

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

AMA-FV Docket No. 09-0050

In re: LION RAISINS, INC.,
a California corporation,

Petitioner

MEMORANDUM OPINION AND ORDER

This matter is before the Administrative Law Judge upon the Respondent's Motion to Dismiss the Petition which has been filed "Challenging the Authority of the RAC President to Suspend Handlers from Participation in the Export Program, the Attempted Suspension Imposed on October 3, 2008, and the Authority of the RAC to Enact Binding Regulations with a 'Circular.'" The Petitioner has filed its Opposition to Respondent's Motion to Dismiss and the matter is now ripe for disposition at this time.

The Petitioner Lion Raisin, Inc., formerly Lion Enterprises, (hereafter "Lion") is a California corporation incorporated more than forty years ago in 1967 that describes itself as the second largest handler of raisins produced from grapes grown in California and one of the largest bulk exporters of raisins. Lion acknowledges that it is subject to the federal raisin Marketing Order and the Regulations. The relationship between Lion and the Agricultural Marketing Service of the United States Department of Agriculture

(“USDA”) may easily be characterized as having been more than a little acrimonious at times during recent years, with numerous actions being brought by one party or the other both at the administrative level and before the federal courts.¹

The current action has been brought by Lion invoking Section 8c(15)(A) of the Agricultural Marketing Agreement Act, (AMAA), 7 U.S.C. § 608c(15)(A) and 7 C.F.R. § 989.1, *et seq.* and seeks relief in the form of an order or orders (1) declaring that the Raisin Advisory Committee (the “RAC”) or its agents or representatives, with or without the concurrence of USDA, has no authority to suspend handlers from the Export Program; (2) declaring that the September 24, 2008 notification from the RAC for delivery of raisins to the RAC was unreasonable and in violation of Section 989.66(b)(4) of the Order; (3) granting injunctive relief directing the RAC to remove offending language from all pending and future Circulars and/or Agreements for participation in the Export Program that confers any power to the RAC President (or any officer, agent or representative to suspend handlers from participation in the Export Program by

¹ The following listing may not be exhaustive, but certainly is sufficient to reflect a portion of the history between Lion and USDA. A number of prior Section 608c(15)(A) Petitions were filed by Lion: *In re: Boghosian Raisin Packing Co. and Lion Raisin, Inc.*, 2001 AMA Docket No F & V 989-1, 60 Agric. Dec. 645 (2001); *In re: Lion Raisins, Inc.*, 2002 AMA Docket No. F & V 989-1, 66 Agric. Dec 585 (2007); *In re: Lion Raisins, Inc.*, 2003 AMA Docket No. F & V 989-7, 64 Agric. Dec. 11 (2005); *In re: Lion Raisins, Inc.*, 2005 AMA Docket No. F & V 989-1, 64 Agric. Dec. 27 (2005); *In re: Lion Raisins, Inc.*, 2005 AMA Docket No. F & V 989-2, 64 Agric. Dec. 637 (2005). Three separate debarment actions have been brought by the Department, *In re: Lion Raisins, et al.*, I & G Docket No. 01-0001 (currently pending before United States Administrative Judge Jill S. Clifton; *In re: Lion Raisins, et al*, I & G Docket No.03-0001, Default entered by Judicial Officer, 63 Agric. Dec. 211 (2004), remanded upon appeal, *Lion Raisins, Inc., et al v. USDA*, No. CV-F-04-5844 REC DLB, (E.D. Ca. 2005), *also reported in* 66 Agric. Dec. 531, on remand, further remanded by Judicial Officer to Judge Clifton, 64 Agric. Dec. 687 (2005), *See, also*, 65 Agric. Dec. 1205 (2006) and 65 Agric. Dec. 1207 (2006); *In re: Lion Raisins, et al.*, I & G Docket No. 04-0001, 65 Agric. Dec. 193 (2006) (currently on appeal to the Judicial Officer). Other litigation includes: *Lion Raisins, Inc. v. United States Department of Agriculture*, No. CIV-F-01-5050 OWW DLB (E.D. Cal.); *Lion Raisins, Inc. v. United States*, 51Fed. Cl. 238 (Fed Cl. 2001); *Lion Raisins, Inc. v. USDA*, 354 F 3d 1072 (9th Cir. 2004); *Lion Raisins, Inc. v. United States*,416 F 3d 1356 (Fed Cir. 2005); *Lion Raisins, Inc. v. USDA*, No. CV F-02-5064 JKS, 2005 U.S. Dist LEXIS 29595); *Lion Raisins, Inc. v. United States*, 64 Fed Cl. 536 (Fed Cl. 2005); and *Lion Raisins, Inc. v. USDA*, 231 *Fed. Appx* 565 (9th Cir. 2007). Although Lion has expressed its willingness to participate in arbitration or mediation to reach a “global” settlement of all pending differences, USDA has resisted such a solution.

