G. Jenson, Judicial Officer.

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on January 10, 2003. Complainant instituted the proceeding

under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges Erica Nicole Mashburn, d/b/a Living Legend Kennel [hereinafter Respondent Erica Mashburn], and James Mashburn, d/b/a Living Legend Kennel [hereinafter Respondent James Mashburn], violated the Animal Welfare Act and the Regulations and Standards (Compl. ¶¶ II-IV).

The Hearing Clerk served Respondent Erica Mashburn and Respondent James Mashburn with the Complaint on January 22, 2003.[1] An answer in response to the Complaint was filed on February 20, 2003.

On March 18, 2003, Complainant filed an "Amended Complaint" which the Hearing Clerk served on Respondent James Mashburn on March 22, 2003,[2] and served on Respondent Erica Mashburn on April 16, 2003.[3] Respondent Erica Mashburn requested an extension of time within which to file an answer in response to the Amended Complaint.[4] Chief Administrative Law Judge James W. Hunt extended both Respondent Erica Mashburn's and Respondent James Mashburn's time to file answers to the Amended Complaint to May 2, 2003.[5] Respondent James

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[1]United States Postal Service Domestic Return Receipts for Article Number 7000 1670 0011 8982 7814 and Article Number 7000 1670 0011 8982 7685.

[2]United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8982 7241.

[3]Memorandum of Tonya Fisher, Office of the Hearing Clerk, dated April 16, 2003.

[4]"Request for Extension on Time" filed April 17, 2003.

[5]"Order Extending Time to File Answer" filed April 17, 2003.

Mashburn failed to file an answer to the Amended Complaint within the time prescribed by Chief Administrative Law Judge James W. Hunt.

On September 3, 2003, Complainant filed a "Motion for Adoption of Decision and Order as to James Mashburn Upon Admission of Facts by Reason of Default" [hereinafter Motion for Default Decision] and a proposed "Decision and Order as to James Mashburn Upon Admission of Facts by Reason of Default" [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondent James Mashburn with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on September 11, 2003.[6] Respondent James Mashburn failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service as required by the Rules of Practice.[7]

On October 14, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] filed an "Order Denying APHIS' Motion re: James Mashburn" denying Complainant's Motion for Default Decision based on the ALJ's conclusions that Respondent James Mashburn had filed a timely answer to the Complaint and that Respondent James Mashburn's timely answer to the Complaint operates as an answer to Complainant's Amended Complaint.

On November 13, 2003, Complainant filed "Complainant's Appeal of Order Denying APHIS' Motion Re: James Mashburn" [hereinafter Appeal Petition]. The Hearing Clerk served Respondent James Mashburn with Complainant's Appeal Petition on November 26, 2003.[8] Respondent James Mashburn failed to file a response to Complainant's Appeal Petition within 20 days after service as required by the Rules of

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[6]United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0310 3491.

[7]*See* 7 C.F.R. § 1.139.

[8]United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0310 3897.

Practice.[9] On January 12, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

On January 15, 2004, I issued an Order dismissing Complainant's Appeal Petition and remanding the proceeding to the ALJ based upon my conclusion that Complainant's Appeal Petition was premature.[10] On January 21, 2004, I vacated the January 15, 2004, Order concluding that section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) provides that an administrative law judge's denial of a motion for a default decision may be appealed to the Judicial Officer pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145);[11] therefore, Complainant's Appeal Petition was not premature.

Complainant contends the ALJ's denial of Complainant's Motion for Default Decision is error (Complainant's Appeal Pet.). I agree with Complainant's contention. Complainant's operative pleading is the Amended Complaint filed on March 18, 2003, and served on Respondent James Mashburn on March 22, 2003.[12] Pursuant to the Rules of Practice, Respondent James Mashburn was required to file his answer to the Amended Complaint no later than April 11, 2003;[13] however, Chief Administrative Law Judge James W. Hunt extended Respondent James Mashburn's time to file an answer to the Amended Complaint to May 2, 2003.[14] Respondent James Mashburn failed to file an answer to the Amended Complaint within the time prescribed by Chief Administrative Law Judge James W. Hunt. Even if I were to find that Respondent James

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[9]*See* 7 C.F.R. § 1.145(b).

[10]*In re Erica Nicole Mashburn*, 63 Agric. Dec. ___ (Jan. 15, 2004) (Order Dismissing Interlocutory Appeal as to James Mashburn and Remanding the Proceeding to the ALJ).

[11]In re Erica Nicole Mashburn, 63 Agric. Dec. ___ (Jan. 21, 2004) (Order Vacating Order Dismissing Interlocutory Appeal as to James Mashburn).

[12]*See* note 2.

[13]*See* 7 C.F.R. § 1.136(a).

[14]*See* note 5.

Mashburn filed a timely answer to the Complaint, Respondent James Mashburn's timely answer to the Complaint does not operate as an answer to the Amended Complaint.

The Rules of Practice provide that the failure to file an answer to a complaint shall be deemed an admission of the allegations in the complaint and a waiver of hearing.[15] Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) provides that, upon a failure to file an answer, the complainant shall file a proposed decision, along with a motion for the adoption of the proposed decision, both of which shall be served upon the respondent by the Hearing Clerk. Unless a respondent files timely meritorious objections to the complainant's motion and proposed decision, the administrative law judge is required to issue a decision without further procedure or hearing. The Hearing Clerk served Respondent James Mashburn with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on September 11, 2003.[16] Respondent James Mashburn failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision, meritorious or otherwise, within 20 days after service as required by the Rules of Practice.[17] Therefore, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the ALJ is required to issue a decision as to Respondent James Mashburn without further procedure or hearing.

For the foregoing reasons, the following Order should be issued.

ORDER

The ALJ's "Order Denying APHIS' Motion re: James Mashburn," filed October 14, 2003, is vacated. This proceeding is remanded to the ALJ to issue a decision as to Respondent James Mashburn in accordance with the Rules of Practice.

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[15]*See* 7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

[16]*See* note 6.

[17]*See* 7 C.F.R. § 1.139.

In re: WINIFRED M. CANAVAN, d/b/a WESTPORT AQUARIUM.
AWA Docket No. 03-0003.
Remand Order.
Filed April 20, 2004.

AWA – Motion to modify order – Remand order.

The Judicial Officer (JO) remanded the proceeding to the Acting Chief Administrative Law Judge for assignment to an administrative law judge to rule on the parties' joint motion to modify a consent decision entered by the former Chief Administrative Law Judge who retired from federal service effective August 1, 2003. The JO, citing 7 C.F.R. § 1.143(a), held, because no appeal had been filed and the joint motion did not relate to an appeal, an administrative law judge, rather than the JO must rule on the joint motion.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Consent Decision issued by James W. Hunt, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on December 4, 2002. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges Winifred M. Canavan, d/b/a Westport Aquarium [hereinafter Respondent], committed willful violations of the Regulations and Standards (Compl. ¶¶ II-VI).

In accordance with section 1.138 of the Rules of Practice (7 C.F.R. § 1.138), Complainant and Respondent agreed to the entry of a consent decision. On July 24, 2003, former Chief Administrative Law Judge James W. Hunt [hereinafter the former Chief ALJ], entered a "Consent Decision and Order." On April 14, 2004, Complainant and Respondent filed a "Joint Motion to Modify Order" requesting a modification of the former Chief ALJ's July 24, 2003, Consent Decision and Order. On April 16, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on the Joint Motion to Modify Order.

CONCLUSIONS BY THE JUDICIAL OFFICER

Section 1.143(a) of the Rules of Practice identifies the person who shall rule on motions and requests, as follows:

> **§ 1.143 Motions and requests.**
>
> (a) *General*. All motions and requests shall be filed with the Hearing Clerk, and served upon all the parties, except (1) requests for extensions of time pursuant to § 1.147, (2) requests for subpoenas pursuant to § 1.149, and (3) motions and requests made on the record during the oral hearing. *The Judge shall rule upon all motions and requests filed or made prior to the filing of an appeal of the Judge's decision pursuant to § 1.145, except motions directly relating to the appeal. Thereafter, the Judicial Officer will rule on any motions and requests, as well as the motions directly relating to the appeal.*

7 C.F.R. § 1.143(a) (emphasis added).

No appeal has been filed in this proceeding, and the Joint Motion to Modify Order does not relate to an appeal. The former Chief ALJ retired from federal service effective August 1, 2003. Accordingly, the proceeding cannot be remanded to the former Chief ALJ and must be assigned to another administrative law judge.

For the foregoing reasons, the following Order should be issued.

ORDER

The proceeding is remanded to Acting Chief Administrative Law Judge Marc R. Hillson for assignment to an administrative law judge in accordance with 5 U.S.C. § 3105 to rule on the Joint Motion to Modify Order.

In re: WINIFRED M. CANAVAN d/b/a WESTPORT AQUARIUM.
AWA Docket No. 03-0003.
Modification of Order.
Filed May 7, 2004.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Order issued by Marc R. Hillson, Chief Administrative Law Judge.

