UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	I & G Docket No. 01-0001
Lion Raisins, Inc., a California corporation formerly known as Lion Enterprises, Inc., and as Lion Raisins; 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	)	**Decision and Order**

PROCEDURAL HISTORY

The Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], instituted this debarment proceeding by filing a Complaint on January 12, 2001.[1] The Administrator instituted the proceeding under the

[1]The Administrator filed an Amended Complaint on February 15, 2001, and a Second Amended Complaint on July 2, 2002. On March 9, 2004, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued an "Order Granting Complainant's Motion to Amend Second Amended Complaint to Conform to Proof, and Changing Caption." The Second Amended Complaint, as amended by the ALJ's March 9, 2004,

(continued...)

Agricultural Marketing Act of 1946, as amended (7 U.S.C. §§ 1621-1632) [hereinafter the Agricultural Marketing Act]; the regulations 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]. The Administrator seeks an order debarring Lion Raisins, Inc.; Lion Raisin Company; Lion Packing Company; Al Lion, Jr.; Dan Lion; Jeff Lion; and Bruce Lion [hereinafter the Lions] from the receipt of inspection services under the Agricultural Marketing Act for violations of the Agricultural Marketing Act and the Regulations.

The Administrator alleges, during the period March 14, 1997, through April 27, 1998, the Lions caused the issuance and use of six false inspection certificates and facsimile forms and engaged in misrepresentation or deceptive or fraudulent practices or acts, in willful violation of 7 U.S.C. § 1622(h) and 7 C.F.R. § 52.54(a) (Second Amended Compl. ¶¶ 8-18). The Lions filed an answer denying the material allegations of the Second Amended Complaint and asserting affirmative defenses.

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[1](...continued)
Order, is the operative pleading in the instant proceeding.

The ALJ conducted a 72-day hearing in Fresno, California, beginning January 28, 2002, and ending March 31, 2006. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Wesley T. Green, Corporate Counsel for Lion Raisins, Inc., Selma, California, and James A. Moody, Washington, DC, represented the Lions. Daniel A. Bacon, Fresno, California, also represented Bruce Lion.

On May 4, 2009, after the parties filed post-hearing briefs, the ALJ issued a Decision and Order in which she: (1) consolidated the instant proceeding with *In re Bruce Lion*, I & G Docket No. 03-0001; (2) found Lion Raisins, Inc.'s shipping department violated the Agricultural Marketing Act and the Regulations, as alleged in the Second Amended Complaint; (3) debarred Lion Raisins, Inc., Lion Raisin Company, Lion Packing Company, and Bruce Lion from receiving inspection services under the Agricultural Marketing Act for a period of 3 years; (4) debarred Dan Lion from receiving inspection services under the Agricultural Marketing Act for a period of 3 months; and (5) determined that Al Lion, Jr., and Jeff Lion were not culpable for Lion Raisins, Inc.'s shipping department's violations of the Agricultural Marketing Act and the Regulations (ALJ's Initial Decision at 6 ¶ 10; 16-17 ¶¶ 36-43).

On July 24, 2009, the Administrator filed "Complainant's Petition for Appeal" [hereinafter the Administrator's Appeal Petition]. On July 27, 2009, the Lions filed "Respondents' Appeal Petition from the Decision of the Judge on May 4, 2009"

[hereinafter the Lions' Appeal Petition] and requested oral argument before the Judicial Officer. On August 13, 2009, the Administrator filed "Complainant's Response to Petition for Appeal," and on August 26, 2009, the Lions filed "Respondents[']' Reply to Complainant's Petition for Appeal." On August 31, 2009, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

On January 19, 2010, I severed the instant proceeding from *In re Bruce Lion*, I & G Docket No. 03-0001, and remanded *In re Bruce Lion*, I & G Docket No. 03-0001, to Acting Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] for further proceedings in accordance with the Administrative Procedure Act and the Rules of Practice (Judicial Officer's January 19, 2010, Order Severing Cases and Remanding I & G Docket No. 03-0001). On January 21, 2010, I returned the record in the instant proceeding to the Hearing Clerk to make corrections to the transcript, as ordered by the ALJ. (See ALJ's Initial Decision at 5 ¶ 9.) On February 23, 2010, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

DECISION

Decision Summary

Based upon a careful review of the record, I find the Lions engaged in a pattern of misrepresentation or deceptive or fraudulent practices or acts in connection with the use of inspection certificates and inspection results during the period March 14, 1997,

through April 27, 1998, in willful violation of 7 U.S.C. § 1622(h) and 7 C.F.R. § 52.54(a), as alleged in the Second Amended Complaint. To maintain public confidence in the integrity and reliability of the processed products inspection service the Secretary of Agriculture is directed and authorized to administer, I debar each of the Lions from receiving inspection services under the Agricultural Marketing Act and the Regulations for a period of 3 years.

Introduction

The Lions provided inspection certificates to customers to apprise the customers of the condition and quality of raisin shipments. The inspection certificates provided by the Lions to their customers did not, at times, match the United States Department of Agriculture [hereinafter USDA] copies of inspection certificates in USDA's files. The Lions assert the fault lay with USDA's record-keeping failures. Evidence to the contrary comes from two sources: (1) documentation surrounding inspection certificate issuance found in the Lions' and USDA's files; and (2) the experience of the Lions' employees who were responsible for creating inspection certificates that USDA never issued. The Administrator's explanation: In order to convey to the Lions' customers that the customers got what they ordered, Lion employees forged, altered, or otherwise falsified USDA results. The Lions' explanation: USDA did determine the condition of the raisins to be as stated on the inspection certificates that the Lions provided to the their customers, but USDA's record-keeping did not accurately reflect USDA determinations. Further, the

Lions assert the inspection certificates they provided to their customers conveyed the true condition of the raisins.

Six inspection certificates are at issue in the instant proceeding. Of the six inspection certificates the Lions provided to their customers, one inspection certificate has a discrepancy between the U.S. Grade, based on USDA records, and the grade shown to the Lions' customer as if it were the U.S. Grade as determined by USDA. The remaining five inspection certificates have discrepancies between the moisture content, based on USDA records, and the moisture content shown to the Lions' customers as if it were the moisture content as determined by USDA.

Findings of Fact and Conclusions of Law

1. The Secretary of Agriculture has jurisdiction over the Lions and the subject matter involved in the instant proceeding.

2. Lion Raisins, Inc., is a California corporation, formerly known as Lion Raisins and Lion Enterprises, Inc. Lion Raisins, Inc., produces, packs, and sells processed raisins. (CX 29, CX 38.)

3. Lion Raisins, Inc., has several affiliated business entities, including Lion Raisin Company and Lion Packing Company (CX 16d-CX 16e, CX 16m, CX 17f, CX 17i, CX 26, CX 147b; Tr. 477-78).

4. Lion Raisins, Inc., is a closely held subchapter S corporation (Complainant's Response to "Respondent's Motion for Summary Judgment and/or

Summary Disposition and/or Directed Verdict," Attach. B at 38-40; Tr. 13,753-56, 13,787-88).

5. Al Lion, Jr., owned 50 percent of Lion Raisins, Inc., and, during the period 1996 through 2000 was a director, the president, the chief executive officer, the chief financial officer, and the registered agent of Lion Raisins, Inc. (CX 38, CX 72).

6. During the period 1997 and 1998, Al Lion, Jr., and his three sons, Dan Lion, Jeff Lion, and Bruce Lion, handled and controlled Lion Raisins, Inc.'s business affairs (Tr. 1555, 13,523-24, 13,756, 13,977, 14,006).

