UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	I & G Docket No. 04-0001
	)	
Lion Raisins, Inc., a California corporation; Lion Raisin Company, a partnership or unincorporated association; Lion Packing Company, a partnership or unincorporated association; Alfred Lion, Jr., an individual; Daniel Lion, an individual; Jeffrey Lion, an individual; Bruce Lion, an individual; Larry Lion, an individual; and Isabel Lion, an individual,	)	**Order Denying Petition to Reconsider as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion**
Respondents	)	

PROCEDURAL HISTORY

I issued *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), __ Agric. Dec. ___ (Apr. 17, 2009), in which I: (1) concluded Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion [hereinafter the Lions], on 33 occasions, during the period November 11, 1998, through May 11, 2000, willfully violated the Agricultural Marketing Act of 1946, as amended (7 U.S.C. §§ 1621-1632) [hereinafter the Agricultural Marketing Act], and

the regulations governing inspection and certification of processed fruits and vegetables (7 C.F.R. pt. 52) [hereinafter the Regulations] by engaging in misrepresentation or deceptive or fraudulent practices or acts; and (2) debarred the Lions from receiving inspection services under the Agricultural Marketing Act and the Regulations for a period of 5 years. On July 27, 2009, the Lions filed a timely "Petition for Reconsideration" [hereinafter Petition to Reconsider], and on August 5, 2009, the Associate Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], filed "Complainant's Reply to Petition for Reconsideration." On August 10, 2009, the Hearing Clerk transmitted the record to me to consider and rule on the Lions' Petition to Reconsider.

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

The Lions raise 10 issues in the Petition to Reconsider. First, the Lions request that I promote settlement of the instant proceeding by dismissing the Second Amended Complaint or amending *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), __ Agric. Dec. ___ (Apr. 17, 2009) (Pet. to Reconsider at 1-2).

Section 1.143(b)(1) of the rules of practice applicable to the instant proceeding[1] (7 C.F.R. § 1.143(b)(1)) provides that any motion will be entertained other than a motion to dismiss on the pleading;[2] therefore, to the extent that the Lions' request that I dismiss the Second Amended Complaint is a motion to dismiss on the pleading, I deny the Lions' request. Moreover, while litigants are generally encouraged to settle, I find *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), __ Agric. Dec. ___ (Apr. 17, 2009), supported by the record before me and I decline to amend *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), __ Agric. Dec. ___ (Apr. 17, 2009), merely to promote settlement of the instant proceeding.

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[1]The rules of practice applicable to the instant proceeding are 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].

[2]*See In re Judie Hansen*, 57 Agric. Dec. 1072, 1074-75 (1998) (dismissing 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.* (Remand Order), 56 Agric. Dec. 1643, 1650 (1997) (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 All-Airtransport, Inc.* (Remand Order), 50 Agric. Dec. 412, 414 (1991) (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.* (Ruling on Certified Question), 48 Agric. Dec. 434 (1989) (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).

Second, the Lions contend the weight of the evidence demonstrates the Lions did not misrepresent United States Department of Agriculture [hereinafter USDA] inspection results (Pet. to Reconsider at 2-11).

I have carefully reviewed the record in the instant proceeding and find that the weight of the evidence supports my conclusion that, on 33 occasions, during the period November 11, 1998, through May 11, 2000, the Lions willfully violated the Agricultural Marketing Act and the Regulations. *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), __ Agric. Dec. ___ (Apr. 17, 2009), describes each of the 33 instances in which the Lions engaged in misrepresentation or deceptive or fraudulent practices or acts and provides citations to the evidence that support my findings.

Third, the Lions contend I should distinguish more precisely between debarment from non-marketing order voluntary inspections and debarment from marketing order inspections. Specifically, the Lions assert the Secretary of Agriculture conducts inspections under the Agricultural Marketing Act and inspections under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [hereinafter the Agricultural Marketing Agreement Act], and I failed to clearly state that the instant debarment proceeding relates to the Agricultural Marketing Act. (Pet. to Reconsider at 11-19.)

As stated in *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), __ Agric. Dec. ___, slip op. at 62 (Apr. 17, 2009), "[t]he instant proceeding concerns only debarment from receiving USDA inspection services under the Agricultural Marketing Act." The Order issued both in *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), __ Agric. Dec. ___, slip op. at 91 (Apr. 17, 2009), and this Order Denying Petition to Reconsider as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion debars the Lions for a period of 5 years from receiving inspection services under the Agricultural Marketing Act and the Regulations.