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondent willfully violated the Act. The complaint was served on the respondent by certified mail and respondent filed an answer thereto. On July 24, 2003, a Consent Decision and Order was issued by the Administrative Law Judge.

Upon the Joint Motion of the parties and for good cause shown, the Order contained in the Decision and Order issued on July 24, 2003, is modified to read as follows:

Order

1. Respondent, her agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from:

(a) Failing to maintain primary enclosures for animals in a clean and sanitary condition;

(b) Failing to maintain housing facilities for animals so that surfaces may be readily cleaned and sanitized or be replaced when necessary;

(c) Failing to provide animals with food of sufficient quantity and nutritive value to meet their normal daily requirements;

(d) Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine;

(e) Failing to utilize a sufficient number of trained employees to maintain the prescribed level of husbandry practices; and

(f) Failing to maintain and make available records of the acquisition, disposition, description, and identification of animals, as required.

2. Respondent is assessed a civil penalty of $25,000, which is hereby suspended provided that the respondent is not found, after notice and opportunity for a hearing, to have violated the Act and the regulations and standards for a period of ten years from the effective date of this order.

3. The $15,000.00 "Improvement and Training Fund" shall be liquidated and any monies remaining in said fund shall be returned to the respondent.

4. All animals currently located at the facility shall be transferred to facilities approved in advance by APHIS.

5. Respondent's license under the Act and Regulations is permanently revoked.

In re: NICHOLAS W. EIGSTI.
FSA Docket No. 04-0001.
Dismissal Without Prejudice.
Filed May 14, 2004.

FSA – Jurisdiction, subject matter.

Robert Ertman, for Complainant.
Respondent, Pro se.
Order issued by Jill S. Clifton, Administrative Law Judge.

[1] Nicholas W. Eigsti ("Petitioner Eigsti") filed a petition on March 26, 2004, under the Federal Seed Act, 7 U.S.C. §§ 1551-1611, Sec. 201.34(d)(3), with the Hearing Clerk, United States Department of Agriculture ("USDA"). In the normal course, the Hearing Clerk docketed the case as (Federal Seed Act) FSA Docket No. 04-0001.

[2] The case has been assigned to me for consideration and decision. Administrative proceedings under the Federal Seed Act are governed by the "Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes." 7 C.F.R. § 1.130 et seq. *See*, especially 7 C.F.R. § 1.131, regarding the Federal Seed Act. As explained below, I find that the petition should be dismissed without prejudice, and a copy forwarded by the Hearing Clerk to the Agricultural Marketing Service, USDA.

[3] The petition, entitled "Complaint and Petition for Review," identifies as
respondents Syngenta Seeds, Inc.; Novartis Seeds, Inc. (Predecessor in Interest); and American Sun Melon (Predecessor in Interest). Petitioner Eigsti alleges violation(s) of the Federal Seed Act by respondents.

[4] The Federal Seed Act contemplates the Secretary of Agriculture being the moving party. *See* 7 U.S.C. § 1599. "Upon receipt of the information and supporting evidence, **the Administrator** (emphasis added) shall cause such investigation to be made as, in the opinion of the Administrator, is justified by the facts." 7 C.F.R. § 1.133(a)(3).

[5] Persons, such as Petitioner Eigsti, who submit information alleging violations of the Federal Seed Act, "shall not be a party to any proceeding

which may be instituted as a result [of the information] and such person shall have no legal status in the proceeding, except as a subpoenaed witness, or as a deponent . . ." 7 C.F.R. § 1.133(a)(4).

[6] Attachment A to the petition is a response prepared by the Chief, Seed Regulatory and Testing Branch, Livestock and Seed Program, Agriculture Marketing Service, USDA. The response is to Petitioner Eigsti's "complaint alleging that the parentage of the seedless watermelon variety 'Tri-X-313' (or Tri-X Brand '313') has been changed since the introduction of the variety and that seed currently being shipped under that variety name is mislabeled under the Federal Seed Act." Petitioner Eigsti's cover letter states, "**there is further information**," as contained in the petition.

[7] Petitioner Eigsti has no administrative remedy for the violation(s) of the Federal Seed Act he alleges, except in accordance with 7 C.F.R. § 1.133. He submits his petition under 7 C.F.R. § 1.133. He presumes that it is appropriately submitted to the Hearing Clerk. I find to the contrary, that his petition would be appropriately submitted to the Administrator of the agency administering the statute involved, that is, the Agricultural Marketing Service. Accordingly, for lack of subject matter jurisdiction, I hereby **dismiss without prejudice** Petitioner Eigsti's "Complaint and Petition for Review."

[8] This Dismissal shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service upon Petitioner Nicholas W. Eigsti, unless an appeal to the Judicial Officer is filed within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Dismissal shall be served by the Hearing Clerk upon Petitioner Eigsti, and, **together with a copy of the Complaint and Petition for Review** with its 2-page cover letter and all its attachments, upon **(1) the Chief, Seed Regulatory and Testing Branch, Livestock and Seed Program, Agriculture Marketing Service, USDA, and (2) the Office of the General Counsel, Marketing Division, Attn: Robert A. Ertman.**

In re: FRESH FREEZE, INC.
FSIS Docket No. 04-0001.
Order Dismissing Case.
Filed May 14, 2004.

Carlynne S. Cockrum, for Complainant.
Respondent, David A. Cantu.
Order issued by Marc R. Hillson, Chief Administrative Law Judge.

Complainant's Motion to Dismiss the Complaint is **GRANTED**. It is hereby ordered that the Complaint, filed herein on January 7, 2004, be withdrawn.

Accordingly, this case is **DISMISSED.**

In re: DARRALL S. McCULLOCH, PHILLIP TRIMBLE, AND SILVERSTONE TRAINING, L.L.C.
HPA Docket No. 02-0002.
Order Lifting Stay as to Phillip Trimble.
Filed March 2, 2004.

HPA – Horse Protection Act – Order lifting stay – Requisites for lifting stay.

Sharlene A. Deskins, for Complainant.
Brenda S. Bramlett, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On March 27, 2003, I issued a Decision and Order as to Phillip Trimble: (1) concluding that Phillip Trimble [hereinafter Respondent] violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831); (2) assessing Respondent a $2,200 civil penalty; and (3) disqualifying Respondent for a period of 1 year from showing, exhibiting, or entering any horse and from managing, judging, or

otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.[1]

On April 18, 2003, Respondent filed a petition for review of the March 27, 2003, Decision and Order as to Phillip Trimble in the United States Court of Appeals for the Sixth Circuit. On April 22, 2003, Respondent filed a "Motion for Stay of Order" requesting a stay of the Order in the March 27, 2003, Decision and Order as to Phillip Trimble, pending judicial review. The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], did not object to Respondent's Motion for Stay of Order, and I granted Respondent's Motion for Stay of Order.[2]

The United States Court of Appeals for the Sixth Circuit denied Respondent's petition for review,[3] and on February 19, 2004, Complainant filed a "Motion to Lift Stay." On February 25, 2004, Respondent filed a "Response to Motion to Lift Stay" agreeing that the Stay Order as to Phillip Trimble should be lifted and requesting that I disqualify Respondent effective January 14, 2004, 35 days after the entry of the Order in *Trimble v. United States Dep't of Agric.*, denying Respondent's petition for review. On March 1, 2004, Complainant filed "Opposition to the Respondent's 'Response to Motion to Lift Stay'" opposing Respondent's request that his 1 year disqualification begin on January 14, 2004. On March 1, 2004, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant's Motion to Lift Stay and for a ruling on Respondent's request that his 1 year disqualification begin on January 14, 2004.

Based upon the agreement of the parties, the Stay Order as to Phillip Trimble is lifted. However, I decline to disqualify Respondent beginning

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[1]*In re Darrall S. McCulloch* (Decision as to Phillip Trimble), 62 Agric. Dec. 83 (2003).

[2]*In re Darrall S. McCulloch* (Stay Order as to Phillip Trimble), 62 Agric. Dec. 103 (2003).

[3]*Trimble v. United States Dep't of Agric.*, No. 03-3568, 2003 WL 23095662 (6th Cir. Dec. 10, 2003).

35 days after the entry of the Order in *Trimble v. United States Dep't of Agric.*, as Respondent requests. A stay order issued by the Judicial Officer pending the outcome of judicial review is not automatically lifted upon the conclusion of judicial review. Instead, action must be taken to lift a stay order.[4] Moreover, the Stay Order as to Phillip Trimble specifically states "[t]his Stay Order as to Phillip Trimble shall remain effective until the Judicial Officer lifts it or a court of competent jurisdiction vacates it."[5]

For the foregoing reasons, the Order in *In re Darrall S. McCulloch* (Decision as to Phillip Trimble), 62 Agric. Dec. 83 (2003), is effective, as follows:

ORDER

1. Respondent is assessed a civil penalty of $2,200. The civil penalty shall be paid by certified check or money order, made payable to the "Treasurer of the United States" and sent to:

Sharlene A. Deskins
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Respondent's payment of the civil penalty shall be forwarded to, and received by, Ms. Deskins within 60 days after service of this Order on

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[4]*In re Cecil Jordan*, 56 Agric. Dec. 758, 760 (1997) (Order on Recons. of Order Lifting Stay Order); *In re Jackie McConnell*, 55 Agric. Dec. 336, 339 (1996) (Order Modifying Order Lifting Stay Order).