7. Dan Lion managed Lion Raisins, Inc.'s production, including packing. Dan Lion was a vice president of Lion Raisins, Inc. (CX 36a, CX 72 at 2; Tr. 1554-55.)

8. Jeff Lion managed growers who dealt with Lion Raisins, Inc. Jeff Lion was a vice president of Lion Raisins, Inc. (CX 72 at 1-2, 4-6; Tr. 1554-55.)

9. Bruce Lion managed Lion Raisins, Inc.'s office, sales, and shipping. Bruce Lion was a director and officer of Lion Raisins, Inc. (CX 36a, CX 38 at 4, CX 72 at 1, 4-6; Tr. 1554-55.)

10. Lion Raisins, Inc., did not observe the formalities required of a California corporation and did not operate as an entity separate from Lion Raisin Company, Lion Packing Company, Al Lion, Jr., Dan Lion, Jeff Lion, and Bruce Lion.

11. In 1997 and 1998, the Lions fabricated or altered USDA inspection certificates when inspector worksheets (the inspector's worksheet is used to communicate

the findings that are to be included on the inspection certificate) reflected something other than customer specifications (CX 31a-CX 31b, CX 36-CX 36a).

12. By fabricating or altering USDA inspection certificates, the Lions attributed to USDA unfounded statements of quality and condition of raisins. Thus, since USDA had not made the findings, the Lions' creation of inspection certificates that stated USDA had made the findings, were misrepresentations, or deceptive or fraudulent practices or acts.

13. Even when fabricated or altered inspection certificates were more accurate as to the quality and condition of raisins than the unfabricated or unaltered inspection certificates, the Lions' fabrication and alteration of inspection certificates constituted misrepresentations, or deceptive or fraudulent practices or acts, because the statements of the quality and condition of raisins were falsely attributed to USDA.

14. Measuring raisin moisture content is not an exact science. Moisture content in raisins varies from raisin to raisin: Twelve pounds of raisins taken as a sample during an hour, when 40,000 pounds of raisins passed through the stemmer, may vary from a different 12-pound sample. (Tr. 12,808-10.) Even using the same sample can yield a different moisture content reading, depending on the method of taking the reading. Many raisin shipments lose moisture during shipping. Many of the Lions' customers used different equipment to measure moisture than that used by the inspectors at Lions' plant. If the Lions needed to communicate these factors to their customers to assure customers

they were getting what they requested, despite USDA inspection certificates that reflected a different moisture content finding, a cover letter or a telephone call could have been the remedy, rather than the unauthorized and unlawful alteration or fabrication of USDA inspection certificates.

15. The Administrator seeks an order debarring each of the Lions from receiving inspection services under the Agricultural Marketing Act and the Regulations for a period of 36 years (Complainant's Proposed Findings of Fact, Conclusions of Law, Order and Brief in Support Thereof at 105, 180). While I find the Lions' violations of the Agricultural Marketing Act and the Regulations egregious, I conclude a 36-year debarment of the Lions is not justified by the facts. Instead, to maintain public confidence in the integrity and reliability of the processed products inspection service the Secretary of Agriculture is directed and authorized to administer, I debar each of the Lions from receiving inspection services under the Agricultural Marketing Act and the Regulations for a period of 3 years.

16. Regarding the credibility of witnesses, to the extent that Bruce Lion did not acknowledge knowing of the fabrication and alteration of USDA inspection certificates in 1997 and 1998 by Lions' employees, I conclude that Bruce Lion did know. Especially valuable witnesses were Maralee Berling, Dorothy Proffitt Hamilton, Ken Turner, and David Trykowski, each of whom had an impressive command of facts relevant to the instant proceeding and each of whom was credible.

17. Order Number 34912. On February 24, 1997, FDB Grocery, Albertslund, Denmark, contracted with the Lions for 1,720 cases of certified U.S. Grade B raisins. On March 7, 1997, and March 14, 1997, USDA inspectors sampled processed raisins at the Lions' plant and graded the officially drawn samples[2] for order number 34912 as U.S. Grade C. The Lions requested a USDA inspection certificate, and on March 21, 1997, USDA issued inspection certificate number Y-819260 which states the raisins sampled were officially drawn and were certified as U.S. Grade C. The Lions altered USDA inspection certificate number Y-819260 to falsely state USDA certified the raisins in order number 34912 as U.S. Grade B and provided altered USDA inspection certificate number Y-819260 to FDB Grocery. (CX 4a-CX 4b, CX 10, CX 16a, CX 16c, CX 16g-CX 16j, CX 27 at 7, CX 28 at 5; Tr. 495-96, 4447-70.)

18. Order Number 40650. On April 16, 1998, Ka Vo Mao Iec Cong Si [hereinafter Ka Vo], Macao, China, contracted with the Lions for 1,480 cases of certified U.S. Grade B raisins having no more than 16% moisture. On April 22, 1998, USDA inspectors sampled processed raisins at the Lions' plant and certified the officially drawn samples for order number 40650 as having 16.0% to 16.4% moisture. The Lions requested a USDA inspection certificate, and USDA issued USDA inspection certificate number Y-815117 which states the raisins sampled were officially drawn and certified as

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[2]"'Officially drawn sample' means any sample that has been selected from a particular lot by an inspector, licensed sampler, or by any other person authorized by the Administrator pursuant to the regulations in [7 C.F.R. pt. 52]." (7 C.F.R. § 52.2.)

having 16.0% to 16.4% moisture. The Agricultural Marketing Service found two certificates in the Lions' shipping file for order number 40650. First, the original USDA inspection certificate number Y-815117, which had been obliterated and altered by the placement of an "X" across its face, and notations in pen, stating:

> 16.0 Max Moisture per Bruce
> 4/23/98
> RW[3]

CX 15q. Second, USDA inspection certificate number Y-815119 (an inspection certificate never issued by USDA) which falsely states USDA certified the raisins as having 16.0% moisture, falsely indicates that it was issued by inspector D. Dobbs, and bears the forged signature of D. Dobbs. The Lions provided fabricated and forged USDA inspection certificate number Y-815119 to Ka Vo. (CX 2, CX 5-CX 7, CX 14, CX 15c, CX 15p-CX 15q, CX 24A-CX 24B, CX 37 at 1-2; Tr. 496-99, 4548-73.)

19. Order Number 38799. On December 1, 1997, Navimpex, Charenton, France, contracted with the Lions for 1,600 cases of certified U.S. Grade B raisins having no more than 16% moisture. On December 18, 1997, USDA inspectors sampled processed raisins at the Lions' plant and certified the officially drawn samples for order number 38799 as having 16.0% to 17.8% moisture. The Lions requested a USDA inspection certificate, and USDA issued USDA inspection certificate number B-032572

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[3]"RW" is a reference to Rosangela Wisley, one of the Lions' employees in the Lions' shipping department (Tr. 497).

which states the raisins sampled were officially drawn and certified as having 16.0% to 17.8% moisture. The Lions' inside invoice contains a note stating "USDA cert must show moisture as 16% maximum!" (CX 17b.) The Lions' invoice trail bears a post-it note on which the Lions' shipping clerk, Susan Danes, states:

> USDA moisture
> is over 16%
> Sould [sic] we do re-do
> one?
> sd

CX 17a; Tr. 4503. The handwritten answer is "Yes." (CX 17a.) The Lions' shipping file for order number 38799 contains USDA inspection certificate number B-032585 (an inspection certificate never issued by USDA) which falsely states USDA certified the raisins as having 15.9% moisture, falsely indicates that it was issued by inspector J. Brower, and bears the forged signature of J. Brower. The Lions provided fabricated and forged USDA inspection certificate number B-032585 to Navimpex. (CX 3, CX 17a-CX 17b, CX 17h, CX 17j, CX 20, CX 23A-CX 23C, CX 46; Tr. 4490-4514.)

