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2
3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF CALIFORNIA
5

6 LION RAISINS, INC.,
7 Plaintiff,
8 v.
9 UNITED STATES DEPARTMENT OF
10 AGRICULTURE,
11 Defendant.

1:05-CV-00640 OWW-SMS
MEMORANDUM DECISION RE
GRANTING IN PART AND DENYING
IN PART CROSS-MOTIONS FOR
SUMMARY JUDGMENT (DOC. 36, 41)

12
13 1. INTRODUCTION

14 Plaintiff Lion Raisins, Inc. ("Lion") seeks review of a
15 Decision and Order issued by the USDA Judicial Officer on its
16 petition challenging provisions of the California raisin
17 marketing order. Lion initiated this case in federal court by
18 filing a complaint pursuant to section 608c(15)(B) of the
19 Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 et
20 seq. ("AMAA") and the Administrative Procedure Act, 5 U.S.C. §
21 702-706 ("APA"). This case arises from the administration of a
22 federal California raisin marketing order, enacted under the
23 authority of the AMAA, which regulates raisins in the California
24 raisin marketing area. See 7 C.F.R. § 989.1 -.801. ("Raisin
25 Marketing Order").

26 Lion challenges the ruling of the USDA Judicial Officer
27 ("Judicial Officer" or "JO") who affirmed, but did not adopt, the
28 decision of the Administrative Law Judge ("ALJ"), granting USDA's

1 (Doc. 43, AR 2005, Tab 15.)

2 7. On March 24, 2005, Lion re-filed the February Amended
3 Petition ("Re-Filed Amended Petition") pursuant to the March 7,
4 2005 Order. (Doc. 43, AR 2005, Tab 17.)

5 8. On March 30, 2005, Lion filed a response to USDA's
6 appeal petition. (Doc. 43, AR 2005, Tab 19.)

7 9. On March 30, 2005, USDA filed a Motion to Strike the
8 Re-Filed Amended Petition. (Doc. 43, AR 2005, Tab 20.)

9 10. On April 21, 2005, Lion Raisin filed an opposition to
10 USDA's Motion to Strike the Re-Filed Amended Petition. (Doc. 43,
11 AR 2005, Tab 22.)

12 11. On April 25, 2005, the Judicial Officer dismissed the
13 November Petition with prejudice, finding it was barred by *res*
14 *judicata*, technical deficiencies, and failure to present a
15 cognizable claim. The Judicial Officer also struck the February
16 Amended Petition as premature, because it was filed before the
17 March 7, 2005 ALJ Order. (Doc. 43, AR 2005, Tab 24.) The
18 Judicial Officer did not rule on the Re-filed Amended Petition.

19 12. On May 3, 2005, the ALJ dismissed the Re-Filed Amended
20 Petition (filed in March 2005). (Doc. 43, AR 2005, Tab 26.)

21 13. On June 3, 2005, Lion filed an appeal to the Judicial
22 Officer from the ALJ May 3, 2005 Order dismissing the Re-Filed
23 Amended Petition (filed in March 2005).

24 14. On June 27, 2005, USDA filed a response to Lion's
25 petition for appeal. (Doc. 43, AR 2005, Tab 29.)

26 15. On July 13, 2005, the Judicial Officer struck Lion's
27 Re-Filed Amended Complaint (filed in March 2005). (Doc. 43, AR
28 2005, Tab 32.)

1 B. Federal Court

2 1. On May 16, 2005, Lion filed a complaint for judicial
3 review of the Judicial Officer's April 25, 2005 Decision and
4 Order, dismissing with prejudice the November Petition and
5 striking the February Amended Petition. (Doc. 1, Complaint.)

6 2. On August 10, 2005, USDA filed an Amended Answer to
7 Complaint. (Doc. 13, Answer.)

8 3. On April 24, 2007, USDA filed a Motion for Summary
9 Judgment. (Doc. 36, USDA's MSJ.)

10 4. On April 25, 2007, Lion filed a Cross-Motion for Summary
11 Judgment. (Doc. 42, Lion's Cross-MSJ.)¹

12 5. On May 24, 2007, USDA filed an opposition to Lion's
13 Cross-MSJ. (Doc. 46, USDA Opposition.)

14 6. On May 24, 2007, Lion filed an opposition to USDA's MSJ.
15 (Doc. 47, Lion Opposition.)

16 3. FACTUAL HISTORY

17
18
19 ¹ On April 26, 2007, Lion filed an application for late
20 filed documents as to Plaintiff's Cross-Motion for Summary
21 Judgment pursuant to F.R.C.P. Rule 6(b), L.R. 5-135(c) and L.R.
22 6-144(d). (Doc. 45, Application.) The deadline to file cross-
23 motions for summary judgment was April 24, 2007. Plaintiff had
24 attempted to electronically file its motion for summary judgment
25 on April 24, 2007 but encountered a technical failure and
26 inadvertently filed a wrong version of the motion in its rush to
27 address the technical failure. Upon Plaintiff's notice that it
28 filed the incorrect version of the motion, it promptly filed an
Errata on April 25, 2007, and informed opposing counsel who
agreed the filing would be unopposed. Plaintiff filed the
application for acceptance of late filing thereafter on April 26,
2007. (Doc. 45, Application.) Finding no prejudice to the
parties, the Court GRANTS the requested extension of time is
GRANTED through April 25, 2007 for Plaintiff to file the cross-
motion for summary judgment *Errata* and its supporting documents.