[5]*In re Darrall S. McCulloch* (Stay Order as to Phillip Trimble), 62 Agric. Dec. 103, 104 (2003).

Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 02-0002.

2. Respondent is disqualified for 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, corporation, partnership, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (1) transporting, or arranging for the transportation of, horses to or from equine events; (2) personally giving instructions to exhibitors; (3) being present in the warm-up or inspection areas or in any area where spectators are not allowed; and (4) financing the participation of others in equine events. This disqualification shall continue until the civil penalty assessed in paragraph 1 of this Order and any costs associated with collecting the civil penalty are paid in full.

The disqualification of Respondent shall become effective on the 60th day after service of this Order on Respondent.

In re: DERWOOD STEWART AND RHONDA STEWART, d/b/a STEWART'S NURSERY, a/k/a STEWART'S FARM, STEWART'S FARM & NURSERY, THE DERWOOD STEWART FAMILY, AND STEWART'S NURSERY FARM STABLES.
HPA Docket No. 99-0028.
Order Lifting Stay Order as to Derwood Stewart.
Filed May 21, 2004.

HPA – Order lifting stay.

Colleen A. Carroll, for Complainant.
L. Thomas Austin and Jennifer Mitchell, Dunlap, TN, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On September 6, 2001, I issued a Decision and Order as to Derwood Stewart concluding Derwood Stewart [hereinafter Respondent] violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831).[1] On February 22, 2002, Respondent requested a stay of the Order in *In re Derwood Stewart* (Decision as to Derwood Stewart), 60 Agric. Dec. 570 (2001), pending the outcome of proceedings for judicial review. On March 4, 2002, I granted Respondent's request for a stay.[2]

Respondent filed a petition for review with the United States Court of Appeals for the Sixth Circuit which issued an opinion denying Respondent's petition for review.[3] The time for filing a petition for a writ of certiorari with the Supreme Court of the United States has expired.

On April 19, 2004, Complainant requested that I lift the March 4, 2002, Stay Order as to Derwood Stewart on the ground that proceedings for judicial review have concluded.[4] The Hearing Clerk served Respondent with Complainant's Motion to Lift Stay Order on April 26, 2004.[5] Respondent failed to file a response to Complainant's Motion to Lift Stay Order within 20 days after service, as required by the rules of practice applicable to this proceeding.[6] On May 19, 2004, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant's Motion to Lift Stay Order.

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[1]*In re Derwood Stewart* (Decision as to Derwood Stewart), 60 Agric. Dec. 570 (2001).

[2]*In re Derwood Stewart*, 61 Agric. Dec. 291 (2002) (Stay Order as to Derwood Stewart).

[3]*Stewart v. United States Dep't of Agric.*, 64 Fed. Appx. 941, 2003 WL 21147808 (6th Cir. May 15, 2003).

[4]Complainant's Motion to Lift Stay Order.

[5]United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0003 5453 1235.

[6]*See* 7 C.F.R. §§ 1.130-.151 and, in particular, 7 C.F.R. § 1.143(d).

CONCLUSION BY THE JUDICIAL OFFICER

I issued the March 4, 2002, Stay Order as to Derwood Stewart to postpone the effective date of the Order issued in *In re Derwood Stewart* (Decision as to Derwood Stewart), 60 Agric. Dec. 570 (2001), pending the outcome of proceedings for judicial review. Proceedings for judicial review are concluded and the time for filing further requests for judicial review has expired. Therefore, Complainant's Motion to Lift Stay Order is granted; the March 4, 2002, Stay Order as to Derwood Stewart is lifted; and the Order issued in *In re Derwood Stewart* (Decision as to Derwood Stewart), 60 Agric. Dec. 570 (2001), is effective, as set forth in the following Order.

ORDER

1. Respondent is assessed a $2,200 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
Room 2343-South Building
Washington, DC 20250-1417

Respondent's payment of the civil penalty shall be forwarded to, and received by, Ms. Carroll within 60 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 99-0028.

2. Respondent is disqualified for a period of 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of

a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Respondent shall become effective on the 60th day after service of this Order on Respondent.

In re: LION RAISINS, INC., A CALIFORNIA CORPORATION FORMERLY KNOWN AS LION ENTERPRISES, INC.; LION RAISIN COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; LION PACKING COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; AL LION, JR., AN INDIVIDUAL; DAN LION, AN INDIVIDUAL; JEFF LION, AN INDIVIDUAL; AND BRUCE LION, AN INDIVIDUAL.
I & G Docket No. 03-0001.
Order Vacating the ALJ's Denial of Complainant's Motion for Default Decision and Remand Order.
Filed February 9, 2004.

I&G – Agricultural Marketing Act of 1946 – Failure to file answer – Default.

The Judicial Officer (JO) vacated Administrative Law Judge Jill S. Clifton's (ALJ) ruling denying Complainant's motion for a default decision. The JO found that Respondents failed to file an answer to the Complaint and failed to file meritorious objections to Complainant's motion for a default decision. The JO concluded that under the circumstances, the ALJ was required, pursuant to 7 C.F.R. § 1.139, to issue a decision without further procedure or hearing. The JO remanded the proceeding to the ALJ to issue a decision in accordance with the Rules of Practice.

Colleen A. Carroll, for Complainant.
Brian C. Leighton, Clovis, California, for Respondents.

Ruling issued by Jill S. Clifton, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

Kenneth C. Clayton, Associate Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on October 11, 2002. Complainant instituted the proceeding under the Agricultural Marketing Act of 1946, as amended (7 U.S.C. §§ 1621-1632 (1994)) [hereinafter the Agricultural Marketing Act]; the regulations and standards governing the inspection and certification of processed fruits and vegetables (7 C.F.R. pt. 52) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) and the Rules of Practice Governing Withdrawal of Inspection and Grading Services (7 C.F.R. pt. 50) [hereinafter the Rules of Practice].

Complainant alleges that on or about August 26, 1997, Lion Raisins, Inc.; Lion Raisin Company; Lion Packing Company; Al Lion, Jr.; Dan Lion; Jeff Lion; and Bruce Lion [hereinafter Respondents] violated the Agricultural Marketing Act and the Regulations (Compl. ¶¶ 8-10).

The Hearing Clerk served Respondents with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter dated October 11, 2002, during the period October 22, 2002, through November 5, 2002.[1]

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[1]The Hearing Clerk served the Complaint, the Rules of Practice, and the October 11, 2002, service letter on: (1) Respondent Lion Raisins, Inc., on October 30, 2002 (see memorandum of RA Paris, Office of the Hearing Clerk, dated October 30, 2002); (2) Respondent Lion Raisin Company on October 23, 2002 (see United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8985 0676); (3) Respondent Lion Packing Company on October 22, 2002 (see United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8985 0669); (4) Respondent Al Lion, Jr., on October 22, 2002 (see United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8985 0690); (5) Respondent Jeff Lion on October 22, 2002 (see United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8985 0683); (6) Respondent Bruce Lion on October 23, 2002 (see United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8985 0713); and

(continued...)

The Rules of Practice require that an answer must be filed with the Hearing Clerk within 20 days after service of the complaint.[2] On October 29, 2002, Respondents filed a request for an extension of time to December 24, 2002, to respond to the Complaint.[3] Chief Administrative Law Judge James W. Hunt granted Respondents' request for an extension of time.[4]

On December 20, 2002, Respondents filed "Respondents' Motion to Dismiss Complaint." On December 26, 2002, Complainant filed a "Motion for Adoption of Proposed Decision and Order" [hereinafter Motion for Default Decision] and a "Proposed Decision and Order Upon Admission of Facts by Reason of Default" [hereinafter Proposed Default Decision]. Complainant contends Respondents failed to file an answer to the Complaint within the time prescribed by Chief Administrative Law Judge James W. Hunt.[5]

The Hearing Clerk served Respondents with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on January 3, 2003.[6] On January 8, 2003, Respondents filed "Respondents' Opposition to Complainant's Motion for Adoption of Proposed Decision and Order Upon Admission of Facts by Reason of Default" in which

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[1](...continued)
(7) Brian C. Leighton, attorney for Respondents, on November 5, 2002 (see United States Postal Service Domestic Return Receipt for Article Number 7099 3400 0014 4581 8175).

[2]*See* 7 C.F.R. § 1.136(a).

[3]"Respondents' Motion to Continue Respondents' Time to Respond to the Complaint to December 24, 2002;" and "Declaration of Brian C. Leighton in Support of Respondents' Motion to Continue Respondents' Time to Respond to the Complaint to December 24, 2002."