20. Order Number 38962. On December 12, 1997, Farm Gold, Neudorf, Austria, contracted with the Lions for 1,600 cases of certified U.S. Grade B raisins having no more than 17% moisture. On December 18, 1997, USDA inspectors sampled processed raisins at the Lions' plant and certified the officially drawn samples for order number 38962 as having 18% moisture. The Lions requested a USDA inspection certificate, and USDA issued USDA inspection certificate number B-032570 which states

the raisins sampled were officially drawn and certified as having 18% moisture. The Lions' shipping file for order number 38962 contains USDA inspection certificate number B-032573 (an inspection certificate never issued by USDA) which falsely states USDA certified the raisins as having 17% moisture, falsely indicates that it was issued by inspector J. Brower, and bears the forged signature of J. Brower. (CX 23A-CX 23C, CX 43, CX 44a-CX 44c, CX 44r; Tr. 4518-29, 12,189-99.)

21. Order Number 38802. On December 1, 1997, Navimpex, Charenton, France, contracted with the Lions for 1,600 cases of certified U.S. Grade B raisins having no more than 15% moisture. On March 18, 1998, USDA inspectors sampled processed raisins at the Lions' plant and certified the officially drawn samples for order number 38802 as having 16.0% to 16.6% moisture. The Lions requested a USDA inspection certificate, and USDA issued USDA inspection certificate number Y-809431 which states the raisins sampled were officially drawn and certified as having 16.0% to 16.6% moisture. In response to the Agricultural Marketing Service's request for a copy of the USDA inspection certificate the Lions provided Navimpex in connection with order number 38802, Navimpex provided a "Lion USDA" certificate which mimics the USDA certificate and represents that the raisins sampled were officially drawn and certified at 15% moisture. A copy of the "Lion USDA" certificate for order 38802 was found in the Lions' shipping files for order number 38802. (CX 1, CX 18c-CX 18f, CX 18o, CX 18r, CX 21-CX 22, CX 26, CX 49; Tr. 4624-41.)

22. Order Number 39924. On February 25, 1998, Navimpex, Charenton, France, contracted with the Lions for 1,600 cases of certified U.S. Grade B raisins having no more than 15% moisture. On April 27, 1998, USDA inspectors sampled processed raisins at the Lions' plant and certified the officially drawn samples for order number 39924 as having 14.8% to 16.8% moisture. The Lions requested a USDA inspection certificate, and USDA issued USDA inspection certificate number Y-815121 which states the raisins sampled were officially drawn and certified as having 14.8% to 16.8% moisture. In response to the Agricultural Marketing Service's request for a copy of the USDA inspection certificate the Lions provided Navimpex in connection with order number 39924, Navimpex provided a "Lion USDA" certificate which mimics the USDA certificate and represents that the raisins sampled were officially drawn and certified at 15% moisture. A copy of the "Lion USDA" certificate for order 39924 was found in the Lions' shipping files for order number 39924. (CX 12-CX 13, CX 19a-CX 19g, CX 19i, CX 19o, CX 19r, CX 25 at 5, CX 47 at 1-2.)

23. Each of the Lions' acts and practices described in Findings of Fact and Conclusions of Law numbers 17 through 22 was a willful violation of 7 U.S.C. § 1622(h) and 7 C.F.R. § 52.54(a).

24. The acts and practices described in Findings of Fact and Conclusions of Law numbers 17 through 22 constitute sufficient cause for debarment of the Lions from

receiving services under the Agricultural Marketing Act and the Regulations for a period of 3 years.

The Lions' Request for Oral Argument

The Lions' request for oral argument, which the Judicial Officer may grant, refuse, or limit,[4] is refused because the issues have been fully briefed by the parties and oral argument would serve no useful purpose.

The Lions' Appeal Petition

The Lions raise 31 issues in the Lions' Appeal Petition. First, the Lions contend the ALJ erroneously found Bruce Lion was the Lions' shipping department manager in 1997 and 1998. The Lions assert that, in 1997 and 1998, Bruce Lion was the Lions' sales manager, and Ken Turner was the shipping manager from 1996 until February 1997, after which Yvonne Adams became the shipping manager. (Lions' Appeal Pet. ¶¶ 1, 10.)

The ALJ found Bruce Lion was the manager of Lion Raisins, Inc.'s shipping department (ALJ's Initial Decision at 4 ¶ 6). The record supports the ALJ's finding that Bruce Lion was Lion Raisins, Inc.'s shipping manager in 1997 and 1998 and supervised Ken Turner and the shipping department employees (Tr. 455-56, 1552-58, 1573-78). Therefore, I reject the Lions' contention that the ALJ's finding that Bruce Lion was the shipping manager in 1997 and 1998, is error.

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[4] 7 C.F.R. § 1.145(d).

Second, the Lions contend the ALJ's finding that the Lions altered USDA inspection certificate Y-819260 to falsely state USDA had graded the raisins to be U.S. Grade B, is error. The Lions assert, while the USDA-retained copy of USDA inspection certificate Y-819260 states USDA graded the raisins as U.S. Grade C, the Lions presented unrebutted evidence that the grade was probably updated by an inspector. (Lions' Appeal Pet. ¶ 2.)

The Lions cite no evidence to support their assertions regarding USDA inspection certificate Y-819260, and I cannot locate any evidence to support the Lions' assertions; therefore, I reject the Lions' contention that the ALJ's finding that the Lions altered USDA inspection certificate Y-819260 to falsely state USDA had graded the raisins to be U.S. Grade B, is error.

Third, the Lions contend the ALJ erroneously relied on USDA's inspection procedures and record-keeping and the ALJ's failure to find that USDA's test results and records were untrustworthy, is error (Lions' Appeal Pet. ¶¶ 3-4, 6-9, 33-34, 40-43).

The issue in the instant proceeding is whether the Lions engaged in misrepresentation or deceptive or fraudulent practices or acts in connection with the use of inspection certificates and/or inspection results. Even if I were to find USDA's test results unreliable and USDA's record-keeping untrustworthy, I would not dismiss the instant proceeding. The ALJ's findings regarding the Lions' fabrication or alteration of the six inspection certificates in question is fully supported by the record.

Fourth, the Lions contend Ken Turner and Dorothy Proffitt Hamilton were the only Lion shipping department employees that testified and Mr. Turner and Ms. Hamilton were biased, untruthful, and lacked personal knowledge of any of the allegations in the Second Amended Complaint (Lions' Appeal Pet. ¶¶ 5, 25-26, 46).

I agree with the Lions that Mr. Turner and Ms. Hamilton were the only Lion shipping department employees that testified; however, the ALJ does not state that shipping department employees other than Mr. Turner and Ms. Hamilton testified. Therefore, I do not find the ALJ erred with respect to the number and identity of the Lions' shipping department employees that testified.

The ALJ found both Mr. Turner and Ms. Hamilton credible (ALJ's Initial Decision at 7 ¶ 20; 13 ¶ 33). As for the Lions' assertion that Mr. Turner and Ms. Hamilton were not credible, the Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence.[5] The Administrative Procedure Act provides that, on appeal from an administrative law judge's initial decision, the agency

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[5] *In re KOAM Produce, Inc.* (Order Denying Pet. to Reconsider), 65 Agric. Dec. 1470, 1474 (2006), *aff'd*, 269 F. App'x 35 (2d Cir. 2008); *In re Southern Minnesota Beet Sugar Cooperative*, 64 Agric. Dec. 580, 605 (2005); *In re Excel Corp.*, 62 Agric. Dec. 196, 244-46 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 210 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004); *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. 527, 560 (2001), *appeal dismissed sub nom. Graves v. U.S. Dep't of Agric.*, No. 01-3956 (6th Cir. Nov. 28, 2001).

has all the powers it would have in making an initial decision.[6] Moreover, the Attorney General's Manual on the Administrative Procedure Act describes the authority of the agency on review of an initial or recommended decision, as follows:

> *Appeals and review*. . . .
>
> In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board v. Elkland Leather Co.*, 114 F.2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705.