1 Lion Raisins, Inc., (or Lion), is a California corporation,
2 that purchases raisins in the State of California which are then
3 processed and packed for sale in intrastate, interstate and
4 foreign commerce for human consumption. Lion also produces its
5 own raisins, performing the same processing functions. Lion is
6 considered a handler of California Raisins.²

7 The AMAA delegates authority to the Secretary of the United
8 States Department of Agriculture to issue marketing orders, upon
9 the request of producers, regulating the sale and delivery of
10 various commodities, including raisins, "in order to avoid
11 unreasonable fluctuations in supplies and prices." *Kyer v. U.S.*,
12 369 F.2d 714, 717, 177 Ct.Cl. 747 (1966) cert. denied 387 U.S.
13 929 (1967); 7 U.S.C. § 608c, 602(4) (2000). "The AMAA was
14 originally enacted during the Depression, with the objective of
15 helping farmers obtain a fair value for their agricultural
16 products." *Lion Raisins, Inc. v. U.S.*, 416 F.3d 1356, 1358
17 (Fed.Cir. 2005). "The Act contemplates a cooperative venture
18 among the Secretary, handlers, and producers the principal
19 purposes of which are to raise the price of agricultural products
20 and to establish an orderly system for marketing them." *Block v.*
21 *Community Nutrition Institute*, 467 U.S. 340, 346 (1984). The
22 principal mechanism is through the implementation of marketing
23 orders.

24 The marketing order for the California raisin market, the
25 Raisin Marketing Order, was promulgated in 1960 under Parts §§
26

27 ² (Doc. 46-2, Plaintiff's Statement of Undisputed Facts,
28 (PSUDF), No. 1-2)

1 989.1-989.801, covering the region of the State of California. 7
2 C.F.R. § 989.1-.801. Before a marketing order is issued under
3 the AMAA, the Secretary must give notice and an opportunity for a
4 hearing upon the contemplated marketing order. 7 U.S.C. §
5 608c(3), (4). Under 7 U.S.C. § 608c(7)(C)(i)-(iv), the Secretary
6 can delegate the responsibility of implementing the Raisin
7 Marketing Order to marketing committees and to empower the
8 marketing committees to issue rules and regulations. The Raisin
9 Administrative Committee (RAC), appointed by the USDA, is the
10 committee charged with overseeing and administering the Raisin
11 Marketing Order. 7 C.F.R. § 989.35(a), (b). The RAC is composed
12 of 47 members, the majority from the raisin production industry,
13 including 35 producers and 10 handlers, in addition to one member
14 from the public and one member from the industry's collective
15 bargaining association. 7 C.F.R. § 989.26.

16 Part 989.58(d) and .59(d) requires "handlers" of California
17 raisins to "cause" an "inspection and certification...of all
18 natural condition raisins..." for both incoming and outgoing
19 raisins. 7 C.F.R. § 989.58(d) and § 989.59(d).

20 The inspections of raisins generally are governed pursuant
21 to the authority of the USDA under the Agricultural Marketing Act
22 of 1946, as amended. 7 U.S.C. § 1621, *et seq.* ("AMA"). The USDA
23 has issued regulations under Title 7, Part 52 ("Part 52")
24 pursuant to its authority under the AMA governing the inspection
25 and certification of certain agricultural products, including
26 raisins, and has established standards for grades of commodities,
27 including raisins. 7 C.F.R. § 52.5. Section 52.5 states that
28 "[a]n application for inspection service may be made by any

1 interested party..." 7 C.F.R. § 52.5.

2 The Agricultural Marketing Service ("AMS") is in charge of
3 administering the inspection regulations, including providing
4 inspection services to any applicant in accordance with the
5 regulations established pursuant to the AMA and the AMAA. It is
6 undisputed in this suit that Lion exhausted its administrative
7 remedies.³

8
9 ³ Plaintiff Lion's Statement of Undisputed Facts also states
10 facts regarding its contention that the USDA's interpretation and
11 application of Part 989 provisions concerning who can cause "an
12 inspection and certification" under the Raisin Marketing Order is
13 arbitrary, an abuse of discretion and not otherwise in accordance
14 with the law. The USDA has interpreted Part 989 provisions
15 regarding "who" causes an inspection of incoming and outgoing
16 raisins to mean only the "handler" of raisins.

17 Lion, a handler, disputes this interpretation of Part
18 989.58(d) and 989.59(d) provisions and claim it is not only
19 "handlers" that can "cause" an "inspection and certification" of
20 raisins. Lion contends that the "growers," the front-end of the
21 raisin process, or the "packers," the back-end of the raisin
22 process, can "cause an inspection and certification" of raisins.
23 Lion provides facts to support its contention that the provision
24 requiring handlers to "cause an inspection and certification"
25 should be interpreted to mean that handlers can apply for
26 inspection services directly *or compel another interested party*
27 *to apply*, namely growers of natural condition raisins and buyers
28 of packed raisins. However, while these facts are informative,
the Judicial Officer's April 25, 2005 Decision and Order did not
reach the merits of Lion's petition and dismissed the petition on
res judicata grounds and failure to comply with the Rules of
Practice. The Court is limited to reviewing the decision and
evidence before the Judicial Officer. In addition, the Judicial
Officer's decision granted USDA's Motion to Strike on the basis
that the February Amended Petition was premature. The Judicial
Officer Decision and Order did not address the underlying merits
of the petition and therefore there is no decision in the
administrative record determining whether Lion, as the handler,
is the only party that can "cause" an inspection and
certification.

1 4. STANDARD OF REVIEW

2 A. Motion for Summary Judgment

3 Summary judgment is warranted only "if the pleadings,
4 depositions, answers to interrogatories, and admissions on file,
5 together with the affidavits, if any, show that there is no
6 genuine issue as to any material fact." Fed. R. Civ. P. 56(c);
7 *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998). To
8 defeat a motion for summary judgment, the non-moving party must
9 show (1) that a genuine factual issue exists and (2) that this
10 factual issue is material. *Id.* A genuine issue of fact exists
11 when the non-moving party produces evidence on which a reasonable
12 trier of fact could find in its favor viewing the record as a
13 whole in light of the evidentiary burden the law places on that
14 party. *See Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216,
15 1221 (9th Cir. 1995); *see also Anderson v. Liberty Lobby, Inc.*,
16 477 U.S. 242, 252-56 (1986). Facts are "material" if they "might
17 affect the outcome of the suit under the governing law."
18 *Campbell*, 138 F.3d at 782 (quoting *Anderson*, 477 U.S. at 248).