Fourth, the Lions contend the Agricultural Marketing Act does not authorize the Secretary of Agriculture to debar the Lions from receipt of inspection services (Pet. to Reconsider at 19-46).

The Agricultural Marketing Act directs and authorizes the Secretary of Agriculture to develop and improve standards of quality, condition, quantity, grade, and packaging and to recommend and demonstrate such standards in order to encourage uniformity and consistency in commercial practices.[3] The Secretary of Agriculture is also directed and authorized to inspect, certify, and identify the class, quality, quantity, and condition of agricultural products under orders, rules, and regulations as the Secretary of Agriculture

[3]7 U.S.C. § 1622(c).

deems necessary to carry out the Agricultural Marketing Act.[4] The Secretary of Agriculture's debarment regulations (7 C.F.R. § 52.54) establish a means to maintain public confidence in the integrity and reliability of the processed products inspection service the Secretary is directed and authorized to administer. Based on the plain language of the Agricultural Marketing Act, I conclude the Secretary of Agriculture has authority to promulgate debarment regulations and to debar persons who engage in misrepresentation or deceptive or fraudulent practices or acts in connection with the inspection services provided by the Secretary of Agriculture.

Moreover, the United States Court of Appeals for the Ninth Circuit specifically addressed the issue of the Secretary of Agriculture's authority to promulgate debarment regulations under the Agricultural Marketing Act, as follows:

> American Raisin's contention that 7 U.S.C. § 1622(h) prohibits debarment for innocent or negligent misconduct is unavailing. Section 1622(h) provides ample authority for the promulgation of Section 52.54, in addition to establishing penalties for other abuses.

American Raisin Packers, Inc. v. U.S. Dep't of Agric., 66 F. App'x 706 (9th Cir. 2003). Similarly, the United States Court of Appeals for the Eighth Circuit concluded the Agricultural Marketing Act authorizes the Secretary of Agriculture to promulgate regulations to withdraw meat grading services and affirmed the district court's denial of a request to enjoin the Secretary of Agriculture from holding an administrative hearing to

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[4]7 U.S.C. §§ 1622(h), 1624(b).

determine whether meat grading services under the Agricultural Marketing Act should be withdrawn, as follows:

> In summary, we uphold regulation 53.13(a), which permits the Secretary to withdraw grading services for misconduct in order to ensure the integrity of the grading service. The Secretary's interpretation of his power to enforce the substance of 53.13(a) has been followed, unchallenged, for at least thirty years. Moreover, the regulation was issued pursuant to express rule making authority and is reasonably designed to preserve the integrity and reliability of the grading system the Secretary is directed and authorized to administer. Thus, although not expressly authorized, the regulation enjoys an especially strong presumption of validity which West has not rebutted. The regulation is not inconsistent either with an express statutory provision or with agriculture laws taken as a whole. Finally, the legislative history tends to support rather than strongly oppose the view that the regulations are authorized by Congress.

West v. Bergland, 611 F.2d 710, 725 (8th Cir. 1979), *cert. denied*, 449 U.S. 821 (1980).

Finally, in response to certified questions submitted to me by Administrative Law Judge Jill S. Clifton, I held the Secretary of Agriculture has authority under the Agricultural Marketing Act to debar persons from USDA inspection services.[5] The Lions have again thoroughly addressed the issue of the Secretary of Agriculture's debarment authority in the Petition to Reconsider; however, the Lions' arguments fail to convince me that the Secretary of Agriculture lacks authority to debar the Lions from receiving inspection services from USDA under the Agricultural Marketing Act.

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[5]*In re Lion Raisins, Inc.* (Ruling on Certified Questions), 63 Agric. Dec. 836 (2004).

Fifth, the Lions contend the right to receive inspection services is a "license" as that term is defined in the Administrative Procedure Act; thus, the Administrator was required to provide the Lions with notice of the conduct that may warrant debarment from receiving USDA inspection services and an opportunity to demonstrate or achieve compliance with lawful requirements (Pet. to Reconsider at 46-59).