[4]"Order Extending Time to File Answer to Complaint" filed December 24, 2002.

[5]Complainant's Motion for Default Decision at 2.

[6]United States Postal Service Domestic Return Receipt for Article Number 7099 3400 0014 4581 6461.

Respondents contend Complainant's Motion for Default Decision should be denied because Respondents' Motion to Dismiss Complaint, filed December 20, 2002, constitutes a timely response to the Complaint.[7] On January 21, 2003, Complainant filed "Complainant's Reply to Respondents' Opposition to Complainant's Motion for Decision and Order by Reasons of Default." Complainant reiterates his contention that Respondents failed to file a timely answer to the Complaint and contends Respondents' Motion to Dismiss Complaint is not an answer to the Complaint.[8]

On February 12, 2003, Respondent filed "Respondents' Request to File Its Answer to Complaint" and "Respondents' Answer to Complaint." On November 28, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] filed a "Ruling Denying Complainant's Motion for Adoption of a Default Decision; and Order to Show Cause Why Case Should Not Be Dismissed, Based on Respondents' Third Affirmative Defense re: Statutes of Limitations" [hereinafter Ruling and Order to Show Cause]: (1) concluding Respondents failed to file a timely response to the Complaint and were in default; (2) concluding Respondents cured their default when, on February 12, 2003, they filed Respondents' Request to File Its Answer to Complaint and Respondents' Answer to Complaint; (3) granting Respondents' request to file Respondents' Answer to Complaint; (4) denying Complainant's Motion for Default Decision; and (5) ordering the parties to show cause why the Complaint should not be dismissed as time barred by the statute of limitations.

On December 3, 2003, Complainant filed "Complainant's Appeal Petition" requesting that: (1) I reverse the ALJ's ruling denying Complainant's Motion for Default Decision; or (2) I vacate the ALJ's ruling denying Complainant's Motion for Default Decision and remand the proceeding to the ALJ for issuance of a decision in accordance with the Rules of Practice. On December 23, 2003, Respondents filed

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[7]Respondents' Opposition to Complainant's Motion for Adoption of Proposed Decision and Order Upon Admission of Facts by Reason of Default at 2-3.

[8]Complainant's Reply to Respondents' Opposition to Complainant's Motion for Decision and Order by Reasons of Default at 1-3.

"Respondents' Response Complainant's Appeal Petition." On December 24, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Complainant contends the ALJ's denial of Complainant's Motion for Default Decision is error (Complainant's Appeal Pet.). I agree with Complainant's contention.

The Hearing Clerk served Respondents with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter dated October 11, 2002, during the period October 22, 2002, through November 5, 2002.[9] The Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

> **§ 1.136 Answer.**
>
> (a) *Filing and service.* Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . . .
>
> . . . .
>
> (c) *Default.* Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.
>
> **§ 1.139 Procedure upon failure to file an answer or admission of facts.**
>
> The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to

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[9]*See* note 1.

> file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.
>
> **§ 1.141 Procedure for hearing.**
>
> (a) *Request for hearing*. Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint informs Respondents of the consequences of failing to file a timely answer, as follows:

> WHEREFORE, it is hereby ordered that for the purpose of determining whether respondents have in fact violated the Regulations, this complaint shall be served upon said respondents, each of whom shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing this proceeding, 7 C.F.R. §§ 1.130-.151 and §§ 50.1-50.40. The failure to file an answer to this complaint constitutes an admission of all of the material allegations contained therein.

Compl. at 4.

Similarly, the Hearing Clerk, in the October 11, 2002, service letter, informed Respondents that a timely answer must be filed pursuant to the Rules of Practice and that failure to file a timely answer to any allegation in the Complaint would constitute an admission of that allegation, as follows:

October 11, 2002

Mr. Al Lion
Lion Raisins, Inc.
3310 E. California Street
Fresno, California 93702

Lion Raisin Company
Lion Packing Company
9500 South DeWolf Avenue
Selma, California 93662

Mr. Al Lion, Jr.
Mr. Dan Lion
Mr. Bruce Lion
Mr. Jeff Lion
9500 South DeWolf Avenue
Selma, California 93662

Gentlemen:

Subject: In re Lion Raisins, Inc., a California corporation formerly known as Lion Enterprises, Inc.; Lion Raisin Company, a partnership or unincorporated association; Lion Packing Company, a partnership or unincorporated association; Al Lion, Jr. an individual; Dan Lion, an individual; Jeff Lion, an individual; and Bruce Lion, an individual, Respondents
I&G Docket No. 03-0001

Enclosed is a copy of a Complaint, which has been filed with this office under the Agricultural Marketing Act, as amended.

Also enclosed is a copy of the rules of practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have **20 days from the receipt of this letter to file with the Hearing Clerk an original and four copies of your written and signed answer to the complaint**. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case should be directed to the attorney whose name and telephone number appear on the last page of the complaint.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Respondents failed to file a timely answer, and, instead, filed Respondents' Motion to Dismiss Complaint. The Rules of Practice provide that an answer must contain the following:

§ 1.136 Answer.

. . . .
(b) *Contents*. The answer shall:
(1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defenses asserted by the respondent; or
(2) State that respondent admits all the facts alleged in the complaint; or
(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

7 C.F.R. § 1.136(b).

Respondents' Motion to Dismiss Complaint does not meet the requirements for an answer. Moreover, under the Rules of Practice, Respondents' Motion to Dismiss Complaint cannot be entertained.[10] Therefore, I agree both with the ALJ's conclusion that Respondents'

[10]*See* 7 C.F.R. § 1.143(b)(1).

Motion to Dismiss Complaint, filed December 20, 2002, was not an answer to the Complaint, and with the ALJ's conclusion that Respondents were in default.[11]

The ALJ further concluded that Respondents cured their default when, on February 12, 2003, Respondents filed Respondents' Request to File Its Answer to Complaint and Respondents' Answer to Complaint. I disagree with the ALJ's conclusion that Respondents' Request to File Its Answer to Complaint and Respondents' Answer to Complaint cured Respondents' default.

Respondents filed Respondents' Request to File Its Answer to Complaint and Respondents' Answer to Complaint on February 12, 2003, 50 days after Respondents' answer was due. Respondents' failure to file a timely answer to the Complaint is deemed, for purposes of this proceeding, an admission of the allegations in the Complaint and constitutes a waiver of hearing.[12] Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) provides that, upon a failure to file an answer, the complainant shall file a proposed decision, along with a motion for the adoption of the proposed decision, both of which shall be served upon the respondent by the Hearing Clerk. Unless a respondent files meritorious objections to the complainant's motion and proposed decision, the administrative law judge is required to issue a decision without further procedure or hearing. Respondents raise one objection to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision: viz., Respondents were not in default because Respondents' Motion to Dismiss Complaint was a timely response to the Complaint.[13] The ALJ found Respondents' objection to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision without merit and concluded that Respondents were in default.[14] Therefore, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the ALJ is required to issue a decision without further procedure or hearing.

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[11]*See* the ALJ's Ruling and Order to Show Cause at 1.

[12]7 C.F.R. §§ 1.136(c), .139, .141(a).

[13]*See* Respondents' Opposition to Complainant's Motion for Adoption of Proposed Decision and Order Upon Admission of Facts by Reason of Default at 2.

[14]*See* note 11.

For the foregoing reasons, the following Order should be issued.

ORDER

The ALJ's ruling denying Complainant's Motion for Default Decision filed November 28, 2003, is vacated. This proceeding is remanded to the ALJ to issue a decision in accordance with the Rules of Practice.

In re: LION RAISINS, INC., A CALIFORNIA CORPORATION FORMERLY KNOWN AS LION ENTERPRISES, INC.; LION RAISIN COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; LION PACKING COMPANY, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION; AL LION, JR., AN INDIVIDUAL; DAN LION, AN INDIVIDUAL; JEFF LION, AN INDIVIDUAL; AND BRUCE LION, AN INDIVIDUAL.
I & G Docket No. 03-0001.
Stay Order.
Filed June 7, 2004.

Colleen A. Carroll, for Complainant.
Brian C. Leighton, for Respondents.
Order issued by William G. Jenson, Judicial Officer.

On May 24, 2004, I issued a Decision and Order concluding Lion Raisins, Inc.; Lion Raisin Company; Lion Packing Company; Al Lion, Jr.; Dan Lion; Jeff Lion; and Bruce Lion [hereinafter Respondents] violated the Agricultural Marketing Act, as amended (7 U.S.C. § 1621-1632), and the regulations governing the inspection and certification of processed fruits and vegetables (7 C.F.R. pt. 52).[1]

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[1]*In re Lion Raisins, Inc.*, 63 Agric. Dec. ___ (May 24, 2004).