19 The nonmoving party cannot simply rest on its allegations
20 without any significant probative evidence tending to support the
21 complaint. *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir.
22 2001). [T]he plain language of Rule 56(c) mandates the entry of

23 _____
24 Defendant USDA opposes Lion's Undisputed Statement of Facts
25 arguing that only the facts in the administrative record are
26 undisputed for purposes of review of this matter. (Doc. 46,
27 Defendant's Response to Plaintiff's Undisputed Facts) Therefore,
28 Lion's facts concerning the 989.58(d) and 989.59(d) provisions
re: "cause an inspection and certification" are omitted from the
factual section.

1 summary judgment, after adequate time for discovery and upon
2 motion, against a party who fails to make a showing sufficient to
3 establish the existence of an element essential to the party's
4 case, and on which that party will bear the burden of proof at
5 trial. In such a situation, there can be "no genuine issue as to
6 any material fact," since a complete failure of proof concerning
7 an essential element of the nonmoving party's case necessarily
8 renders all other facts immaterial. *Celotex Corp. v. Catrell*, 477
9 U.S. 317, 323 (1986). The more implausible the claim or defense
10 asserted by the nonmoving party, the more persuasive its evidence
11 must be to avoid summary judgment. See *United States ex rel.*
12 *Anderson v. N. Telecom, Inc.*, 52 F.3d 810, 815 (9th Cir. 1996).
13 Nevertheless, the evidence must be viewed in a light most
14 favorable to the nonmoving party. *Id.*; *Anderson*, 477 U.S. at 255.
15 A court's role on summary judgment is not to weigh evidence or
16 resolve issues; rather, it is to determine whether there is a
17 genuine issue for trial. See *Abdul-Jabbar v. G.M. Corp.*, 85 F.3d
18 407, 410 (9th Cir. 1996).

19 B. Agency Action

20 The starting point for judicial review of agency action is
21 the administrative record already in existence, not a new record
22 made initially in the reviewing court. *Camp v. Pitts*, 411 U.S.
23 138, 142 (1973); *Southwest Center for Biological Diversity v.*
24 *U.S. Forest Service*, 100 F.3d 1443, 1450 (9th Cir. 1996). The
25 court may, however, consider evidence outside the administrative
26 record for certain limited purposes, e.g., to explain the
27 agency's decisions, *Southwest Center*, 100 F.3d at 1450; or to
28 determine whether the agency's course of inquiry was insufficient

1 or inadequate. *Love v. Thomas*, 858 F.2d 1347, 1356 (9th Cir.
2 1988), *cert. denied*, 490 U.S. 1035 (1989); *Animal Defense Council*
3 *v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988). In addition, a
4 court, in certain instances, may require supplementation of the
5 record or allow a party challenging agency action to engage in
6 limited discovery. *Southwest Center*, 100 F.3d at 1450.⁴

7 C. Procedures for Review of Agency Action under the AMAA

8 Under the AMAA, handlers may petition the Secretary for
9 relief from any provision of a marketing order believed *not to be*
10 *in accordance with the law*. 7 U.S.C. § 608c(15) (A) (emphasis
11 added).

12 Any handler subject to an order may file a written petition
13 with the Secretary of Agriculture, stating that any such order or
14 any provision of any such order or any obligation imposed in
15 connection therewith is not in accordance with law and may seek a
16 modification of or to be exempted from that order. The handler
17 shall thereupon be given an opportunity for a hearing upon such

18 _____
19 ⁴ In *Public Power Council v. Johnson*, 674 F.2d 791 (9th Cir.
20 1982), the Ninth Circuit isolated four circumstances where
supplementation or discovery may be justified:

- 21 (1) when the record need be expanded to explain agency
22 action;
23 (2) when the agency has relied upon documents or
24 materials not included in the record;
25 (3) to explain or clarify technical matter involved in
26 the agency action; and
27 (4) where there has been a strong showing in support of
28 a claim of bad faith or improper behavior on the part
of the agency decision makers.

674 F.2d at 793-94. Supplementation of an administrative record
is the exception, not the rule.

1 petition, in accordance with regulations made by the Secretary of
2 Agriculture, with the approval of the President. After such
3 hearing, the Secretary shall make a ruling upon the prayer of
4 such petition which shall be final, if in accordance with law. 7
5 U.S.C. § 608c(15) (A). The Rules of Practice Governing Procedures
6 on Petitions to Modify or to Be Exempted from Marketing Order
7 apply to petitions filed under § 608c(15) (A). 7 C.F.R. §
8 900.50-64.

9 Such a petition is first heard by the ALJ. A handler may
10 appeal any ALJ decision to the Judicial Officer of the USDA.
11 After the Judicial Officer issues a decision, a handler, under
12 Section 608c(15) (B), may appeal any Judicial Officer decision to
13 the district court in the district in which handler is an
14 inhabitant or has a principal place of business. The statute
15 limits the district court's review to the following:

16 If the court determines that such ruling is not in
17 accordance with law, it shall remand such proceedings
18 to the Secretary with directions either (1) to make
19 such ruling as the court shall determine to be in
20 accordance with law, or (2) to take such further
21 proceedings as, in its opinion, the law requires.

22 7 U.S.C. § 608c(15) (B). The Administrative Procedure Act has
23 been applied in prior Ninth Circuit cases concerning challenges
24 to Marketing Orders under § 608c(15) (B) to the marketing orders.
25 See e.g. *Cal-Almond, Inc. v. United States Dep't Agric.*, 14 F.3d
26 429, 444 (9th Cir. 1993) (challenge to the California almond
27 marketing order).