The Administrative Procedure Act defines the word "license" as follows:

§ 551. Definitions

> For the purpose of this subchapter—
>
> . . . .
>
> (8) "license" includes 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). Inspection and grading services performed by USDA for the Lions are not forms of permission granted to the Lions, but rather services performed by USDA for the Lions. Therefore, I reject the Lions' claims that the debarment Order in *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), __ Agric. Dec. ___ (Apr. 17, 2009), constitutes withdrawal of a license and that 5 U.S.C. § 558(c) is applicable to the instant proceeding.

Sixth, the Lions contend USDA's issuance of nonprocurement debarment and suspension regulations (7 C.F.R. pt. 3017) repealed the debarment authority in 7 C.F.R. § 52.54 (Pet. to Reconsider at 59-61).

The Lions raise the argument that 7 C.F.R. § 52.54 has been repealed for the first time in the Petition to Reconsider. It is well settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer;[6] therefore, I reject the Lions' argument as not timely raised.

Moreover, even if the Lions had raised the argument before the administrative law judge, I would reject it. The nonprocurement debarment and suspension regulations cited by the Lions do not apply to 16 types of nonprocurement transactions, including the inspection services from which the Lions are debarred in the instant proceeding:

> **§ 3017.215 Which nonprocurement transactions are not covered transactions?**
>
> The following types of nonprocurement transactions are not covered transactions:
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> . . . .
>
> (m) The receipt of official grading and inspection services, animal damage control services, public health and safety inspection services, and animal and plant health inspection services.

7 C.F.R. § 3017.215(m).

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[6] *In re ZooCats, Inc.* (Order Denying Respondents' Pet. To Reconsider And Administrator's Pet. To Reconsider), __ Agric. Dec. ___, slip op. at 2-3 (Dec. 14, 2009); *In re Jerome Schmidt* (Order Denying Pet. to Reconsider), 66 Agric. Dec. 596, 599 (2007); *In re Bodie S. Knapp*, 64 Agric. Dec. 253, 289 (2005); *In re William J. Reinhart* (Order Denying William J. Reinhart's Pet. for Recons.), 60 Agric. Dec. 241, 257 (2001); *In re Marysville Enterprises, Inc.* (Decision as to Marysville Enterprises, Inc., and James L. Breeding), 59 Agric. Dec. 299, 329 (2000); *In re Mary Meyers* (Order Denying Pet. for Recons.), 58 Agric. Dec. 861, 866 (1999); *In re Anna Mae Noell* (Order Denying the Chimp Farm, Inc.'s Motion to Vacate), 58 Agric. Dec. 855, 859-60 (1999).

The Lions argue 7 C.F.R. 3017.215(m) does not specifically reference 7 C.F.R. § 52.54; therefore, while 7 C.F.R. pt. 3017 does not explicitly repeal 7 C.F.R. § 52.54, the Lions should be allowed to rely on 7 C.F.R. pt. 3017 as having excluded inspection services under the Agricultural Marketing Act from the risk of debarment pursuant to 7 C.F.R. § 52.54 (Pet. to Reconsider at 60). The plain language of 7 C.F.R. § 3017.215(m) removes inspection services such as those performed pursuant to the Agricultural Marketing Act from the purview of the nonprocurement debarment and suspension regulations in 7 C.F.R. pt. 3017; therefore, I reject the Lions' argument that USDA's issuance of nonprocurement debarment and suspension regulations (7 C.F.R. pt. 3017) repealed (or in any other way affected) the Secretary of Agriculture's debarment authority in 7 C.F.R. § 52.54.

Seventh, the Lions contend any remedy imposed by the Secretary of Agriculture must affirmatively protect the Lions' right "to do business" (Pet. to Reconsider at 61-65).

In light of the number and the nature of the Lions' violations of the Agricultural Marketing Act and the Regulations and the 2-year period during which the Lions violated the Agricultural Marketing Act and the Regulations, I find the imposition of a 5-year period of debarment reasonable and conclude the 5-year period of debarment is sufficient and necessary to maintain public confidence in the integrity and reliability of the processed products inspection service. Debarment does not deprive the Lions of the right

"to do business"; it merely debars the Lions from receiving inspection services from USDA under the Agricultural Marketing Act and the Regulations.