On June 1, 2004, Respondents filed "Respondents' Motion to the Judicial Officer for a Stay of Enforcement of Its May 24, 2004 Ruling Debarring Respondents From Inspection Services" [hereinafter Motion for Stay]. Respondents state they intend to file a petition for review of the Judicial Officer's May 24, 2004, Decision and Order in the United States District Court for the Eastern District of California, Fresno Division, and request a stay pending the outcome of proceedings for judicial review. On June 7, 2004, Kenneth C. Clayton, Associate Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed "Complainant's Response to 'Respondents' Motion to the Judicial Officer for a Stay of Its May 24, 2004 Ruling Debarring Respondents From Inspection Services'" stating Complainant does not oppose Respondents' motion for a stay of the May 24, 2004, Order. On June 7, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondents' Motion for Stay.

For the foregoing reason, the following Order should be issued.

ORDER

The Order in *In re Lion Raisins, Inc.*, 63 Agric. Dec. ___ (May 24, 2004), is stayed. This Stay Order shall remain effective until the Judicial Officer lifts the Stay Order or a court of competent jurisdiction vacates the Stay Order.

In re: MASSACHUSETTS INDEPENDENT CERTIFICATION, INC.
OFPA Docket No. 03-0001.
Order Dismissing Petitioner's Appeal.
Filed April 27, 2004.

OFPA – National Organic Program – Judicial Officer's jurisdiction.

The Judicial Officer (JO) concluded he did not have jurisdiction over the proceeding in which Petitioner, a certifying agent under the Organic Foods Production Act of 1990, as amended (7 U.S.C. §§ 6501-6522), and the National Organic Program (7 C.F.R. pt. 205), appealed a decision by the Administrator sustaining an applicant's appeal of Petitioner's denial of organic certification. Based on his lack of jurisdiction, the JO dismissed Petitioner's appeal.

Nazima H. Razick, for the Secretary and the Administrator.
Jill E. Krueger and Susan E. Stokes, for Petitioner.
Order Dismissing "Complaint" issued by Jill S. Clifton, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On February 26, 2003, Massachusetts Independent Certification, Inc. [hereinafter Petitioner], instituted this proceeding by filing a "Complaint" against Ann Veneman, Secretary, United States Department of Agriculture [hereinafter the Secretary], and A. J. Yates, Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator]. Petitioner instituted the proceeding under the Organic Foods Production Act of 1990, as amended (7 U.S.C. §§ 6501-6522) [hereinafter the Organic Foods Production Act]; the regulations issued under the Organic Foods Production Act (7 C.F.R. pt. 205) [hereinafter the National Organic Program]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Petitioner: (1) alleges that it is a Massachusetts nonprofit corporation which operates the NOFA/Mass Organic Certification Program, a "certifying agent" under the Organic Foods Production Act and the National Organic Program;[1] (2) alleges that on or about July 15, 2002,

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[1]Section 2103(3) of the Organic Foods Production Act defines the term "certifying agent" as follows:

§ 6502. Definitions

As used in this chapter:

(continued...)

The Country Hen filed an application for organic certification as an egg producer with Petitioner; (3) alleges that in October 2002, Petitioner denied The Country Hen's application for organic certification; (4) alleges that, on October 22, 2002, The Country Hen appealed Petitioner's denial of organic certification to the Administrator; (5) alleges that the Administrator sustained The Country Hen's appeal and directed Petitioner to grant organic certification to The Country Hen retroactive to October 21, 2002; and (6) seeks reversal of the Administrator's decision and reinstatement of Petitioner's denial of The Country Hen's application for organic certification (Compl. ¶¶ II(1), (2); V(26), (75), (76), (78), (88), (89), (93); VII(A)).

On March 14, 2003, the Administrator filed a "Motion to Dismiss Complaint." The Administrator seeks dismissal of Petitioner's Complaint

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[1](...continued)

. . . .

(3) Certifying agent

The term "certifying agent" means the chief executive officer of a State or, in the case of a State that provides for the Statewide election of an official to be responsible solely for the administration of the agricultural operations of the State, such official, and any person (including private entities) who is accredited by the Secretary as a certifying agent for the purpose of certifying a farm or handling operation as a certified organic farm or handling operation in accordance with this chapter.

7 U.S.C. § 6502(3).

Section 205.2 of the National Organic Program defines the term "certifying agent" as follows:

§ 205.2 Terms defined.

. . . .

Certifying agent. Any entity accredited by the Secretary as a certifying agent for the purpose of certifying a production or handling operation as a certified production or handling operation.

7 C.F.R. § 205.2

on the grounds that the Office of Administrative Law Judges lacks subject matter jurisdiction in this proceeding and, under the Organic Foods Production Act and the National Organic Program, Petitioner cannot appeal the Administrator's decision to sustain The Country Hen's appeal of Petitioner's denial of The Country Hen's application for organic certification.

On November 4, 2003, after the parties filed additional documents addressing the issues in the Administrator's Motion to Dismiss Complaint, Administrative Law Judge Jill S. Clifton issued an "Order Dismissing 'Complaint'" in which she concluded that the Office of Administrative Law Judges lacks subject matter jurisdiction and dismissed Petitioner's Complaint.

On December 12, 2003, Petitioner filed an "Appeal Petition"; on January 30, 2004, the Secretary and the Administrator filed "Respondents' Opposition and Brief in Support Thereof, to Petitioner's Appeal Petition"; and on February 18, 2004, Petitioner filed "Petitioner's Request for Permission to File Reply Brief" and a "Reply Brief."[2] On February 23, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

CONCLUSION BY THE JUDICIAL OFFICER

I have thoroughly reviewed the parties' filings, the Organic Foods Production Act, the National Organic Program, and the Secretary's delegations of authority to the Judicial Officer.[3] The parties do not cite any law, regulation, or delegation of authority which provides the Judicial Officer with jurisdiction in this proceeding. Moreover, neither the

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[2]Petitioner's request for permission to file a reply brief is granted.

[3]The Act of April 4, 1940, as amended (7 U.S.C. §§ 450c-450g), also called the Schwellenbach Act, authorizes the Secretary to delegate regulatory functions to an employee of the United States Department of Agriculture. Pursuant to the Schwellenbach Act, the Secretary established the position of Judicial Officer and delegated authority to the Judicial Officer to act in lieu of the Secretary in certain regulatory matters. The specific delegations of authority are set forth in 7 C.F.R. § 2.35.

Organic Foods Production Act, the National Organic Program, nor the Secretary's delegations of authority to the Judicial Officer provide the Judicial Officer with jurisdiction in this proceeding.

For the foregoing reasons, the following Order should be issued.

ORDER

Petitioner's appeal is dismissed.

In re: ATLAS AIR, INC.
P.Q. Docket No. 03-0001.
Order Dismissing Case.
Filed March 18, 2004.

Thomas Bolick, for Complainant.
Respondent, Pro se.
Order issued by Marc R. Hillson, Chief Administrative Law Judge.

Complainant's Motion to Dismiss is GRANTED.

Accordingly, this case is DISMISSED.

In re: WAHMHOFF FARMS.
P.Q. Docket No. 03-0010.
Order Withdrawing Complaint and Dismissing Case.
Filed March 31, 2004.

Margaret Burns, for Complainant.
Respondent, Pro se.
Order issued by Marc R. Hillson, Chief Administrative Law Judge.

Complainant's March 29, 2004, Motion to Withdraw Complaint is granted. It is hereby ordered that the Complaint, filed herein on January 29, 2003, be withdrawn.

Accordingly, this case is hereby dismissed.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties. The Hearing Clerk is requested to show the addresses to which the copies were mailed, and the mailing dates.

In re: FLORI M. SORI.
P.Q. Docket No. 03-0003.
Order Dismissing Case.

Filed June 16, 2004.
James Booth, for Complainant.
Respondent, Pro se.
Order issued by Marc R. Hillson, Chief Administrative Law Judge.

Complainant's Motion to Dismiss the Complaint is **GRANTED.**

Accordingly, this case is **DISMISSED.**

DEFAULT DECISION

ANIMAL QUARANTINE ACT

In re: VIRGILIO VASQUEZ VARELA.
A.Q. Docket No. 03-0001.
P.Q. Docket No. 04-0007.
Decision and Order
Filed April 30, 2004.

A.Q. - Default – P.Q. - Default.

Thomas Bolick, for Complainant.
Respondent, Pro se.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

[1] This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. § 111); the Plant Protection Act, as amended (7 U.S.C. §7701 *et seq*.); and the regulations promulgated under those Acts (9 C.F.R. § 94 *et seq*. and 7 C.F.R. § 319.56 *et seq*.); by a complaint filed on October 11, 2002, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint was originally assigned A.Q. Docket No. 03-0001; I have added P.Q. Docket No. 04-0007.

[2] The respondent, Virgilio Vasquez Varela, was served with a copy of the complaint on October 21, 2002. Respondent Virgilio Vasquez Varela's answer was due no later than November 10, 2002, twenty days after service of the complaint (7 C.F.R. § 136(a)).

[3] Respondent Virgilio Vasquez Varela failed to file an answer within 20 days after service. To date, Respondent Virgilio Vasquez Varela has still not filed an answer to the complaint. The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R.§ 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. § 1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139.