28 5. DISCUSSION

Plaintiff's Complaint contains a single claim for,
declaratory relief from the Judicial Officer's April 25, 2005

1 Decision and Order striking Plaintiff's February 9, 2005 Amended
2 Petition, (February Amended Petition), and dismissing with
3 prejudice Plaintiff's November 10, 2004 Petition, (November
4 Petition). Plaintiff's cause of action is as follows:

5 24. The JO's decision and order of April 25, 2005, is
6 arbitrary, capricious, and not in accordance with law.
7 7 U.S.C. § 608c(15)(A) allows a handler subject to an
8 order (which Lion is) to file an administrative
9 petition with the secretary alleging that any such
10 order or any provision of any such order or any
11 obligation imposed in connection therewith is not in
12 accordance with law "and praying for a modification
13 thereof or to be exempted therefrom." That section also
14 provides that the handler "shall thereupon be given an
15 opportunity for a hearing upon such petition, in
16 accordance with regulations made by the Secretary of
17 Agriculture . . . [and that] after such hearing, the
18 Secretary shall make a ruling upon the prayer of such
19 petition which shall be final, it in accordance with
20 law."

21 25. The Judicial Officer did not permit a hearing in
22 this matter. The Judicial Officer arbitrarily and
23 capriciously held that the petition should be dismissed
24 with prejudice, as opposed to without prejudice.

25 26. The JO's decision was arbitrary, capricious, and
26 not in accordance with law because the Judicial Officer
27 claimed that: (1) Lion's petition was barred by res
28 judicata and should have been dismissed with prejudice
because of a previous petition that was dismissed was
erroneous; (2) Lion did not comply with the requirement
of the rules of practice requiring the petition to
contain the names, addresses and respective positions
held by the corporate officers of Lion (a mere
formality easily correctable); (3) Lion failed to
specifically allege which "corollary" raisin order
terms and/or provisions Lion was challenging (not true
or irrelevant); and (4) none of Lion's claims can be
adjudicated in an administrative petition proceeding
because Lion does not make a "legally-cognizable claim"
because Lion is complaining about matters that cannot
be adjudicated in an administrative petition proceeding
setting - which is not true.

27 27. The JO's decision was arbitrary, capricious and not
28 in accordance with law. The JO's decision was further
arbitrary and capricious when the JO struck the amended
petition, and dismissed the petition with prejudice
instead of allowing Lion to amend the petition to
clear-up any problems the JO had. The decision was also

1 arbitrary, capricious and not in accordance with law
2 since the matters complained of by Lion can be
3 adjudicated pursuant to the administrative petition
4 proceedings, because the claims were that the marketing
5 order provisions and the obligations imposed in
6 connection therewith were not in accordance with law,
7 and requesting a modification thereof or to be exempted
8 therefrom.

9 28. This matter must be decided on the merits, after a
10 hearing. Under the APA, this JO's decision now must be
11 decided on the administrative record.

12 (Doc. 1, Complaint, ¶¶ 24-28)

13 In sum, Plaintiff's Complaint alleges that the Judicial
14 Officer's decision is arbitrary, capricious and not in accordance
15 with the law for the following reasons:

- 16 • JO did not permit a hearing on the matter;
- 17 • JO found the petition was barred by *res judicata*
18 and dismissed it with prejudice;
- 19 • JO found that Plaintiff failed to comply with the
20 required rules of practice requiring the petition
21 to contain the names, addresses and respective
22 decisions held by Plaintiff's corporate officers;
- 23 • JO found Plaintiff failed to specifically allege
24 which "corollary" Raisin Order terms and/or
25 provisions Plaintiff was challenging;
- 26 • JO found Plaintiff's claims cannot be adjudicated
27 in an administrative petition proceeding as there
28 are no "legally-cognizable claims" that can be
adjudicated in such proceeding; and
- JO struck the amended petition and failed to
permit Plaintiff to amend the petition to clear
any issues in accordance with the Judicial
Officer's order.

Defendant moves for summary judgment claiming the record
contains substantial evidence to demonstrate the USDA's decision
was in accordance with the law:

- USDA was not required to hold a hearing on
Plaintiff's petition.
- Plaintiff's claims were previously adjudicated by

1 the USDA;

- 2 • The claims in Plaintiff's November Petition are
3 identical to those in the petition filed by Lion
4 on September 10, 2003, the September Petition, and
5 are therefore barred by the doctrine of *res*
6 *judicata* and the USDA properly dismissed the
7 petition;
- 8 • Plaintiff did not seek judicial review of the
9 prior October 19, 2004 Decision and Order on the
10 September Petition and instead filed a separate
11 petition alleging the same complaints; and
- 12 • USDA correctly struck Plaintiff's February Amended
13 Petition since it was indisputably filed in
14 violation of the Rules of Practice.

15 (Doc. 36, USDA's MSJ, p. 2:1-11)

16 Plaintiff cross-moves for summary judgment and seeks an
17 order relieving Plaintiff from certain obligations imposed under
18 the Raisin Marketing Order, or in the alternative seeks an order
19 to remand this case to the USDA with instructions to hold an
20 administrative hearing on Plaintiff's petition. Plaintiff also
21 provides the history of the larger dispute between Plaintiff and
22 USDA over inspection services. It is unnecessary to re-state the
23 alleged acrimonious history as the merits of that dispute are not
24 at issue in either of the motions for summary judgment.

25 Lion's cross-motion for summary judgment, requests the Court
26 issue an order relieving it from obligations imposed under the
27 Raisin Marketing Order, specifically that Plaintiff:

28 (1) can comply with the incoming and outgoing
inspection obligations of the Raisin Marketing Order by
"causing" its grower (for incoming) and customer (for
outgoing) to apply for inspections from the USDA; or

(2) can have inspection services performed by a non-
USDA agency such as the well-recognized Dried Fruit
Association; or in the alternative

(3) can comply with all applicable rules and
regulations, and require the USDA to provide an

1 adequate number of inspectors consistent with
2 Plaintiff's obligation to pay for these services under
3 the Raisin Marketing Order.