Attorney General's Manual on the Administrative Procedure Act 83 (1947).

However, the consistent practice of the Judicial Officer is to give great weight to the credibility determinations of administrative law judges, since they have the opportunity to see and hear witnesses testify.[7] I have examined the record and find no

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[6] 5 U.S.C. § 557(b).

[7] *In re KOAM Produce, Inc.* (Order Denying Pet. to Reconsider), 65 Agric. Dec. 1470, 1476 (2006), *aff'd*, 269 F. App'x 35 (2d Cir. 2008); *In re Southern Minnesota Beet Sugar Cooperative*, 64 Agric. Dec. 580, 608 (2005); *In re Excel Corp.*, 62 Agric. Dec. 196, 244-46 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 210 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004); *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. 527, 561-62 (2001), *appeal dismissed sub nom. Graves v. U.S. Dep't of Agric.*, No. 01-3956 (6th Cir. Nov. 28, 2001); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 602 (1999); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1055-56 (1998); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1510 (1997), *aff'd*, 99 F. Supp. 2d 1308 (D. Kan. 1998), *aff'd*, 12 F. App'x 718 (10th Cir.), *cert. denied*, 534 U.S. 1440 (2001).

basis upon which to reverse the ALJ's credibility determinations with respect to Mr. Turner and Ms. Hamilton.

Fifth, the Lions contend the ALJ erroneously failed to mention that the hearing in the instant proceeding was the longest in USDA's history, the hearing spanned the course of 4 years, the transcript consists of approximately 40,000 pages, approximately 40,000 pages of exhibits were admitted into evidence, and the proceeding involves 40,000 shipping files (Lions' Appeal Pet. ¶ 12).

The ALJ is not required to include in the decision a recitation of the length of the hearing, the number of transcript and exhibit pages, and the number of shipping files involved in the instant proceeding. Therefore, I reject the Lions' contention that the ALJ's failure to mention length of the hearing, the number of transcript and exhibit pages, and the number of shipping files involved in the instant proceeding, is error.

Sixth, the Lions assert the ALJ erroneously consolidated the instant proceeding with *In re Bruce Lion*, I & G Docket No. 03-0001, and decided the consolidated proceeding without first giving the respondents in *In re Bruce Lion*, I & G Docket No. 03-0001,[8] an opportunity to present their case (Lions' Appeal Pet. ¶ 13).

I agree with the Lions that the ALJ erroneously consolidated *In re Bruce Lion*, I & G Docket No. 03-0001, with the instant proceeding and decided the consolidated

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[8]The respondents in *In re Bruce Lion*, I & G Docket No. 03-0001, are the Lions, Larry Lion, and Isabel Lion.

proceeding before giving the respondents in *In re Bruce Lion*, I & G Docket No. 03-0001, an opportunity to present their case. On January 19, 2010, I severed the instant proceeding from *In re Bruce Lion*, I & G Docket No. 03-0001, and remanded *In re Bruce Lion*, I & G Docket No. 03-0001, to the Chief ALJ for further proceedings in accordance with the Administrative Procedure Act and the Rules of Practice (Judicial Officer's January 19, 2010, Order Severing Cases and Remanding I & G Docket No. 03-0001).

Seventh, the Lions contend the ALJ's denial of their petition to reopen and supplemental petitions to reopen, is error (Lions' Appeal Pet. ¶ 14).

The 72-day hearing in the instant proceeding concluded on March 31, 2006. During the hearing, the Lions introduced hundreds of pages of exhibits and presented the testimony of 12 witnesses. On February 26, 2007, the Lions filed a petition to reopen the hearing for the admission of additional exhibits and previously identified exhibits that were not admitted into evidence.

As an initial matter, exhibits that have been adduced at the hearing, but were not admitted into evidence, are not properly the subject of a petition to reopen the hearing; therefore, as to the exhibits that were adduced at the hearing, I conclude the ALJ's denial of the Lions' February 26, 2007, petition to reopen (ALJ's Initial Decision at 6 ¶ 15), is not error. Moreover, as to the exhibits that were not adduced at the hearing, based on my review of the reasons provided by the Lions for their failure to adduce the evidence at the hearing, I conclude the ALJ's ruling denying the Lions' February 26, 2007, petition to

reopen (ALJ's Initial Decision at 6 ¶ 15), is not error. As for the Lions' supplemental petitions to reopen the hearing, the Rules of Practice do not provide an automatic right to file more than one petition to reopen the hearing.[9] The Lions did not seek leave to file multiple petitions to reopen the hearing. Therefore, I conclude the ALJ's denial of the Lions' supplemental motions to reopen (ALJ's Initial Decision at 6 ¶ 15), is not error.

Eighth, the Lions assert, while the ALJ denied the Administrator's Motion to Rescind Order Assigning Mediator (ALJ's Initial Decision at 6 ¶ 14), the ALJ did not provide any direction on how to overcome the Administrator's reluctance to engage in mediation. The Lions assert the Administrator's counsel, Ms. Carroll, has refused to engage in mediation or in meaningful settlement negotiations. (Lions Appeal Pet. ¶ 16.)

On November 6, 2008, the ALJ issued an Order Assigning Mediator pursuant to 7 C.F.R. § 1.140, which provides that the administrative law judge "may direct the parties

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[9] *In re Lion Raisins, Inc.* (Ruling on Respondents' Petitions to Reopen), __ Agric. Dec. ___, slip op. at 5-6 (Apr. 16, 2009) (stating the Rules of Practice do not provide an automatic right to file more than one petition to reopen a hearing and denying respondents' supplemental motions to reopen because the respondents had not sought leave to file multiple petitions to reopen the hearing). *Cf. In re Heartland Kennels, Inc.* (Order Denying Second Pet. for Recons.), 61 Agric. Dec. 562 (2002) (holding, under the Rules of Practice, a party may not file more than one petition for reconsideration of a decision of the Judicial Officer); *In re Jerry Goetz* (Order Lifting Stay), 61 Agric. Dec. 282, 286 (2002) (holding the Rules of Practice do not provide for filing more than one petition for reconsideration of a decision of the Judicial Officer); *In re Fitchett Bros., Inc.* (Dismissal of Pet. for Recons.), 29 Agric. Dec. 2, 3 (1970) (dismissing a second petition for reconsideration on the basis that the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders do not provide for more than one petition for reconsideration of a final decision and order).

or their counsel to attend a conference at any reasonable time, prior to or during the course of the hearing[.]" The oral hearing before the ALJ concluded March 31, 2006; therefore, I find the ALJ's Order Assigning Mediator moot.

Ninth, the Lions contend the ALJ erroneously failed to specifically rule on the Lions' motion to accept rejected exhibits (Lions' Appeal Pet. ¶ 18).

The ALJ specifically denied the Administrator's Motion to Rescind Order Assigning Mediator and provided that "[a]ll other pending motions are denied, to the extent that they are not addressed in this Decision and Order." (ALJ's Initial Decision at 6 ¶¶ 14-15.) The Rules of Practice do not require an administrative law judge to rule on each individual motion specifically; therefore, I reject the Lions' contention that the ALJ's failure to specifically address the Lions' motion to accept rejected exhibits, is error.