[4] Respondent Virgilio Vasquez Varela was informed in the complaint, and in the Hearing Clerk's letter accompanying the complaint, that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer within twenty (20) days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing. The Hearing Clerk's Office mailed respondent Virgilio Vasquez Varela a"No Answer Letter" on November 22, 2002.

[5] Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to the Rules of Practice. (7 C.F.R. § 1.139). *See* 7 C.F.R. §1.130 *et seq*.; *see also* 7 C.F.R. §380.1 *et seq*.

Findings of Fact

[6] Respondent Virgilio Vasquez Varela is an individual with a mailing address of 5201 Camelback Road, Lot E 150, Phoenix, Arizona 85301.

[7] On or about April 9, 2001, respondent Virgilio Vasquez Varela imported into the United States at Douglas Port of Entry, Arizona, approximately 472 pounds of bologna, which contained pork and poultry products, without a certificate, in violation of 9 C.F.R. § 94.6 an 9 C.F.R. § 94.9.

[8] On or about April 9, 2001, respondent Virgilio Vasquez Varela imported into the United States at Douglas Port of Entry, Arizona, approximately one pound of oranges from Mexico without a phytosanitary certificate, in violation of 7 C.F.R. § 319.56-2t.

Conclusion

[9] By reason of the Findings of Fact set forth above, respondent Virgilio Vasquez Varela has violated the Act of February 2, 1903, as amended (21 U.S.C. § 111); the Plant Protection Act as amended (7 U.S.C. §§7001 *et seq*.); and the regulations issued under those Acts, specifically, 9 C.F.R. § 94.6, 9 C.F.R. § 94.9, and 7 C.F.R. § 319.56-2t. Therefore, the following Order issued.

Order

[10] Respondent Virgilio Vasquez Varela is hereby assessed a civil penalty of three thousand ($3,000.00). Respondent Virgilio Vasquez Varela shall pay the $3,000.00 by cashier's check or money order, made payable to the order of the **"Treasurer of the United States"** and forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent Virgilio Vasquez Varela shall indicate that payment is in reference to **A.Q. Docket No. 03-0001 and P.Q. Docket No. 04-0007.**

[11] This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service upon of this Default Decision and Order upon respondent Virgilio Vasquez Varela, unless an appeal to the Judicial Officer is filed within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

[This Decision and Order became final June 9, 2004.-Editor]

DEFAULT DECISION

ANIMAL WELFARE ACT

In re: EDWARD B. LAKE d/b/a BUCKRITE DEER FARMS.
AWA Docket No. 03-0016.
Decision and Order.
Filed February 26, 2004.

AWA- Default.

Brian T. Hill, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Chief Administrative Law Judge.

This proceeding was instituted under the Animal Welfare Act ("Act") as amended (7 U.S.C. § 2131 *et seq.*), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that Edward Lake willfully violated the Act and the regulations and standards issued pursuant to the Act (9 C.F.R. § 1.1 *et seq.*).

Copies of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were sent via certified mail to Edward Lake, return receipt requested, on March 10, 2003. The copies were returned to the office of the Hearing Clerk marked "unclaimed" on April 15, 2003. Pursuant to the Act, 7 C.F.R. § 1.147(c)(1), copies of the Complaint and the Rules of Practice were sent by ordinary mail to Mr. Lake on April 16, 2003. Mr. Lake was informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation. Mr. Lake has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted as set forth herein by his failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact and Conclusions of Law

I

A. Edward B. Lake, hereinafter referred to as respondent is an individual doing business as Buckrite Deer Farms, whose address is Rt. 1, Box 153, Vienna, Missouri 65582.

B. The respondent, at all times material hereto, was operating as an exhibitor as defined in the Act and the regulations.

II

A. On at least nineteen occasions between July 20, 2000 and August 19, 2001, the respondent operated as an exhibitor as defined n the Act and the regulations, without being licensed, in willful violation of section 2.1(a)(1) of the regulations (9 C.F.R. § 2.1(a)(1)). Each exhibition constitutes a separate violation.

Conclusions

1. The Secretary has jurisdiction in this matter.

2. The following Order is authorized by the Act and under the circumstances.

Order

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from:

(a) Exhibiting animals without a license when such license is required by the Act, regulations, or standards.

2. Respondent is assessed a civil penalty of $5,225, which shall be paid by a certified check or money order made payable to the Treasure of United States.

3. Respondent is disqualified from obtaining a USDA license for a period of two years and continuing thereafter until he demonstrates to the Animal and Plant Health Inspection Service that he is in full compliance with the Act, the regulations and standards issued thereunder, and this order, including payment of the civil penalty imposed herein.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this decision shall be served upon the parties.

[This Decision and Order became final April 6, 2004.-Editor]

DEFAULT DECISION

FEDERAL CROP INSURANCE ACT

In re: CHARLES H. PARRISH, JR.
FCIA Docket No. 04-0002.
Decision and Order.
Filed January 30, 2004.

FCIA - Default.

Donald A. Brittenham, Jr., for Complainant.
Respondent, Pro se.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

Pursuant to section 1.136(c) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, failure of Respondent, Charles H. Parrish, jr., to file an answer within the time provided is deemed an admission of the allegations contained in the Complaint. since the allegations in paragraphs I and II of the Complaint are deemed admitted, it is found that the Respondent has willfully and intentionally provided false or inaccurate information to the Federal Crop Insurance Corporation or to the insurer with respect to an insurance plan or policy under the Federal Crop Insurance Act (Act) (7 U.S.C. 1506(n))/

It is further found that, pursuant to section 506 of the Act (7 U.S.C. 1506). Respondent is disqualified from purchasing catastrophic risk protection or receiving non-insured assistance for a period of two years, and from receiving any other benefit under the Act for a period of two years.

It is further found that, pursuant to section 506 of the Act (7 U.S.C. 1506), a civil fine of $1,000 will be imposed upon the Respondent. The period of disqualification shall be effective 35 days after this decision is served on the Respondent unless there is an appeal to the Judicial Officer pursuant to § 1.145.

The civil fine amount should be made payable to the Federal Crop Insurance Corporation, Attn: Kathy Santora, Collection Examiner,

Fiscal Operations Branch, 6501 Beacon Road, Kansas City, Missouri 64133 (Account Name: Charles H. Parrish, Jr.)

If the period of disqualification would commence after the beginning of the crop year, and the Respondent has a crop insurance policy in effect, disqualification will commence at the beginning of the following crop year and remain in effect for the entire period specified in this decision.

[This Decision and Order became final March 13, 2004.-Editor]

DEFAULT DECISIONS

PLANT QUARANTINE ACT

In re: GOLDEN AIRLINES, INC.
P.Q. Docket No. 03-0014.
Decision and Order.
Filed January 30, 2004.

P.Q. - Default.

Tracy Manoff, for Complainant.
Respondent, Pro se.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

This is an administrative proceeding for assessment of a civil penalty for violations of the Plant Protection Act (7 U.S.C. §§ 7701 *et seq*. (Act) and the regulations promulgated thereunder (7 C.F.R. §§ 330.111 *et seq*.) (regulations), in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq*. and 380.1 *et seq.*

This proceeding was instituted by a complaint filed on September 23, 2003 by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged the following:

(1) On or about February 23, 2002, Golden Airlines, Inc. failed to update the appropriate Plant Protection and Quarantine office of the estimated time of arrival for flight number GDD 181 from Havana, Cuba to Miami, Florida, in violation of 7 C.F.R. §330.111 (4) (d);

(2) On or about March 30, 2002, Golden Airlines, Inc., failed to contact the Plant Protection and Quarantine office in Miami, Florida for the arrival of flight number GDD 931 from Treasure Key, Bahamas in violation of 7 C.F.R. § 330.111;

(3) On or about April 20, 2002, Golden Airlines, Inc., failed to contact the Plant Protection and Quarantine office in Miami, Florida, for the arrival of flight number GDP 181 from Cuba, in violation of 7 C.F.R. § 330.111.

The respondent failed to file an answer to the complaint within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. The failure to file an answer also constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material allegations in the complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.139.

Findings of Fact

1. Golden Airlines, Inc., respondent herein, is a corporation whose mailing address is 6595 N.W. 36th Street, Suite 300-A, Miami, Florida 33166.

2. On or about February 23, 2002, respondent failed to update the Plant Protection and Quarantine Office of the estimated time of arrival for flight number GDD 181 from Havana, Cuba to Miami, Florida, in violation of 7 C.F.R. § 330.11 (4) (d);

3. On or about March 30, 2002, respondent failed to contact the Plant Protection and Quarantine office in Miami, Florida for the arrival of flight number GDD 931 from Treasure Key, Bahamas, in violation of 7 C.F.R. § 330.111;

4. On or about April 20, 2002, respondent failed to contact the Plant Protection and Quarantine office in Miami, Florida for the arrival of flight number GDP 181 from Havana, Cuba, in violation of 7 C.F.R. § 330.111.