(Doc. 37, Lion's Cross-MSJ, pp. 27:22-28:10)

4 The Judicial Officer did not address any relief requested by
5 Plaintiff, because the petition was dismissed before its merits
6 were adjudicated. The Judicial Officer found Plaintiff's
7 November Petition barred by *res judicata* based on its similarity
8 to a previously filed petition, and dismissed the November
9 Petition on *res judicata* grounds with prejudice, and also
10 dismissed the petition because Plaintiff failed to comply with
11 the Rules of Practice, specifically: section 900.52(b)(1)
12 requiring that a petition contain the names, addresses, and
13 respective positions held by corporate petitioner's officers;
14 section 900.52(b)(2) requiring each petition to contain a
15 reference to the specific terms or provisions of the marketing
16 order, or the interpretation or application of the marketing
17 order, about which the petitioner complains; and section
18 900.52(b)(4) requiring each petition contain a statement of
19 grounds upon which the terms or provisions of the marketing
20 order, or the interpretation or application of the marketing
21 order, are challenged as not in accordance with law.

22 Specifically, the November Petition was dismissed with
23 prejudice upon the Judicial Officer's finding that the petition
24 was barred on *res judicata* grounds and the petition failed to "to
25 state a legally-cognizable claim" because it challenged
26 inspection obligations under the raisin marketing order, which
27 the Judicial Officer found to be a matter of policy,
28 desirability and a challenge to the effectiveness of the order

1 provisions. The Judicial Officer found proceedings under AMAA
2 section 8c(15)(A) (7 U.S.C. § 608c(15)(A) did not afford relief
3 for such claims.

4 A district court's review of a Judicial Officer's Decision
5 and Order is limited to a review of whether the Judicial
6 Officer's Decision and Order is "in accordance with the law."

7 The District Courts of the United States in any
8 district in which such handler is an inhabitant, or has
9 his principal place of business, are hereby vested with
10 jurisdiction in equity to review such ruling... If the
11 court determines that such ruling is not in accordance
12 with law, it shall remand such proceedings to the
13 Secretary with directions either (1) to make such
14 ruling as the court shall determine to be in accordance
15 with law, or (2) to take such further proceedings as,
16 in its opinion, the law requires.

17 7 U.S.C. § 608c(15)(B).

18 Judicial review of the agency action is also limited to the
19 administrative record in existence and Plaintiff has provided no
20 legal justification for the Court to go beyond the administrative
21 record.

22 While Plaintiff requests in its cross-motion for summary
23 judgment an order addressing Lion's inspection obligations under
24 the Raisin Marketing Order, judicial review is limited to
25 reviewing the Judicial Officer's Decision and Order to determine
26 if the Decision and Order is in accordance with the law. The
27 underlying merits of the petition cannot be addressed.

28 **A. *Res Judicata***

On April 25, 2005, the Judicial Officer filed his Decision
and Order which dismissed the November Petition with prejudice.
(AR 2005, Tab 24) The decision found that the November Petition
raised the same claims Lion had raised in an earlier filed

1 petition filed on September 14, 2003 ("September Petition") that
2 was dismissed by the same Judicial Officer on October 19, 2004 in
3 *In re Lion Raisins, Inc.*, 63 Agric. Dec. __ (October 19, 2004)
4 (Doc. 36-4, Administrative Records, 2003 AMA Docket No. F&V 989-
5 7, submitted by Defendant in Support of Motion for Summary
6 Judgment ("AR 2003"), September Petition, Tab1 and October
7 Decision and Order, Tab. 15). The Judicial Officer concluded
8 that the November Petition was barred by *res judicata* and
9 dismissed the November Petition with prejudice. The Judicial
10 Officer specifically found:

11 Petitioner's Petition raises the same claims Petition
12 raised in the petition filed by Petition in *In re Lion*
13 *Raisins, Inc.*, 63 Agric. Dec. __ (October 19, 2004). I
14 dismissed with prejudice the petition filed by
15 Petitioner in *In re Lion Raisins, Inc.*, 63 Agric.
16 Dec. __ (October 19, 2004). A dismissal with prejudice
17 has the effect of final adjudication on the merits
18 favorable to the defendant and bars future suits
19 brought by the plaintiff on the same cause of action.
20 A dismissal with prejudice constitutes a final judgment
21 with the preclusive effect of *res judicata* not only as
22 to all matters litigated and decided by the dismissal,
23 but as to all relevant issues that could have been
24 raised and litigated in the suit. Therefore,
25 Petitioner's Petition is barred by *res judicata* and
26 should be dismissed with prejudice.

27 (AR 2005, Tab 24, at p. 10)

28 Under the doctrine of *res judicata*, a prior adjudication may
have two distinct types of preclusive effects: claim preclusion
(*res judicata*) and issue preclusion (collateral estoppel).

 Res judicata ensures the finality of decisions. Under
res judicata, 'a final judgment on the merits bars
further claims by parties or their privies based on the
same cause of action.' Res judicata prevents litigation
of all grounds for, or defenses to, recovery that were
previously available to the parties, regardless of
whether they were asserted or determined in the prior
proceeding. Res judicata thus encourages reliance on
judicial decisions, bars vexatious litigation, and
frees the courts to resolve other disputes.

1 *Brown v. Felsen*, 442 U.S. 127, 131 (1979), *superceded by statute*
2 *on other grounds* (citations and quotations omitted). "Under the
3 doctrine of *res judicata*, a final judgment on the merits
4 precludes the parties from relitigating claims which were or
5 could have been raised in that action." *Amaro v. Continental Can*
6 *Co.*, 724 F.2d 747, 749 (9th Cir. 1984) (citing *Nevada v. United*
7 *States*, 463 U.S. 110, 103 (1983)). "A factor to be considered in
8 determining whether the same claim is involved is whether the two
9 suits involve infringement of the same right." *Id.* (citations and
10 quotations omitted).