Tenth, the Lions contend the Secretary of Agriculture has no authority under the Agricultural Marketing Act to debar the Lions from inspection services (Lions' Appeal Pet. ¶ 20).

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.[10] 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 deems necessary to carry out the Agricultural Marketing Act.[11] 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

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[10]7 U.S.C. § 1622(c).

[11]7 U.S.C. §§ 1622(h), 1624(b).

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 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, I have previously held that the Secretary of Agriculture has authority under the Agricultural Marketing Act to debar persons from USDA inspection services.[12]

Eleventh, the Lions assert the Administrator seeks to debar the Lions from inspection required under the order regarding "Raisins Produced From Grapes Grown In

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[12] *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 62-64 (Apr. 17, 2009), *appeal docketed*, No. 1:10-CV-00217-AWI-DLB (E.D. Cal. Feb. 10, 2010); *In re Lion Raisins, Inc.* (Ruling on Certified Questions), 63 Agric. Dec. 836 (2004).

California" (7 C.F.R. pt. 989) issued pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [hereinafter the AMAA] (Lions' Appeal Pet. ¶¶ 21, 29).

The instant proceeding concerns only debarment from receiving USDA inspection services under the Agricultural Marketing Act. The instant proceeding was not instituted under the AMAA or 7 C.F.R. pt. 989. Therefore, I reject the Lions' description of the order sought by the Administrator in the instant proceeding.

Twelfth, the Lions contend the ALJ erroneously failed to find USDA conducted an extensive criminal investigation of the Lions that was abandoned in July 2007 without the indictment of any of the Lions (Lions' Appeal Pet. ¶¶ 21, 29).

The instant proceeding is an administrative proceeding in which the Administrator seeks to debar the Lions from receiving inspection services under the Agricultural Marketing Act. A finding that USDA conducted and abandoned a criminal investigation of the Lions is not relevant to the instant proceeding. Therefore, I reject the Lions' contention that the ALJ's failure to find that USDA conducted and abandoned a criminal investigation of the Lions, is error.

Thirteenth, the Lions contend the ALJ's findings that the Lions fabricated and altered inspection certificates and provided those fabricated and altered inspection certificates to their customers, are error (Lions' Appeal Pet. ¶¶ 22-24, 29, 47).

The ALJ's findings that the Lions fabricated and altered inspection certificates and provided the fabricated and altered inspection certificates to their customers, are supported by the record. Moreover, the ALJ cites portions of the record which support her findings (ALJ's Initial Decision at 7 ¶ 20). Therefore, I reject the Lions' contention that the ALJ's findings regarding the fabrication and alteration of inspection certificates and use of those fabricated and altered inspection certificates, are error.

Fourteenth, the Lions contend the ALJ erroneously found Bruce Lion was aware of the fabrication and alteration of USDA inspection certificates by the Lions' employees. (See ALJ's Initial Decision at 7 ¶ 20.) (Lions' Appeal Pet. ¶¶ 27, 34, 45-46.)

As an initial matter, the record contains evidence that Bruce Lion knew of the violations of the Agricultural Marketing Act and the Regulations (Tr. 15,920-23). Moreover, knowledge is not a prerequisite to debarment. The Regulations provide that any person committing an act or engaging in a practice or causing an act or practice described in 7 C.F.R. § 52.54(a)(1)-(3) may be debarred from any or all of the benefits under the Agricultural Marketing Act. In addition, the Regulations provide that "agents, officers, subsidiaries, or affiliates" of the person who actually committed an act or engaged in a practice or caused an act or practice described in 7 C.F.R. § 52.54(a)(1)-(3) may be debarred from any or all benefits of the Agricultural Marketing Act. Therefore, even if I were to conclude the ALJ's finding that Bruce Lion knew of the fabrications and alterations of USDA inspection certificates, was error (which I do not so conclude), I

would not dismiss the proceeding as to Bruce Lion because he is an officer and agent of Lion Raisins, Inc., and, as such, may be debarred from benefits under the Agricultural Marketing Act based upon Lion Raisins, Inc.'s violations of the Agricultural Marketing Act and the Regulations.

Fifteenth, the Lions contend the ALJ did not have sufficient cause to debar Lion Raisins, Inc., Lion Raisin Company, Lion Packing Company, Bruce Lion, and Dan Lion because it is unlikely that the Lions fabricated or altered inspection certificates, the Lions made changes designed to ensure that violations of the Agricultural Marketing Act and the Regulations do not occur in the future, the Agricultural Marketing Service has exhibited bad faith, and debarment would have an impact on the entire industry (Lions' Appeal Pet. ¶¶ 28, 33).

As an initial matter, the record belies the Lions' contention that it is unlikely that they fabricated or altered USDA inspection certificates. Moreover, the Lions' post-violation changes, the Agricultural Marketing Service's purported bad faith, and the impact of debarment of the Lions on the California raisin industry are not relevant to whether the Lions violated the Agricultural Marketing Act and the Regulations or whether debarment is necessary to maintain public confidence in the integrity and reliability of the processed products inspection service the Secretary of Agriculture is directed and authorized to administer.

Sixteenth, the Lions contend the ALJ's failure to find that the Lions' modifications of inspection certificates are attributable to undocumented or undisclosed retest, recheck, reinspection, or updated evaluations by inspectors, is error (Lions' Appeal Pet. ¶ 30).

The Lions cite no evidence to support their claim that their modifications of inspection certificates were based upon retests, rechecks, reinspections, or updated evaluations by inspectors. To the contrary, the Lions state these retests, rechecks, reinspections, and updated evaluations are "undocumented or undisclosed[.]" The ALJ's failure to make a finding based upon actions not evidenced in the record, is not error.

Seventeenth, the Lions assert the Administrator failed to produce any Lion customer as a witness and made no effort to calculate any financial damages (Lions' Appeal Pet. ¶ 30). I infer the Lions contend the instant proceeding should be dismissed based on the Administrator's failures to call at least one of the Lions' customers as a witness and to prove the Lions' misrepresentations or deceptive or fraudulent practices or acts resulted in financial damage to the Lions' customers.

In order to prevail, the Administrator must show that the Lions engaged in misrepresentation or deceptive or fraudulent practices or acts in violation of the Agricultural Marketing Act and the Regulations. The Administrator need not show that those misrepresentations or deceptive practices or acts resulted in financial damage to those who were the recipients of the Lions' fabricated or altered inspection certificates. The Administrator's failures to call a Lion customer as a witness and to establish that the

Lions' customers were financially damaged by the Lions' violations are not bases upon which to dismiss the instant proceeding.

Eighteenth, the Lions assert the inspection certificates they provided customers accurately reflected moisture content of the Lions' raisins on arrival (Lions' Appeal Pet. ¶¶ 31-32).

Even if I were to find that the inspection certificates the Lions provided to customers more accurately reflected the moisture content of raisins on arrival than the USDA inspection certificates, I would not dismiss the instant proceeding. The issue in the instant proceeding is whether the Lions engaged in misrepresentation or deceptive or fraudulent practices or acts in connection with the use of inspection certificates and/or inspection results, not whether the fabricated or altered inspection certificates more accurately reflect the moisture content of raisins on arrival than USDA inspection certificates. I find the relative accuracy of USDA inspection certificates and the inspection certificates as fabricated or altered by the Lions irrelevant to the instant proceeding.

Nineteenth, the Lions contend the ALJ's finding that the Agricultural Marketing Service has good cause to be outraged, is error (Lions' Appeal Pet. ¶ 33).