withholding “cash back” or “raisins back” for non-compliance; (4) granting injunctive relief directing the RAC to provide reasonable notice (consistent with past practice) for delivery pursuant to Section 989.66(b)(4) and, in the event of non-compliance with that Section, to pursue only the exclusive remedy authorized by Section 989.166 of the Regulations and Order; (5) granting injunctive relief enjoining the RAC President (or any other RAC officer, agent or representative) from suspending handlers from participation in the Export Program; (6) awarding monetary damages for interest on export subsidy payments wrongfully withheld for the period September 12, 2008 to October 17, 2008; and (7) awarding damages according to proof in value of raisins and loss of sales and customers caused by the suspension.

The Respondent presents two arguments supporting its Motion to Dismiss, asserting first that the Petitioner’s Section 608c(15)(A) Petition should be dismissed as a matter of law as the Petitioner’s claims are moot. Alternatively, the Respondent asserts that the Petitioner has failed to state claim upon which relief might be granted. In asserting that the Petitioner has failed to state a claim upon which relief might be granted, the Respondent has advanced multiple points, arguing (1) the Petitioner was properly suspended from the voluntary Marketing Export Program under an agreement which was voluntarily entered into with the RAC; (2) the Petitioner cannot challenge agency enforcement decisions in a Section 608c(15)(A) proceeding; (3) the Petitioner cannot use a Section 608c(15)(A) proceeding to challenge regulations that are based upon a completely different statute; (4) the Secretary is authorized after recommendation by the RAC to approve appropriate criteria to effectively regulate projects designed to promote the consumption of raisins in foreign markets; (5) reasonable time was afforded the

petitioner to allow the RAC to pick up its reserve raisins; (6) the Petitioner was not the subject of retaliatory action; and (7) the Petitioner's claims as to available remedies are not [sic] justiciable.

The Petitioner has filed its Opposition to Respondent's Motion to Dismiss. In its Opposition, it initially notes that in the consideration of motions to dismiss, material facts must be construed in light most favorable to the Petitioner. It next asserts that the Respondent violated suspension regulations for non procurement transactions and that the Respondent's contention that the regulations are inapplicable as being promulgated under a different statute than the AMAA is in error. The Petitioner then suggests that reliance upon the claim being moot is misplaced due to the existence of three recognized exceptions which are applicable to the case at issue. The exceptions include: (1) the action is capable of repetition and would evade review; (2) the action constitutes "voluntary cessation" of illegal conduct; and (3) although the primary injury has passed, there remains a substantial controversy between the parties having adverse legal interests of sufficient immediacy and reality to warrant granting relief. Last, the Petitioner argues that relief in the form of equitable restitution is clearly permissible.

When considering motions to dismiss petitions filed pursuant to Section 8c(15)(A) of the AMAA, 7 U.S.C. §608c(15)(A), allegations of material fact contained in the petitions must be construed in the light most favorable to the Petitioners. *In re: United Foods, Inc.*, 57 Agric. Dec. 329 (1998); *In re: Midway Farms, Inc.*, 56 Agric. Dec. 102, 113-14 (1997); *In re: Asakawa Farms, et al.*, 50 Agric. Dec. 1144, 1149 (1991). Here, the material facts do not appear to have been disputed or that there is any substantial dispute. On or about July 25, 2008, the RAC notified Lion by facsimile transmission that