11 A comparison of Lion's November Petition with its September
12 Petition reveals not only that the two petitions allege the same
13 claims regarding inspection requirements under the Raisin
14 Marketing Order, but Lion uses substantially the same language in
15 both.

16 First, the title reflects the similarity of claims advanced
17 sought by the two petitions:

18 September Petition Title:

19 Petition to Enforce and/or Modify Raisin Marketing
20 Order Provisions/Regulations and/or Petition to the
21 Secretary of Agriculture to Eliminate as Mandatory the
22 use of USDA's Processed Products Inspection Branch
23 Services for All Incoming and Outgoing Raisins, as
24 Currently Required by 7 C.F.R. § § 989.58 & 989.59, And
25 to Exempt Petitioner from the Mandatory Inspection
26 Services by USDA for Incoming and Outgoing Raisins
27 and/or Any Obligations Imposed in Connection Therewith
28 That are Not in Accordance with Law

(AR 2003, Tab 1)

26 November Petition Title:

27 Petition to Enforce and/or Modify Raisin Marketing
28 Order Provisions/Regulations and/or Petition to the
Secretary of Agriculture to Eliminate as Mandatory the
Use of USDA's Processed Products Inspection Branch

1 Services for All Incoming and Outgoing Raisins, as
2 Currently Required by 7 C.F.R. §§ 989.58 & 989.59, To
3 Exempt Petitioners from the Mandatory Inspection
4 Services by USDA for Incoming and Outgoing Raisins
5 and/or Any Obligations Imposed in Connection Therewith
6 That are Not in Accordance with Law

(AR 2005, Tab 24)

7 The title of the petitions show Lion makes the same
8 challenge to the identical provisions, 7 C.F.R. § 989.58 and §
9 989.59, the inspection and certification regulations for incoming
10 and outgoing raisins. The relevant portions of 7 C.F.R. § 989.58
11 and § 989.59 are as follows:

12 § 989.58 Natural condition raisins.

(d) Inspection and certification.

13 (1) *Each handler shall cause an inspection and*
14 *certification to be made of all natural condition*
15 *raisins acquired or received by him, . . . The handler*
16 *shall submit or cause to be submitted to the committee*
17 *a copy of such certification, together with such other*
18 *documents or records as the committee may require. Such*
19 *certification shall be issued by inspectors of the*
20 *Processed Products Standardization and Inspection*
21 *Branch of the U.S. Department of Agriculture, unless*
22 *the committee determines, and the Secretary concurs in*
23 *such determination, that inspection by another agency*
24 *would improve the administration of this amended*
25 *subpart. . .*

7 C.F.R. § 989.58(d)(1) (emphasis added).

26 § 989.59 Regulation of the handling of raisins
27 subsequent to their acquisition by handlers.

28 (d) Inspection and certification. . . *each handler*
shall, at his own expense, before shipping . . . cause
and inspection to be made of such raisins to determine
whether they meet the then applicable minimum grade and
condition standards for natural condition raisins or
the then applicable minimum grade standards for packed
raisins. Such handler shall obtain a certificate that
such raisins meet the aforementioned applicable minimum
standards and shall submit or cause to be submitted to
the committee a copy of such certificate together with
such other documents or records as the committee may
require. The certificate shall be issued by the
Processed Products Standardization and Inspection
Branch of the United States Department of Agriculture,

1 *unless the committee determines, and the Secretary*
2 *concur in such determination, that inspection by*
3 *another agency will improve the administration of this*
4 *amended subpart.*

5 7 C.F.R. § 989.59(d) (emphasis added).

6 In addition, to challenging the same provisions, the issues
7 Lion is addressing are predominately similar in both the November
8 10, 2004 Petition and September 10, 2003 Petition:

9 (1) USDA's inspection fees were not established through
10 formal rulemaking.

11 September Petition:

12 The fees imposed by the USDA Inspection Service have
13 not been properly adopted under the Marketing Order and
14 are also arbitrary and capricious, and not based on the
15 actual costs of providing the service to Petitioners.

16 Without complying with the Administrative Procedures
17 Act, the USDA Inspection Service unilaterally comes out
18 every year stating what its inspection fee will be and
19 what Petitioners must pay.

20 (AR 2003, Tab 1, ¶¶ 8, 16)

21 November Petition:

22 The fees imposed by the USDA Inspection Service have
23 not been properly adopted under the Marketing Order and
24 are also arbitrary and capricious and not based on the
25 actual costs of providing the service to Lion.

26 (AR 2005, Tab 1, ¶ 8) These claims are in substance identical.

27 (2) USDA's inspection fees are unreasonably high and not
28 based on actual cost; and Lion is often shorted inspectors.

September Petition:

 Petitioner Lion runs approximately 15 tons per hour,
 for which it is paying USDA approximately \$135.00 per
 hour for inspection services. There are only two USDA
 inspectors working at Lion at any one time, and, on
 many occasions there is only one inspector.

 At the \$9.00 per ton fee the USDA charges, this equates
 to a cost of only \$9.00 per hour for one inspector. A
 consumer pack-oriented packed could have as many as six

1 inspectors on various consumer lines and only incur
2 \$54.00 per hour in inspection fees. In
3 comparisons,...Lion incurs approximately \$135.00 per
4 hour one inspector.

(AR 2003, Tab 1, ¶¶ 8, 9)

5 November Petition

6 Lion runs approximately 15 tons per hour which means
7 that Lion is paying for USDA inspections at
8 approximately \$135.00 per (it will be more now since
9 the rate has increased to \$10.00 per ton), and there
10 are generally only two USDA inspectors working at any
11 one time, and, on many occasions only one inspector is
12 working at Lion.

13 At the \$9.00 per ton fee the USDA charges, this equates
14 to a cost of only \$9.00 per hour for one inspector. A
15 consumer pack-oriented packer could have as many as six
16 inspectors on various consumer lines and only incur
17 \$54.00 per hour in inspection fees. In
18 comparisons,...Lion incurs approximately \$135.00 per
19 hour one inspector.