The Agricultural Marketing Service is not a sentient being capable of emotion. I find whether the Agricultural Marketing Service has good cause to experience an emotion

that it cannot possibly experience, irrelevant to the instant proceeding. I do not adopt the ALJ's finding that the Agricultural Marketing Service has good cause to be outraged.

Twentieth, the Lions assert Ms. Carroll, the Administrator's counsel, was married to Neil Blevins, a sanction witness for the Administrator. The Lions assert Mr. Blevins and Ms. Carroll concealed their marriage, but, in May 2008, after an investigation, the Lions discovered the marriage. The Lions contend Mr. Blevins and Ms. Carroll violated USDA ethics regulations and were required to withdraw from the instant proceeding or seek a waiver (presumably from the Lions) allowing both Ms. Carroll and Mr. Blevins to participate in the proceeding. (Lions' Appeal Pet. ¶ 33.)

The Lions do not cite, and I cannot locate, any provision in USDA's ethics regulations[13] that prohibits a USDA attorney and a USDA witness, without a waiver from the adverse parties, from participating in an administrative proceeding because of a spousal relationship between that attorney and the witness. Therefore, I reject the Lions contention that Ms. Carroll and Mr. Blevins committed violations of USDA's ethics regulations.

Twenty-first, the Lions assert David W. Trykowski, a witness for the Administrator, committed perjury when he stated he had nothing to do with drafting the complaints, a team of investigators was not assigned to investigate the Lions' violations

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[13] I infer the Lions' reference to "USDA ethics regulations" is a reference to 5 C.F.R. pts. 2635 and 8301.

of the Agricultural Marketing Act and the Regulations, his involvement did not begin until after the Complaint was filed, and he had never seen a signed worksheet (Lions' Appeal Pet. ¶¶ 14, 35).

The ALJ found Mr. Trykowski "totally credible." (ALJ's Initial Decision at 13 ¶ 33.) While the Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence,[14] the consistent practice of the Judicial Officer is to give great weight to the credibility determinations of administrative law judges, since they have the opportunity to see and hear witnesses testify.[15] I have examined the record and find no basis upon which to reverse the ALJ's credibility determination with respect to Mr. Trykowski.

Twenty-second, the Lions contend the ALJ's debarment of Lion Raisins, Inc., Lion Raisin Company, Lion Packing Company, Bruce Lion, and Dan Lion from receiving inspection services under the Agricultural Marketing Act, is error, because none of them knew, or were in a position to know, of the violations of the Agricultural Marketing Act and the Regulations (Lions' Appeal Pet. ¶ 35).

Knowledge is not a prerequisite to debarment. The Regulations provide that any person committing an act or engaging in a practice or causing an act or practice described

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[14]See note 5.

[15]See note 7.

in 7 C.F.R. § 52.54(a)(1)-(3) may be debarred from any or all of the benefits under the Agricultural Marketing Act. In addition, the Regulations provide that "agents, officers, subsidiaries, or affiliates" of the person who actually committed an act or engaged in a practice or caused an act or practice described in 7 C.F.R. § 52.54(a)(1)-(3) may be debarred from any or all benefits of the Agricultural Marketing Act. Therefore, even if I were to conclude that Lion Raisin Company, Lion Packing Company, Bruce Lion, and Dan Lion did not know of the violations of the Agricultural Marketing Act and the Regulations and had no reason to know of the violations, I would not dismiss the proceeding as to Lion Raisin Company, Lion Packing Company, Bruce Lion, and Dan Lion because they are agents, officers, subsidiaries, or affiliates of Lion Raisins, Inc., and, as such, may be debarred from benefits under the Agricultural Marketing Act based upon Lion Raisins, Inc.'s violations of the Agricultural Marketing Act and the Regulations.

Twenty-third, the Lions assert Neil Blevins (not the Administrator) sought a 36-year debarment of the Lions. The Lions contend Mr. Blevins intends to punish the Lions and his recommended period of debarment demonstrates his loss of impartiality based upon his marriage to Ms. Carroll, the Administrator's counsel. (Lions' Appeal Pet. ¶ 36.)

Mr. Blevins testified that the 36-year period of debarment was not his personal recommendation designed to punish the Lions, but rather, the Agricultural Marketing Service's proposed recommendation for a remedy (Tr. 15,693-94). Therefore, I reject the

Lions' assertion that the recommendation for a 36-year period of debarment was Mr. Blevins' personal recommendation designed to punish the Lions. Since the recommendation is not Mr. Blevins' personal recommendation, but rather, the recommendation of the Agricultural Marketing Service, I reject the Lions' contention that the recommendation demonstrates Mr. Blevins' loss of impartiality based upon his marriage to Ms. Carroll.

Twenty-fourth, the Lions contend debarment of the Lions would have no deterrent effect (Lions' Appeal Pet. ¶ 37).

The purpose of debarring those who engage in misrepresentation or deceptive or fraudulent practices or acts in violation of the Agricultural Marketing Act and the Regulations is to protect the integrity of the inspection service and to protect the public.[16] The exclusion of such persons helps to ensure that quality and condition standards are uniform and consistent, so that consumers may be able to obtain the quality product that they desire unaffected by corrupt influences. Therefore, whether debarment has a deterrent effect is irrelevant to the instant proceeding.

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[16] *See Manocchio v. Kusserow*, 961 F.2d 1539 (11th Cir. 1992) (stating a 5-year suspension from the Medicare program was remedial because its purpose was to protect the public from those who defraud the program); *United States v. Drake*, 934 F. Supp. 953, 959 (N.D. Ill. 1996) (stating suspension from obtaining loans from the Commodity Credit Corporation for failure to employ good faith in disposition of secured crops "was not punitive in nature, rather, the regulation exists to protect the integrity of the CCC and the price support loan program.").

Twenty-fifth, the Lions contend debarment would constitute a "death penalty" (Lions' Appeal Pet. ¶ 37).

Debarment is not a penalty. Debarment is "the act of precluding someone from having or doing something" and "does not extract payment in cash or in kind."[17]

[17] *In re American Raisin Packers, Inc.*, 60 Agric. Dec. 165, 186 n.6 (2001) (citing *Printup v. Alexander & Wright*, 69 Ga. 553, 556 (Ga. 1882) ("to debar" is to cut off from entrance, to preclude, to hinder from approach, entry, or enjoyment, to shut out or exclude), *aff'd*, 221 F. Supp.2d 1209 (E.D. Cal. 2002), *aff'd*, 66 F. App'x 706 (9th Cir. 2003); *Haynesworth v. Hall Constr. Co.*, 163 S.E. 273, 277 (Ga. Ct. App. 1932) ("to debar" is to cut off from entrance, to preclude, to hinder from approach, entry, or enjoyment, to shut out or exclude); BLACK'S LAW DICTIONARY 407 (7th ed. 1999) (defining debarment as the act of precluding someone from having or doing something; exclusion or hindrance); WEBSTER'S COLLEGIATE DICTIONARY 296 (10th ed. 1997) (defining "debar" as to bar from having or doing something); 4 THE OXFORD ENGLISH DICTIONARY 308 (2d ed. 1991) (defining "debar" as to exclude or shut out from a place or condition; to prevent or prohibit from entrance or from having, attaining, or doing anything)).

Debarment from the benefits of the Agricultural Marketing Act is strictly remedial.[18] Therefore, I reject the Lions' claim that debarment would constitute a "death penalty."

Twenty-sixth, the Lions assert debarment would encourage the Agricultural Marketing Service to engage in legal and ethical abuses (Lions' Appeal Pet. ¶ 37).

