

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

2007 AMA Docket No. F & V 989-0069

In re: MARVIN and LAURA HORNE, Husband and Wife,
d/b/a RAISIN VALLEY FARM;
DON DURBAHAN;
RAISIN VALLEY FARMS MARKETING ASSOCIATION,
an entity which does not now exist, but has in the past;
RAISIN VALLEY FARMS MARKETING, LLC,
a California limited liability company;
LASSEN VINEYARDS, LLC,
a California limited liability company; and
LASSEN VINEYARDS,
a California general partnership,

Petitioners

ORDER

This matter is before the Administrative Law Judge upon the Motion of the Respondent to Dismiss the Petition for Review. The Respondent has filed its Opposition to Respondent's Motion to Dismiss.

The Petitioners filed their Petition to Modify Raisin Marketing Order Provisions/Regulations and/or Petition to Terminate Specific Raisin Marketing Order Provisions/Regulations, and/or Petition To Exempt Petitioners From Various Provisions of the Raisin Marketing Order and Any Obligations Imposed In Connection Therewith That Are Not In Accordance With Law on March 5, 2007. On March 23, 2007, the Respondent moved to dismiss the Petition, arguing that Petitioners lack standing to file a

Petition pursuant to Section 8c(15)(A) of the Agricultural Marketing Act of 1937 (AMAA), 7 U.S.C. §601, *et seq.*, that the Petitioners are precluded under the doctrine of *res judicata* from relitigating claims and issues adjudicated in a prior litigation, and that the Petitioner's petition was not filed in good faith. The Petitioners' Opposition to the Respondent's Motion to Dismiss addresses each of the Respondent's arguments.

The Respondent's argument that the Petitioners lack standing to file the Petition for Review appears contrary to the holding of *Midway Farms v. United States Department of Agriculture*, 188 F. 3d 1136 (9th Cir. 1999), 58 *Agric. Dec.* 714 (1999). In that case, Midway was the purchaser of off-grade raisins and various raisin residue matter that raisin handlers grade out of the raisins intended for human consumption. Midway then processed those products into other than human consumption products, including distillery material, cattle feed and concentrate material. Midway had been asked to complete and submit certain forms to the Raisin Administrative Committee because it was considered a processor and, as such, a "handler" subject to the Raisin Marketing Order. Midway took the position that it was not a "handler," and completed and submitted the forms, but filed an administrative petition with the Secretary seeking a declaration that it was not subject to the Raisin Marketing Order. As in the instant case, the Department filed a motion to dismiss the petition, arguing that the plain language of section 608c(15)(A) made clear that only a "handler" could file an administrative petition and that Midway did not qualify as it was claiming *not* to be a handler.

The Department's motion to dismiss was granted without prejudice in an Initial Decision and Order by former Chief Administrative Law Judge Victor W. Palmer. In that decision, Judge Palmer held that he lacked the requisite power to conduct an *in camera*

inspection of the Petitioner's records which had been subpoenaed by the Department, and without producing its records, the Petitioner could not show itself to be a handler having standing to bring the action.

The Petitioner appealed to the Judicial Officer. In his decision, Judicial Officer William G. Jenson modified the decision by the former Chief Administrative Law Judge and dismissed the petition with prejudice. *In re Midway Farms*, 56 Agric. Dec. 102 (1997). The Petitioner again sought review, filing a petition for review with the United States District Court for the Eastern District of California which denied Petitioner's motion for summary judgment and granted summary judgment in favor of the Department. *Midway Farms v. United States Department of Agriculture*, CV F 97-5460 (E.D. Cal. May 18, 1998). Further review was sought, and on appeal, the Court of Appeals for the Ninth Circuit reversed and remanded the case.

In holding that Midway had standing to file an administrative petition with the Secretary, the Ninth Circuit court noted:

The operative statute allows "[a]ny handler subject to an order" to file an administrative petition with the Secretary. 7 U.S.C. § 608c(15)(A). The term "handler" is defined by regulation for the purposes of section 608c(15)(A) as "any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable." 7 C.F.R. § 900.51(i). Neither party contends, for the purposes of this action, that Midway is a "person who, by the terms of the marketing order, is subject thereto." Thus, the sole question is whether Midway is a "person... to whom a marketing order is sought to be made applicable." 7 C.F.R. § 900.51(i). (Footnotes omitted).

While in *Midway* the forms were sent to Midway by the Committee, there, as here, the Department sought additional information by subpoena. Despite the Department's assurances in this action that neither the Raisin Advisory Committee nor the Department have told the Petitioners that they are subject to the marketing order (Respondent's Motion to Dismiss, Exhibits 1 and 2), those declarations also make it

abundantly clear that the purpose of the investigation being pursued is to determine whether the AMAA and the Raisin Marketing Order have been violated. *Id.* As it is difficult to conceive how a person to whom the marketing order is not applicable would have violated the Act or the order, The Department's actions are consistent with an overt intention to make the Petitioners persons to whom the marketing order is being sought to be made applicable. As such, the Petitioners will be found to have the standing to file the administrative petition and have the ultimate merits determined.

The Respondent also argues that *res judicata* applies and that the Petitioners should be barred from relitigating the issues decided in *In re Marvin D. Horne, et al.*, AMAA Docket No. 04-0002 (Decision and Order by Judge Victor W. Palmer, December 8, 2006) 65 Agric. Dec. ____ (2006).As the Petitioner notes in their Opposition to the Motion to Dismiss, Judge Palmer's decision is limited to the years 2002 to 2003-4. As the previously cited Exhibits indicate that the period of inquiry is 2003 to 2006, the doctrine of *res judicata* is inapplicable.

The Respondent's last argument indicates that the Petitioners have not filed their Petition in good faith. As the points advanced by the Respondent fail to rise to the level required to demonstrate a lack of good faith, the argument will be rejected at this time.

Being sufficiently advised, it is **ORDERED** the Respondent's Motion to Dismiss is **DENIED**.

Copies of this Order will be served upon the parties by the Hearing Clerk.

Done at Washington, D.C.
May 15, 2007

PETER M. DAVENPORT
Administrative Law Judge

Copies to: Brian C. Leighton, Esquire
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