20 Lion is shorted USDA inspectors, and does have their
21 very own USDA area supervisor, whereas a major
22 competitor of Lion has far more inspectors and have
23 their very own area supervisor and thus receive far
24 better service than Lion receives for the same price
25 per ton...

26 (AR 2005, Tab 1, ¶¶ 8-9, 13) These claims are in substance
27 identical.

28 (3) The USDA's Inspection Service performs "negligent"
inspections and "cannot be trusted."

September Petition:

...With the few checks that the USDA performs, even
less [raisin stems] are found, making their [USDA's]
inspection results inadequate and a misrepresentation
of the product's actual quality.

Dating back to at least 1996, on an industry-wide
basis, the USDA Inspection Service has been and is
engaged in a pattern and practice of negligently
accounting for the grade and quality of incoming and
outgoing raisins, in addition to generating negligent
incoming and outgoing Inspection Reports at
Petitioners' facilities... These negligent incoming and
outgoing Inspection Reports authored by the USDA

1 Inspection are ratified and approved by USDA Inspection
2 Service supervisors, agent in charge, and even at USDA
3 headquarters in Fresno, California and Washington, D.C.
4 Petitioners have filed formal and informal complaints
5 to the Raisin Administrative Committee and to the USDA
6 officials in Fresno, California and in Washington D.C.
7 regarding the USDA inspection negligence; however, the
8 USDA refuses to change its procedures and accounting;

(AR 2003, Tab 1, ¶ 14, 15.A)

6 November Petition:

7
8 ...USDA has proven to have an error rate of 20% on
9 their documentation...Lions' Quality Control knows that
10 the USDA Inspector error rate is high and if it
11 continues at this level, Lion fees the USDA's negligent
12 behavior may rub off and threaten the integrity of
13 Lion's in-house Quality Control personnel.

11 Dating back to at least 1996 and continuing to the
12 present, and on an industry-wide basis, the USDA
13 inspection service has been, and is, engaged in a
14 pattern and practice of negligently inspecting the
15 raisins on an incoming and outgoing basis, and
16 negligently recording the grade and quality of incoming
17 and outgoing raisins...Outgoing USDA inspection now
18 actually violates the Marketing Order for Processed
19 Raisins by allowing raisins to be shipped into the
20 market when they exceed 18.4% in moisture.

17 It is arbitrary, capricious and not in accordance with
18 law for Lion to: (1) pay USDA inspection service for
19 negligently performed inspection services and for the
20 faulty and erroneous inspection results; (2) ...to pay
21 for that service when the USDA inspection service
22 erroneously and negligently inspects and records the
23 grade of incoming inspections; and (3) for the
24 marketing order to require that the Lion to use the
25 USDA inspection service for incoming and outgoing
26 raising when that service is negligently and
27 erroneously performed...

23 When USDA inspectors and their aides negligently
24 perform incoming inspections...It is thus arbitrary,
25 capricious and not in accordance with law for the
26 marketing order to require Lion to use the USDA
27 inspection service...but then negligently inspect and
28 record the grade and quality...When USDA negligently
performs the inspection service and grading results
showing that there are more "meeting" raisins than what
the actual grade indicates...

(AR 2005, Tab 1, ¶¶ 10-12, 14) The substance of the claims are

1 identical although the November Petition includes more factual
2 detail.

3 (4) Lion's "quality control" department is more efficient
4 and better than USDA inspectors, and Lion's standards are higher
5 than USDA's.

6 September Petition:

7 Both Petitioners have their own quality control
8 departments whose duties range from product inspection,
9 sanitation, pest control, metal detection, etc. At
10 Petitioners' daily average volumes, Petitioners could
11 employ 8-9 quality control people for the 100 plus
12 dollar per hour that USDA charges Petitioners, or
13 approximately \$1,000.00 per day or more for one
14 inspector at each of the Petitioners' plant.

15 Further, Petitioners' inspect their processed products
16 to their own standards, which are much more stringent
17 than the USDA standards for processed product.

18 (AR 2003, Tab 1, ¶¶ 13-14)

19 November Petition:

20 Lion has their own quality control department whose
21 duties range from processed product inspection,
22 sanitation, pest control, metal detection, etc. At
23 Lions' daily average volume Lion could employ 10
24 quality control people for the 135 plus dollars per
25 hour that USDA charges Lion. USDA has proven to have
26 an error rate of 20% on their documentation. Lions'
27 Quality Control are not allowed such a loose rein on
28 their errors.

(AR 2005, Tab 1, ¶ 10) The petitions contain the same claim
with more factual detail in the November Petition.

(5) USDA's inspection fees "are biased towards consumer-
oriented [rather than bulk] processors" like Lion.

September Petition:

The Inspection Service Fees are biased toward the
consumer-oriented processors; all processors are
charged \$9.00 per ton, but the consumer lines (those
that pack the retail package of raisins) do far less
volume per hour (one ton per hour) versus the bulk
line, which are Petitioners' majority of business.

1 With Petitioners paying \$9.00 per ton at 12-15 tons per
2 hour, Petitioners are subsidizing the consumer
3 processor lines of their competitors who run
4 approximately one ton per hour with the same number or
5 more inspectors than those at Petitioners'
6 facilities...

(AR 2003, Tab 1, ¶ 15.D)

November Petition:

7 Generally, a consumer-pack oriented processor/handler
8 (unlike Lion), on the other hand, with a full line of
9 products, packages product at an approximate average of
10 one ton per hour. At the \$9.00 per ton fee the USDA
11 charges, this equates to a cost of only \$9.00 per hour
12 for one inspector. A consumer pack-oriented packed
13 could have as many as six inspectors on various
14 consumer lines and only incur \$54.00 per hour in
15 inspection fees. In comparisons,...Lion incurs
16 approximately \$135.00 per hour one inspector.

(AR 2005, Tab 1, ¶ 9) These claims are substantially similar.