another handler had purchased 465 tons of “reserve” raisins². This initial notification did not contain a removal date. A little over a month later, on August 28, 2008, the RAC sent Lion an email requesting that Lion make arrangements for the RAC to pick up the reserve raisins, with a proposed schedule for pick up starting on Tuesday, September 2, 2008. Lion apparently considered the proposed schedule onerous and responded by letter dated September 3, 2008, requesting reasonable notice.³ Following a further exchange of letters, Lion confirmed that it had made arrangements for the pick up of the reserve raisins to begin on Wednesday, October 1, 2008 and on that date, the RAC took delivery of the first load.⁴ By letter dated October 2, 2008 (received by Lion the following day), the RAC advised Lion that it had violated Section 989.66(b)(4) by failing to deliver reserve raisins to the RAC as required,⁵ that Lion was suspended from the Export Program, that subsidy payments would be withheld for raisins already exported, and that the RAC would not recognize pending or future subsidy payments and applications therefor.⁶ Exchanges between the RAC and Lion continued, with Lion demanding rescission of the suspension and the RAC advising that it would consider Lion to be in compliance only after the delivery was complete.⁷ Throughout the period that the RAC

² Pursuant to the Raisin Marketing Order, after Lion acquires raisins, it must “set aside” a designated percentage of “reserve” raisins and store them for the RAC. 7 C.F.R. §989.65, 989.66 and 989.166. The raisins or the income from the sale of them are used by the RAC to subsidize the price differential between exported and domestic raisins. 7 C.F.R. §989.67.

³ It had previously taken the RAC up to nine months to deliver reserve raisins to Lion that Lion had purchased from the RAC. In the instant case, the pick up date coincided with the harvest season which is the busiest time of year. Petition ¶6.

⁴ Petition, ¶7. As noted, although the raisins had recently passed inspection at the Lion facility, the first load failed reinspection at the purchasing handler’s facility and the raisins were returned to Lion the following day. Removal of the reserve raisins by the RAC continued the following week.

⁵ The use of the term “delivery” is somewhat misleading, as it appears that it was the RAC’s obligation to arrange the pick up of the reserve raisins from Lion’s storage site. While Lion was obligated to make the raisins available, it would appear that the time required to complete delivery was a factor largely, if not entirely, under the RAC’s control.

⁶ Petition, ¶8

⁷ Petition, 13, 14.

was removing the reserve raisins from the reserve storage location and delivering them to the purchasing handler, the suspension continued to remain in effect. Further communications were exchanged between the RAC and Lion as a result of the purchasing handler's objections to mechanically harvested raisins; however, the RAC agreed with Lion that Sun-Maid (the purchasing handler) had no right of rejection of the raisins on that basis and by October 17, 2008, the RAC agreed that the delivery had been completed, rescinded the suspension, released Lion's pending subsidy payments, agreed to resume accepting applications for subsidy payments and further agreed to release future payments on a timely basis.⁸

Assuming *pro arguendo* the allegations of the Petition to be true and that the Petitioner can establish evidence of disparate treatment in the delivery time by the RAC of raisins which Lion had purchased, it would appear to be a matter of proof as to whether "reasonable notice" was given by the RAC of their intent to require transfer of Lion's reserve raisins for delivery to another handler. While it is clear that Lion was required to store "reserve" raisins at a facility separate and apart from other raisins for the RAC, 7 C.F.R. §989.66(b)(2), what is not clear at this point is what specific arrangements are required in order to make the raisins available for the RAC to take possession of the raisins for transfer to the purchasing handler. Additional questions come to mind as to whether withholding a seven figure subsidy fund remittance for a delivery date dispute with a suspension was an appropriate or an arbitrary and unauthorized sanction, given both the existence of a specified monetary remedy in the regulation and the fact that delivery of the raisins in question was being effected by the RAC on an ongoing basis contemporaneously with the continued running of the suspension.

⁸ Petition, ¶16.

While it will remain the obligation of the Petitioner to establish evidence of damage from the actions of the RAC, it does appear that the Petitioner's claims have not been rendered moot by the lifting of the suspension after completion of delivery and the subsequent release of subsidy funds. Even were I to find that damage, if any, to Lion was *de minimus*, the action taken by the RAC, if established to be not in accordance with law, would nonetheless come within the ambit of the one or more of exceptions to the mootness doctrine,⁹ as well as being within the parameters of 8c(15)(A) of the AMAA.