The Lions' assertion that debarment of the Lions will encourage the Agricultural Marketing Service to engage in legal and ethical abuses is speculative; therefore, the Lions' assertion is rejected.

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[18] *See United States v. Borjesson*, 92 F.3d 954, 956 (9th Cir.) (determining categorically that debarment is not punishment), *cert. denied*, 519 U.S. 1047 (1996); *Bae v. Shalala*, 44 F.3d 489, 493 (7th Cir. 1995) (stating the Generic Drug Enforcement Act's provision for civil debarment was remedial where debarment served compelling government interests unrelated to punishment and punitive effects were merely incidental to the "overriding purpose to safeguard the integrity of the generic drug industry while protecting public health."); *United States v. Furlett*, 974 F.2d 839, 844 (7th Cir. 1992) (stating debarment from all trading activity reasonably can be viewed as a remedial measure); *United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990) (stating removal of persons whose participation in government programs is detrimental to public purposes is remedial by definition); *Taylor v. Cisneros*, 913 F. Supp. 314, 320 (D.N.J. 1995) (stating, while debarment manifestly carried the "sting of punishment" in the eyes of the defendant, that alone could not recast a remedial measure as punishment because the analysis does not proceed from the defendant's perspective; purposes, not deterrent effects, are paramount), *aff'd*, 102 F.3d 1334 (3d Cir. 1996); *United States v. Holtz*, 1993 WL 482953 (E.D. Pa. 1993) (holding the Federal Aviation Administration's revocation of an aviation license for violating federal aviation regulations by falsifying maintenance records subject to FAA inspection was not a punitive sanction), *aff'd*, 31 F.3d 1174 (3d Cir. 1994) (Table); *Doe v. Poritz*, 142 N.J. 1, 43 (1995) (stating a statute that can fairly be characterized as remedial, both in its purpose and implementing provisions, does not constitute punishment even though its remedial provisions have some inevitable deterrent impact, and even though it may indirectly and adversely affect, potentially severely, some of those subject to its provisions; a law does not become punitive simply because its impact, in part, may be punitive unless the only explanation for that impact is a punitive purpose: the intent to punish).

Twenty-seventh, the Lions assert debarment, as applied by Ms. Carroll, the Administrator's counsel, would deprive Lion Raisins, Inc., and Bruce Lion of both "voluntary" and "mandatory" inspection services (Lions' Appeal Pet. ¶ 38).

I find nothing in the record to indicate that debarment of the Lions will be "applied by" counsel for the Administrator. The Order in this Decision and Order debars the Lions from receiving "voluntary" inspection services under the Agricultural Marketing Act and the Regulations; the Order does not relate to mandatory inspection services, as the Lions assert.

Twenty-eighth, the Lions contend debarment is discretionary, and the ALJ's failure to consider the Lions' good faith remedial actions, as well as the positive changes implemented by USDA, is error (Lions' Appeal Pet. ¶ 39).

I agree with the Lions' contention that the ALJ had discretion to impose no period of debarment despite her finding that the Lions' shipping department engaged in misrepresentation or deceptive or fraudulent practices or acts. The Regulations provide that any misrepresentation or deceptive or fraudulent practice or act "may be deemed sufficient cause for . . . debarment[.]"[19] However, I find no indication that the ALJ was unaware that she could find the Lions violated the Agricultural Marketing Act and the Regulations and also determine that the Lions' violations were not a sufficient cause for debarment. Contrary to the Lions' assertion, the ALJ did consider "all the changes during

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[19] 7 C.F.R. § 52.54(a).

the past 11 years that make it impossible for the wrongdoing to happen again." (ALJ's Initial Decision at 10 ¶ 29.)

Twenty-ninth, the Lions contend they were at a disadvantage because the ALJ did not adopt the Lions' theory that the most believable explanation of the discrepancies between USDA records and the inspection certificates issued by the Lions is USDA's correction of errors or USDA's update of inspection results (Lions' Appeal Pet. ¶ 43).

An administrative law judge's refusal to adopt a litigant's theory of a case is a litigation risk, not a "disadvantage." Moreover, based upon my review of the record, I agree with the ALJ's rejection of the Lions' theory of the case.

Thirtieth, the Lions contend USDA inspectors improperly signed inspection certificates for each other (Lions' Appeal Pet. ¶ 44).

The record establishes that USDA inspectors have power of attorney to sign inspection certificates for each other and that they routinely sign for each other (Tr. 933-34, 1859-60). Therefore, I reject the Lions' contention that USDA inspectors' signing inspection certificates for other inspectors is "improper."

Thirty-first, the Lions contend the ALJ's Initial Decision is inadequate in that it does not contain a ruling on each proposed finding of fact and proposed conclusion of law, as required by 5 U.S.C. § 557(c)(3)(A) (Lions' Appeal Pet. ¶ 48).

The Administrative Procedure Act does not require that each initial decision contain a ruling on each proposed finding of fact and proposed conclusion of law

submitted by the parties. Instead, the Administrative Procedure Act provides that all initial decisions shall contain findings and conclusions, as follows:

> **§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record**
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> . . . .
>
> (c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—
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> (1) proposed findings and conclusions; or
>
> (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
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> (3) supporting reasons for the exceptions or proposed findings or conclusions.
>
> The record shall show the ruling on each finding, conclusion, or exception presented. *All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—*
>
> *(A) findings and conclusions, and the reasons and basis therefor, on all material issues of fact, law, or discretion presented on the record;* and
>
> (B) the appropriate rule, order, sanction, relief, or denial thereof.

5 U.S.C. § 557(c) (emphasis added). Nothing in 5 U.S.C. § 557(c) requires that an initial decision contain a ruling on each proposed finding of fact and proposed conclusion of law submitted by the parties.

The Administrator's Appeal Petition

The Administrator raises seven issues in the Administrator's Appeal Petition. First, the Administrator contends the ALJ erroneously concluded both that Al Lion, Jr., and Jeff Lion violated the Agricultural Marketing Act and the Regulations, as alleged in the Second Amended Complaint, and that Al Lion, Jr., and Jeff Lion had no culpability for their violations of the Agricultural Marketing Act and the Regulations. The

Administrator argues Al Lion, Jr., and Jeff Lion cannot have violated the Agricultural Marketing Act and the Regulations and also not be culpable for their violations. The Administrator requests that I set aside these purportedly inconsistent conclusions. (Administrator's Appeal Pet. at 5-7.)

The ALJ concluded Al Lion, Jr., and Jeff Lion were not culpable for the violations of the Agricultural Marketing Act and the Regulations which she found to have occurred (ALJ's Initial Decision at 15 ¶ 35); however, the ALJ's Initial Decision does not indicate that she found Al Lion, Jr., and Jeff Lion committed any violations of the Agricultural Marketing Act and the Regulations. Instead, the ALJ states the "Lion's shipping department" committed violations (ALJ's Initial Decision at 13-15 ¶ 34(A)-(F)). Therefore, I reject the Administrator's contention that the ALJ inconsistently found Al Lion, Jr., and Jeff Lion violated the Agricultural Marketing Act and the Regulations, but were not culpable for their violations of the Agricultural Marketing Act and the Regulations.

Second, the Administrator contends the ALJ's failure to find that Lion Raisins, Inc., is not an entity separate and apart from the individual respondents, is error (Administrator's Appeal Pet. at 7-11).

The record supports findings that Lion Raisins, Inc., failed to observe corporate formalities and did not operate as a California corporation and that Lion Raisins, Inc.'s

principals operated Lion Raisins, Inc., as a family business. I have adopted findings and conclusions to that effect.