Eighth, the Lions contend any debarment must be narrowly tailored and allow Lion Raisins, Inc., an alternative to inspection by USDA under the Agricultural Marketing Agreement Act and the marketing order applicable to raisins produced from grapes grown in California (7 C.F.R. pt. 989) [hereinafter the Raisin Order] (Pet. to Reconsider at 65-68).

The instant proceeding is not brought pursuant to the Agricultural Marketing Agreement Act or the Raisin Order. The Lions' disagreement with the inspection provisions in the Raisin Order is irrelevant to the instant proceeding.

Ninth, the Lions contend their participation in the Raisin Administrative Committee export subsidy program is irrelevant (Pet. to Reconsider at 68).

The record establishes that, under a program operated by the Raisin Administrative Committee, packers who sold raisins for export could apply for, and receive, "cash back" for raisin sales by filing Raisin Administrative Committee Form 100C. The amount of "cash back" was based on weight of the raisins. The documents applicable to the transactions that are the subject of the instant proceeding establish that the Lions requested and received "cash back" from the Raisin Administrative Committee in

virtually all of the transactions.[7] Therefore, I reject the Lions' contention that my descriptions of the transactions, including the Lions' request for, and receipt of, "cash back" from the Raisin Administrative Committee, are error.

Tenth, the Lions contend I erroneously found the Lions advised customers that Lion certificates and USDA certificates were the same and contained the same information (Pet. to Reconsider at 68-69).

I found the Lions advised their customers that Lion certificates contained the same information as USDA certificates, as follows:

> 16. Once Lion Raisins, Inc., developed a "Lion" certificate, Lion implemented the practice of charging its customers for USDA certificates, thereby creating a disincentive to request the USDA certificate FV-146 (CX 7). Customers were advised a "Lion" certificate would be provided without charge and Lion certificates contained the same information as USDA certificates. (See CX 73 at 44 ("Please note that the Lion certificate and the USDA certificate for each order is the same.")).

In re Lion Raisins, Inc. (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), __ Agric. Dec. ___, slip op. at 14-15 (Apr. 17, 2009). I relied for this finding on a letter dated January 12, 2000, from Lion Raisins, Inc.'s export traffic administrator to NAF International - Copehagen, which states, as follows:

> Please find enclosed the USDA Certificates for the above mentioned shipments, per your request. We have also included copies of the Lion

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[7]CX 126A reflects the Lions' receipt of "cash back" from the Raisin Administrative Committee in all but six transactions. The Administrator's exhibits are designated "CX."

> Certificates of Quality and Condition. Please note that the Lion certificate and the USDA certificate for each individual order is the same.
>
> In an effort to remain competitive in the market, we began issuing Lion Quality and Condition certificates in place of the USDA. We do not feel it is justified to require Lion to absorb the cost of issuing USDA certificates when the Lion Certificate provides the same information (obtained from USDA). Please advise your customer that we will issue only Lion Certificates of Quality and Condition for future shipments, unless they are willing to compensate Lion for the administrative/clerical costs.

CX 73 at 44. I find the Lions' own letter a reliable reflection of the advice the Lions provided to their customers; therefore, I reject the Lions' contention that my finding the Lions advised customers that Lion certificates and USDA certificates contained the same information, is error.

For the foregoing reasons and the reasons set forth in *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), __ Agric. Dec. ___ (Apr. 17, 2009), the Lions' Petition to Reconsider is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider. The Lions' Petition to Reconsider was timely filed and automatically stayed *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), __ Agric. Dec. ___ (Apr. 17, 2009). Therefore, since the Lions' Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Lion Raisins, Inc.* (Decision as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), __ Agric. Dec. ___

(Apr. 17, 2009), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition to Reconsider as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion.

For the foregoing reasons, the following Order is issued.

ORDER

1. Lion Raisins, Inc., and its agents, officers, subsidiaries, and affiliates are debarred for a period of 5 years from receiving inspection services under the Agricultural Marketing Act and the Regulations.

2. Alfred Lion, Jr.; Bruce Lion; Daniel Lion; and Jeffrey Lion are each debarred for a period of 5 years from receiving inspection services under the Agricultural Marketing Act and the Regulations.

3. This Order shall become effective 30 days after service of this Order on the Lions.

Done at Washington, DC

January 6, 2010

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William G. Jenson
Judicial Officer