Conclusion

By reasons of the facts contained in the Findings of Facts above, the respondent has violated 7 C.F.R. § 330.111 (4) (d) and 7 C.F.R. § 330.111. Therefore, the following Order is issued.

Order

The respondent is hereby assessed a penalty of six thousand ($6,000.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 55403
Minneapolis, Minnesota 55403

Respondents shall indicate that payment is in reference to P.Q. Docket No. 03-0014.

This Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. 7 C.F.R. § 1.145.

[This Decision and Order became final May 24, 2004.-Editor]

In re: KI SUNG d/b/a BELLASIA CORPORATION.
P.Q. Docket No. 02-0011.
Decision and Order.
Filed February 11, 2004.

P.Q. - Default.

Margaret Burns, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Chief Administrative Law Judge.

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the movement of fruit from Hawaii (7 C.F.R. § 318.13 *et seq.*), hereinafter referred to as the

regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq*. and 380.1 *et seq.*

This proceeding was instituted under the Plant Protection Act (7 U.S.C. § 7701 *et seq.*), and the regulations promulgated thereunder (7 C.F.R. § 318.13 *et seq.*), by a complaint filed on July 22, 2002, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the admission of the allegations in the complaint constitutes a waiver of hearing. (7 C.F.R. § 1.139). Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

I

Ki Sung, dba Bellasia Corporation, hereinafter referred to as the respondent, is an individual whose mailing address is Bellasia Corporation, 725 Kapiolani Vlvd., C#104, Honolulu, Hawaii 96813.

II

On or about May 9, 2001, at Honolulu, Hawaii, the respondent offered to a common carrier, specifically U.S. Postal Service, approximately 10.2 pounds of fresh mangos for shipment from Hawaii to the continental United States, in violation of 7 C.F.R. §§ 318.13(b) and 318.13-2, because offering such product from Hawaii for shipment into or through the continental United States is prohibited.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Acts and the regulations issued under the Acts. Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of five hundred dollars ($500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to:
P.Q. Docket No. 02-0011.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.145).

[This Decision and Order became final March 31, 2004.-Editor]

In re: SIMON FIGUEROA.
P.Q. Docket No. 02-0010.
Decision and Order.
Filed February 17, 2004.

P.Q. - Default.

Margaret Burns, for Complainant.
Respondent, Pro se.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

This proceeding was instituted under the Plant Quarantine Act (7 U.S.C. § 7701 *et seq.*) and the regulations promulgated thereunder (7 C.F.R. § 319.56 *et seq.*), by a Complaint filed on July 22, 2002, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The respondent was served on September 4, 2002, and filed to file an answer within the time prescribed in the Rules of Practice, 7 C.F.R. § 1.136(a). The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the Complaint. 7 C.F.R. § 1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material allegations in the Complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to the Rules of Practice. 7 C.F.R. § 1.139. *See* 7 C.F.R. § 1.130 *et seq.*; *see also* 7 C.F.R. § 380.1 *et seq.*

Findings of Fact

I

Simon Figueroa, hereinafter referred to as respondent, is an individual with a mailing address of 430 Charles Street, Hamilton, Ohio 45011.

II

On or about January 18, 2001, the respondent violated 7 C.F.R. § 319.56 by importing approximately fifty-nine (59) prohibited avocados from Mexico into the United States at Eagle Pass, Texas.

III

On or about January 18, 2001, the respondent violated 7 C.F.R. § 319.56 by importing approximately thirty (30) pounds of prohibited sweet limes from Mexico into the United States at Eagle Pass, Texas.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Plant Protection Act (7 U.S.C. §7701 *et seq.*) and regulations issued under the Act, specifically 7 C.F.R. §319.56 *et seq*. Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of one thousand dollars ($1,000.00). Respondent shall pay the $1,000.00 by cashier's check or money order, made payable to the order of the **"Treasurer of the United States"** and forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to **P.Q. Docket No. 02-0010.**

This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service upon respondent, unless an appeal to the Judicial Officer is filed within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Order shall be served by the Hearing Clerk upon each of the parties.

[This Decision and Order became final April 21, 2004.-Editor]

In re: KELVER DELGADO.
P.Q. Docket No. 02-0012.
A.Q. Docket No. 02-0007.
Decision and Order.
Filed February 19, 2004.

AQ – Default.

Margaret Burns, for Complainant.
Respondent, Pro se.
Decision and Order issued Jill S. Clifton, Administrative Law Judge.

This proceeding was instituted under the Plant Protection Act (7 U.S.C. § 7701 *et seq.*), the Act of February 2, 1903, as amended (21 U.S.C. § 111), and the regulations promulgated thereunder (7 C.F.R. § 319.556 *et seq*. and 9 C.F.R. § 94 *et seq*.), by a Complaint filed on July 22, 2002, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture.

The respondent, Kelver Delgado, was served on October 18, 2002, and failed to file an answer within the time prescribed in the Rules of Practice, 7 C.F.R. § 1.136(a). The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the Complaint. 7 C.F.R. § 1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material allegations in the Complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to the Rules of Practice. 7 C.F.R. § 1.139. *See* 7 C.F.R. §1.130 *et seq*.; *see also* 7 C.F.R. §380.1 *et seq*.

Findings of Fact

I

Kelver Delgado, hereinafter referred to as respondent, is an individual with a mailing address of 664W 161 Street, Apt 4G, New York, New York 10032.

II

On or about March 18, 2001, the respondent violated 7 C.F.R. §319.56 of the regulations by importing into the United States approximately one kilogram of prohibited mangoes from Ecuador to Houston, Texas.

III

On or about March 18, 2001, the respondent violated 9 C.F.R. § 94.10 of the regulations by importing into the United States approximately one kilogram of prohibited pork product from Eucador, a region where hog cholera exists, to Houston, Texas.

IV

On or about March 18, 2001, the respondent violated 9 C.F.R. § 94.14 of the regulations by importing into the United States approximately one kilogram of prohibited pork product from Ecuador, a region where swine vascular disease exists, to Houston, Texas.

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Plant Protection Act (7 U.S.C. § 7701 *et seq*.), the Act of February 2, 1903, as amended (21 U.S.C. § 111), and the regulations issued under those Acts, specifically 7 C.F.R. § 319.56 *et seq.*, and 9 C.F.R. §§ 94.10 & 94.14. Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of five hundred dollars ($500.00). Respondent shall pay the $500.00 by cashier's check or money order, made payable to the order of the **"Treasurer of the United States"** and forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to **P.Q. Docket No. 02-0012 and A.Q. Docket No. 02-0007.**

This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service upon respondent, unless an appeal to the Judicial Officer is filed within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Order shall be served by the Hearing Clerk upon each of the parties.

[This Decision and Order became final April 21, 2004.-Editor]

In re: FERRIES DEL CARIBE, INC. d/b/a M/V REGAL VOYAGER.
P.Q. Docket No. 02-0009.
Decision and Order.
Filed March 22, 2004.

P.Q. - Default.

Margaret Burns, for Complainant.

Respondent, Pro se.
Decision and Order issued by Jill S. Clifton, Administrative Law Judge.

This proceeding was instituted under the Plant Protection Act (7 U.S.C. § 7701 *et seq*.), and the regulations promulgated thereunder (7 C.F.R. § 330.400 *et seq*.), by a Complaint filed on July 5, 2002, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture.

The respondent, Ferries del Caribe, Inc., doing business as M/V Regal Voyager, was served on July 24, 2002, and failed to file an answer within the time prescribed in the Rules of Practice, 7 C.F.R. § 1.136(a). The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the Complaint. 7 C.F.R. §1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. §1.139. Accordingly, the material allegations in the Complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to the Rules of Practice. 7 C.F.R. § 1.139. *See* 7 C.F.R. §1.130 *et seq*.; *see also* 7 C.F.R. §380.1 *et seq*.

Findings of Fact

I

Ferries del Caribe, Inc., hereinafter referred to as the respondent, is a corporation doing business as M/V Regal Voyager, whose mailing address is Calle Concordia #249, Mayaguez, Puerto Rico 00680.

II

On or about June 28, 2000, the respondent moved regulated garbage on a means of conveyance from Santo Domingo, Dominican Republic, to Mayaquez, Puerto Rico, and thereafter violated 7 C.F.R. § 330.400(f) of the regulations by failing to properly dispose of the regulated garbage.

III

On or about June 28, 2000, the respondent moved regulated garbage on a means of conveyance from Santo Domingo, Dominican Republic, to Mayaquez, Puerto Rico, and thereafter violated 7 C.F.R. § 330.400(j) of the regulations by failing to dispose of the regulated garbage in compliance with the conditions of its compliance agreement with the Animal and Plant Health Inspection Service, United States Department of Agriculture (APHIS).

Conclusion

By reason of the Findings of Fact set forth above, the respondent has violated the Plant Protection Act (7 U.S.C. § 7701 *et seq*.), and the regulations issued under that Act (specifically, 7 C.F.R. § 330.100(f) & (j)). Therefore, the following Order is issued.