Section 8c(15)(A) of the AMAA provides:

Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that such order or **any provision 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. (Emphasis added)

The Respondent has raised multiple alternative theories upon which it asserts that the Petitioner has failed to state a claim upon which relief might be granted. The first basis suggests that the Petitioner was properly suspended by virtue of having voluntarily entered into the Marketing Export agreement and appears to assume that Lion failed to allow the RAC to pick up the reserve raisins in a timely manner. Although Lion agreed to participate in the program, while the Circular does contain provisions for suspension from the program, failure to adhere to a delivery schedule is not one of the grounds set forth as an example justifying suspension. Whether the notice given was reasonable under the circumstances remains a factual determination reserved for the fact finder after hearing the evidence from both parties.

⁹ See Argument III, Petitioner's Opposition to Respondent's Motion to Dismiss, pages 7-12

The Respondent next asserts that the Petitioner cannot challenge Agency Enforcement Decisions in a 8c(15)(A) Proceeding. Reliance upon this position appears misplaced as it was the suspension by the RAC and the withholding of subsidy by the RAC which is being called into question. In Marketing Orders, it has long been the position of the Department that the Secretary has retained all of the enforcement and implementation authority. To do otherwise would constitute an unlawful delegation of authority. *In re: Sequoia Orange Co.*, 47 Agric. Dec. 2, 180-185 (1988), *aff'd in part and remanded sub nom. Riverbend Farms, Inc. v. Yeutter*, No. CV F-88-98 EDP (E.D. Cal. June 14, 1989), *on appeal affirmed in part and remanded sub nom. Riverbend Farms, Inc. v. Madigan*, 958 F. 2d 1479 (9th Cir. 1992). As noted in *In re: Asakawa Farms, Inc.*, 50 Agric. Dec. 1144 (1991), “The Committees have no lawmaking authority, therefore there is no unlawful delegation of authority.” *Id.* at 1149. Should the suspension by the RAC been imposed at the suggestion of the Department, it would give credence to Lion’s assertion that it has been vilipended and the action was retaliatory.

As it will be found that the Petitioner has set forth in sufficient detail the provision imposed in connection with the operation of the Raisin Marketing Order which Lion feels is not in accordance with law and has requested specific relief in connection with the action taken by the RAC to state a claim upon which relief might be granted, the other grounds upon which the Respondent asserts that a claim upon which relief cannot be granted need not be discussed and the following Order will be entered.

1. The Respondent’s Motion to Dismiss will be **DENIED**.
2. Exhibit copies, exhibit lists and witness lists will be exchanged between the parties in accordance with the following deadlines to provide disclosure of evidence that

may be presented at the hearing. The exhibit copies should not be filed; however the exhibit lists and witness lists will be filed with the Hearing Clerk's Office. Exhibits shall be pre-marked, on the lower right corner, as PX-1, PX-2 *et seq.* (for Petitioner's exhibits) and RX-1, RX-2 *et seq.* (for Respondents' exhibits). Multi-page exhibits shall be paginated with numbers placed at the bottom of the pages. **At the hearing, both parties are requested to provide copies of the exhibit list and witness list for use by the judge and the court reporter.**

3. By **Thursday, May 14, 2009**, Counsel for the Petitioner will file with the Hearing Clerk a list of exhibits and a list of witnesses. Counsel will also deposit for next day business day delivery to the Respondents, by commercial carrier such as Fed Ex, UPS or other comparable service, copies of Petitioner's proposed exhibits, a list of the exhibits and a list of anticipated witnesses together with a short statement as to the nature of their testimony.

4. By **Thursday, June 11, 2009**, Counsel for the Respondent will file with the Hearing Clerk Respondent's list of exhibits and a list of witnesses. Counsel will also deposit for next day business day delivery to Counsel for the Petitioner, by commercial carrier such as Fed Ex, UPS or other comparable service, copies of the Respondent's proposed exhibits, a list of exhibits and a list of anticipated witnesses together with a short statement as to the nature of their testimony.

5. Failure to file the above lists, as directed, without good cause, may constitute grounds for excluding an exhibit or the testimony of a witness. Counsel shall consult with each other and advise the Administrative Law Judge whether they will be able to stipulate as to any facts, the authenticity, accuracy or admissibility of any documents, or to agree

on any other matters that would expedite the resolution of the issues in this case. The parties are also requested to advise the Administrative Law Judge concerning the expected duration of any hearing, the parties' preferences as to location, any special needs that either party might have and a list of available dates for a teleconference to set a hearing date.

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

Done at Washington, D.C.
April 15, 2009

PETER M. DAVENPORT
Administrative Law Judge

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