Third, the Administrator contends the ALJ erroneously failed to debar all of the violators for a sufficient period of time (Administrator's Appeal Pet. at 11-22).

The ALJ made debarment of each of the Lions contingent upon a showing of knowledge of the violations, responsibility for the violations, or contribution to the violations (ALJ's Initial Decision at 2 ¶ 1; 9 ¶ 25; 12-13 ¶ 32; 15 ¶ 35). Based upon that premises: (1) the ALJ debarred Lion Raisins, Inc.; Lion Raisin Company; Lion Packing Company; and Bruce Lion for 3 years; (2) the ALJ debarred Dan Lion for 3 months; and (3) the ALJ did not debar Al Lion, Jr., or Jeffrey Lion (ALJ's Initial Decision at 2 ¶ 1; 9 ¶ 25; 16-17 ¶¶ 37-43).

The Regulations provide that any person committing an act or engaging in a practice or causing an act or practice described in 7 C.F.R. § 52.54(a)(1)-(3) may be debarred from any or all of the benefits of the Agricultural Marketing Act. In addition, the Regulations provide that "agents, officers, subsidiaries, or affiliates" of the person who actually committed an act or engaged in a practice or caused an act or practice described in 7 C.F.R. § 52.54(a)(1)-(3) may be debarred from any or all benefits of the Agricultural Marketing Act. Nothing in the Regulations requires knowledge of the violations, responsibility for the violations, or contribution to the violations as elements for an order of debarment of the agents, officers, subsidiaries, or affiliates of the person

who committed or caused the commission of a violation. Thus, Lion Raisins, Inc.'s violations subjected Lion Raisins, Inc.'s agents, officers, subsidiaries, and affiliates to debarment. Therefore, I find the ALJ's conclusions that no debarment is necessary, appropriate, or warranted for Al Lion, Jr., and Jeff Lion and that only a 3-month debarment is necessary and appropriate for Dan Lion, error. Instead, I debar each of the Lions for a period of 3 years.

Fourth, the Administrator contends the ALJ's consideration of the Lions' complaints that USDA's inspection results were unreliable, is error (Administrator's Appeal Pet. at 22-23).

The ALJ took into account the Lions' complaints that USDA's inspection results were not reliable (ALJ's Initial Decision at 10-11 ¶ 30). I find irrelevant the Lions' complaints about USDA's inspection program. The issue in the instant proceeding is whether the Lions engaged in misrepresentation or deceptive or fraudulent practices or acts in connection with the use of inspection certificates and/or inspection results. Even if I were to find that USDA's inspection system did not result in accurate determinations as to the quality and condition of the Lions' raisins, the Lions would be prohibited from fabricating and altering USDA inspection certificates and misrepresenting USDA inspection results to their customers. Therefore, I do not adopt the ALJ's findings and conclusions regarding the Lions' complaints about USDA's inspection program.

Fifth, the Administrator contends the ALJ's finding that the Lions were at a disadvantage during the instant proceeding, is error (Administrator's Appeal Pet. at 23-26).

I have not adopted the ALJ's discussion regarding the Lions' disadvantage during the instant proceeding. The ALJ bases her conclusion that the Lions were "at a tremendous disadvantage" on proceedings that were not before her, including a criminal investigation of the Lions conducted by the United States government and the Lions' Freedom of Information Act requests. The ALJ found, despite the Lions' purported disadvantage, the Lions received a fair hearing. I agree with the ALJ's conclusion that the Lions received a fair hearing. My examination of the record reveals that the proceeding was conducted in accordance with the Administrative Procedure Act and the Rules of Practice and the Lions were provided due process.

Sixth, the Administrator contends the ALJ's failure to find Bruce Lion's testimony not credible, is error. In particular, the Administrator contends the ALJ cannot both reject Bruce Lion's testimony regarding the central issue in the case — that the Lions fabricated and falsified inspection certificates and misrepresented USDA inspection results to the Lions' customers — and also rely on Bruce Lion's testimony as support for her findings as to other issues. (Administrator's Appeal Pet. at 26-28.)

The Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility, subject

only to court review for substantial evidence.[20] However, the consistent practice of the Judicial Officer is to give great weight to the credibility determinations of administrative law judges, since they have the opportunity to see and hear witnesses testify.[21] I have examined the record and find no basis upon which to reverse the ALJ's credibility determinations with respect to Bruce Lion. Moreover, I reject the Administrator's contention that the ALJ cannot both find Bruce Lion's testimony regarding the central issue in the case unreliable and rely on Bruce Lion's testimony as support for her findings as to other issues. The legal maxim *falsus in uno, falsus in omnibus* is not a command, and the ALJ may find Bruce Lion's testimony credible in part and not credible in part.

Seventh, the Administrator contends the ALJ's denial of the Administrator's Motion to Rescind Order Assigning Mediator, is error (Administrator's Appeal Pet. at 29-33).

On November 6, 2008, the ALJ issued an Order Assigning Mediator pursuant to 7 C.F.R. § 1.140, which provides that the administrative law judge "may direct the parties or their counsel to attend a conference at any reasonable time, prior to or during the course of the hearing[.]" The oral hearing before the ALJ concluded March 31, 2006; therefore, I find the ALJ's Order Assigning Mediator moot.

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[20]See note 5.

[21]See note 7.

For the foregoing reasons, the following Order is issued.

ORDER

1. Lion Raisins, Inc.; Al Lion, Jr.; Dan Lion; Jeff Lion; and Bruce Lion are debarred for a period of 3 years from receiving inspection services under the Agricultural Marketing Act and the Regulations. Paragraph 1 of this Order shall become effective 30 days after service of this Order on Lion Raisins, Inc.; Al Lion, Jr.; Dan Lion; Jeff Lion; and Bruce Lion.[22]

[22] In a related proceeding, I issued an order debarring Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion for a period of 5 years from receiving inspection services under the Agricultural Marketing Act and the Regulations. *In re Lion Raisins, Inc.* (Order Denying Pet. to Reconsider as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), __ Agric. Dec. ___ (Jan. 6, 2010); *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). However, that 5-year period of debarment is not effective as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion because it has been stayed pending the outcome of proceedings for judicial review. *In re Lion Raisins, Inc.* (Stay Order as to Lion Raisins, Inc.; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; and Bruce Lion), __ Agric. Dec. ___ (Mar. 10, 2010). Therefore, the 3-year debarment period as to Lion Raisins, Inc.; Al Lion, Jr.; Dan Lion; Jeff Lion; and Bruce Lion in the instant proceeding is effective beginning 30 days after service of the instant Order on Lion Raisins, Inc.; Al Lion, Jr.; Dan Lion; Jeff Lion; and Bruce Lion.

2. Lion Raisin Company and Lion Packing Company are debarred for a period of 3 years from receiving inspection services under the Agricultural Marketing Act and the Regulations. Paragraph 2 of this Order shall become effective July 20, 2011.[23]

Done at Washington, DC

May 12, 2010

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William G. Jenson
Judicial Officer

[23] In a related proceeding, the Chief ALJ issued an order debarring Lion Raisin Company and Lion Packing Company for a period of 5 years from receiving inspection services under the Agricultural Marketing Act and the Regulations. *In re Lion Raisins, Inc.*, 65 Agric. Dec. 193, 232-33 (2006). The Chief ALJ's Order became effective as to Lion Raisin Company and Lion Packing Company on July 20, 2006, and Lion Raisin Company's and Lion Packing Company's 5-year debarment period ends July 19, 2011. *See 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. 4 n.3 (Apr. 17, 2009). Therefore, the 3-year debarment period as to Lion Raisin Company and Lion Packing Company in the instant Order is effective beginning July 20, 2011.