Order

The respondent is hereby assessed a civil penalty of one thousand dollars ($1,000.00). Respondent shall pay the $1,000.00by cashier's check or money order, mad payable to the order of the **"Treasurer of the United States"** and forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Fielding Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate that payment is in reference to **P.Q. Docket No. 02-0009.**

This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service upon respondent, unless an appeal to the Judicial Officer is filed within thirty (30) days after service, pursuant to section

1.145 of the Rules of Practice (7C.F.R. § 1.145, see attached Appendix A).

Copies of this Default Decision and Order shall be served by the Hearing Clerk upon each of the parties.

[This Decision and Order became final May 4, 2004.-Editor]

In re: ANDRES REYES BURGOS, INC.
P.Q. Docket No. 03-0007.
Decision and Order.
Filed May 4, 2004.

P.Q. - Default.

James Booth, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Administrative Law Judge.

This administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing regulated garbage and the requirements and conditions of compliance agreement between the respondent and the Complainant, the Animal and Plant Health Inspection Service (APHIS), by failing to properly dispose of regulated garbage to prevent the dissemination of animal and/or plant diseases into or within the United States (7C.F.R. §§ 330.400 *et seq*.) hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. §§ 1.130 *et seq*. and 380.1 *et seq.*

This proceeding was instituted under the Plant Protection Act (7 U.S.C. §§ 7701-7772(Act), by a complaint filed by the Acting Administrator of the Animal and Plant Health Inspection Service on November 7, 2002, alleging that the respondent violated the Act and regulations promulgated under the Act (7 C.F.R. §§ 330.400 *et seq*.). The complaint sought civil penalties as authorized by section 424 of the Plant Protection Act (7 U.S.C. § 7734). This complaint specifically alleged that the respondent corporation violated the regulated garbage regulations and the conditions of the compliance agreement that it had

entered into with APHIS by failing to dispose of regulated garbage at an approved facility to prevent the dissemination into or within the United States of plant pests and livestock or poultry diseases.

The respondent corporation failed to file an answer within the time prescribed in 7 C.F.R. § 1.136(a). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing. (7 C.F.R. § 1.139).

Accordingly, the material allegations in the complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (7 C.F.R. § 1.139).

Findings of Fact

1.Andres Reyes Burgos, Inc., hereinafter referred to as the respondent, is a corporation whose mailing address is P.O. Box 1055, Catano, Puerto Rico 00963.

2.On or about October 20, 2000, the respondent corporation violated 7 C.F.R. §§ 330.400(f)(1), and (j)(2) of the regulations by violating the conditions of the compliance agreement by failing to dispose of regulated garbage at an approved facility to prevent the dissemination into or within the United States of plant pests and livestock or poultry diseases.

Conclusion

By reason of the Findings of Fact set forth above, the respondent corporation has violated the Act and the regulations issued under the Act (7 C.F.R. §§ 330.400 *et seq*.).

Therefore, the following Order is issued.

Order

The respondent, Andres Reyes Buros, inc., is assessed a civil penalty of one thousand dollars ($1,000.00). The respondent Andres Reyes

Burgos, Inc. shall pay one thousand dollars ($1,000.00) as a civil penalty. This civil penalty shall be payable to the "Treasurer of the United States " by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 03-0007.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service of this Default Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145 of the Rules of Practice.

[This Decision and Order became final June 18, 2004.-Editor]

DEFAULT DECISION

WATERMELON RESEARCH AND PROMOTION ACT

In re: ROBERT HARVEY, INC. AND ROBERT HARVEY.
AMA WRPA Docket No. 03-0005.
Decision and Order.
Filed February 13, 2004.

ARPA – Default.

Frank Martin, Jr., for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, Administrative Law Judge.

Preliminary Statement

This proceeding was instituted under the Watermelon Research and Promotion Act, 7 U.S.C. § 4901 *et seq*. (the "Act"), alleging that the respondents violated the Watermelon Research and Promotion Plan, 7 C.F.R. § 1210.301-1210.405 (the "Plan"), and the rules and regulations issued thereunder, 7 c.F.R. § 1210.500-1210.532 (the "Regulations").

A copy of the complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, was served on the respondents by the Office of the Hearing Clerk. Respondents were informed in the letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted as set forth herein by respondents' failure to file an answer, are adopted and set forth herein as Findings of Fact and Conclusions of Law.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact and Conclusions of Law

1.Respondent Robert Harvey, Inc. is a corporation whose address is 100 E. 4th St., Nixon, Texas 78140.
2.Respondent Robert Harvey is an individual whose address is 100 E. 4th St., Nixon, Texas 78140.
3.At all times material herein, the respondents were handlers of watermelons as defined in the Act, 7 U.S.C. § 4902(4), and the Plan, 7 C.F.R. § 1210.308, and the actions of respondent Robert Harvey, Inc. were directed, managed, and controlled by respondent Robert Harvey as president.
4.Respondents violated section 1210.341 of the Plan, 7 C.F.R. § 1210.341, section 1210.350 of the Plan, 7 C.F.R. § 1210.350, and section 1210.518 of the Regulations, 7 C.F.R. § 1210.518, by failing to maintain and file required reports, and by failing to remit assessments owed for the period of July 2000 and August 2000.

Conclusions

1.The Secretary has jurisdiction in this matter.
2.The following Order is authorized by the Act and warranted under the circumstances.

Order

1.Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act, Plan and the regulations issued thereunder, and in particular, shall cease and desist from failing to pay assessments for watermelons handled as required.
2.Respondents are jointly and severally assessed a civil penalty of $10,000 which shall be paid by a certified check or money order made payable to the Treasurer of United States.

The provisions of this order shall become effective on the first day after this decision becomes final.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in section 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. § § 1.142 and 1.145.

[This Decision and Order became final March 26, 2004.-Editor]

CONSENT DECISIONS

(Not published herein-Editor)

AGRICULTURAL MARKETING AGREEMENT ACT

B. Rosen & Sons, Inc., and Bruce Rosen. AMA LMRA Docket No. 04-0001. 5/17/04.

Tremont Produce, Inc. and Terry Bagwell. AMA WRPA Docket No. 03-0006. 2/5/04.

ANIMAL WELFARE ACT

Marc Landers d/b/a Promises Kept. AWA Docket No. 03-0011. 1/20/04.

Diane Swearington d.b.a S&D Kennel. AWA Docket No. 03-0001. 2/11/04.

William Vernon Roberts, d/b/a Suwannee Valley Zoological Park. AWA Docket No. 03-0007. 2/23/04.

Roy Allen Stevens, Ted Eric Stevens, Bone Fam Kennels, L.C., and Lois Stevens. AWA Docket No. 03-0025. 2/24/04.

Consent Decision and Order as to John F. Cuneo, Jr., and The Hawthorn Corporation. AWA Docket No. 03-0023. 3/12/04.

Consent Decision and Order as to John N. Cudill, III, John N. Caudill, Jr. and Walker Brother's Circus Inc. AWA Docket No. 03-0023. 3/29/04.

Delta Air Lines, Inc. AWA Docket No. 02-0022. 3/30/04.

Consent Decision and Order as to Kirby Vanburch. AWA Docket No. 03-0030. 4/15/04.

Team Associates, Inc., Glenn S. Lawton II, Robert J. Lamourex and Urie Jesse Peachey. AWA Docket No. 01-0056. 5/3/04.

ENDANGERED SPECIES ACT

Bryce R. Augustine d/ba Monsoon Flora Orchid Propagation Laboratory. ESA Docket No. 04-0001. 3/4/04.

FEDERAL MEAT INSPECTION ACT

Academy Packing Company, Inc. FMIA Docket No. 04-0004. 4/12/04.

Lakeview Packing Company, Inc. FMIA Docket No. 03-0005. 5/5/04.

HORSE PROTECTION ACT

Consent Decision and Order as to Darrell S. McCulloch. HPA Docket No. 02-0002. 3/16/04.

PLANT QUARANTINE ACT

ISS-Riomar, L.L.C. P.Q. Docket No. 03-0019. 4/9/04.

KLM Royal Dutch Airlines. P.Q. Docket No. 03-0016. 4/29/04.

Cargo Airport Services, LLC. P.Q. Docket No. 03-0016. 4/29/04.

O&S Garden Center Corporation, d/b/a Four Seasons Garden Center, and Mr. Oliver Gardner. P.Q. Docket No. 04-0003. 4/30/04.

Consent Decision Regarding Latin Specialities, Inc. P.Q. Docket No. 03-0002. 5/11/04.

Amazing Productions, Inc. a/k/a Amazing Butterfiles. P.Q. Docket No. 04-0005. 6/4/04.

Mediterranean Shipping Company (USA), Inc. P.Q. Docket No. 04-0008. 6/25/04.

POULTRY PRODUCTS INSPECTION ACT

Industrias Avicolas de Puerot Rico, Inc. d/b/a Empresas Picu PPIA Docket No. 04-0005. 2/11/04