13 (6) The USDA's inspections are "biased" towards raisin
14 growers.

September Petition:

16 The USDA has a built-in bias with the inspection of the
17 producers of incoming raisins to insure that the
18 raisins pass inspection with little or no
19 rejections...The USDA has a built-in bias to force the
20 packers, not the producers, to pay. The USDA also
21 permits persons affiliated with or related to producers
22 to inspect raisins who have a built-in bias for raisin
23 producers, causing an extreme conflict of interest.

(AR 2003, Tab 1, ¶ 15.F)

November Petition:

23 ...Dating back to at least 1996, and continuing to
24 present, USDA inspectors and the inspector aides
25 performing incoming inspections will grade raisins in
26 such a way, and/or record the results of the raisins in
27 such a way, to favor the producer receiving a higher
28 price for the raisins than what the grower otherwise
deserved to receive, and the USDA inspection service
would erroneously provide the grower with more weight
of "meeting" raisins than what the grower deserved...

When USDA inspectors and their aides negligently
perform incoming inspections and the grading results to

1 the benefit of the producers but to the corresponding
2 detriment of Lion ...

3 (AR 2005, Tab 1, ¶¶ 11, 14) These claims are substantially
4 similar.

5 Lion's September Petition was dismissed with prejudice by
6 the ALJ on July 15, 2004. (AR 2003, Tab 10). Lion appealed the
7 decision and on October 19, 2004 the Judicial Officer issued
8 its' October Decision and Order dismissing the September
9 Petition with prejudice. (AR 2003, Tab 11, 15) Lion did not
10 challenge the October 19, 2004 Decision and Order by the
11 Judicial Officer in District Court, although it was represented
12 by knowledgeable counsel and had the opportunity to do.

13 In the November Petition, Lion challenged the same
14 regulations of the Raisin Marketing Order on the same grounds
15 and employed the same arguments, and often, identical language
16 of its earlier petition. Attempts to relitigate issues
17 previously adjudicated have been specifically rejected by the
18 USDA. In *In re Gerawan Co. Inc., A California Corporation*, 90
19 AMA Docket Nos. F&V 916-6 and 917-7, 50 Agric. Dec. 1363, 1991
20 WL 333618 (U.S.D.A. October 31, 1991), the JO affirmed an ALJ
21 decision dismissing a petition under the doctrine of *res*
22 *judicata* because the petition attempted to re-litigate the same
23 issues previously dismissed in an earlier case.

24 The record in Gerawan I clearly shows that petitioner
25 could have had its challenges to the 1988 interim final
26 rules determined in that proceeding if it had chosen to
27 do so. It neglected to do so, and the ALJ's
28 determination of dismissal "with prejudice" correctly
applied the standard of *res judicata* in the instant
proceeding.

However, the instant Petition alleges the same wrong
(the 1988 interim final rules are not in accordance

1 with law) which infringes the same right (the handling
2 of nectarines, plums, and peaches), is based on the
3 same statutory authority, and is made in virtually
4 identical language as the dismissed allegations of
5 Gerawan I.

6 The challenged regulations are the same regulations,
7 imposing the same restrictions on the petitioner as
8 were dismissed with prejudice in Gerawan I.

9 *In re Gerawan Co. Inc., A California Corporation* 90, AMA Docket
10 Nos. F&V 916-6 and 917-7, 50 Agric. Dec. 1363, 1369-70, 1991 WL
11 333618 *4 (U.S.D.A. October 31, 1991).

12 Even if viewed in the light most favorable to Lion, the
13 evidence-in the form of the administrative records of both the
14 September Petition of 2003 and the November Petition of 2004,
15 instituted by Lion-establishes that there is no genuine issue of
16 material fact to be adjudicated. The USDA properly found Lion's
17 November Petition barred by *res judicata*.⁵

18 The Judicial Officer's decision concerning *res judicata* is
19 in accordance with the law.

20 B. Request for Hearing

21 ⁵ The Judicial Officer's decision also dismissed the
22 November Petition on Plaintiff's failure to abide by certain
23 Rules of Practice, § 900.52(b)(1)-(2) and (4). Neither Defendant
24 USDA nor Plaintiff Lion has addressed this portion of the
25 Judicial Officer's decision in their motions for summary
26 judgment. It is unclear whether this portion of the Judicial
27 officer's decision is arbitrary, capricious or not in accordance
28 with law because neither party addresses whether pleading
standards established by the Federal Rules of Civil Procedure
apply to USDA petitions. However, because the November Petition
was dismissed with prejudice on *res judicata* grounds and the
Decision and Order is in accordance with law and any decision on
the Rules of Practice would not change the dismissal on prejudice
grounds, there is no need to address this portion of the Decision
and Order.

1 Lion claims that the Judicial Officer arbitrarily denied
2 Lion "a mandatory hearing to determine what it means to 'cause'
3 an inspection and certification." (Doc. 47, Reply to Defendant's
4 Motion for Summary Judgment or Partial Summary Judgment, p.
5 2:19-20; Doc. 37, Plaintiff's Memorandum of Points and
6 Authorities in Support of Cross-Motion for Summary Judgment, p.
7 5:16-17; Doc. 1, Complaint, ¶ 24)

8 Section 7 U.S.C. § 608(c) (15) (A) provides handlers the
9 opportunity to file a petition for a review of a provision or
10 obligation under any marketing order that is not in accordance
11 with the law. As part of the petition process, a handler is
12 also provided an opportunity for hearing on the petition.
13 However, the statute specifically states, "He shall thereupon be
14 given an opportunity for a hearing upon such petition, *in*
15 *accordance with regulations made by the Secretary of*
16 *Agriculture*, with the approval of the President." 7 U.S.C §
17 608c(15) (A) (emphasis added).⁶ Although, a hearing is permitted
18 for an action filed under 7 U.S.C. § 608c(15) (A), it is subject

19
20 ⁶ 7 U.S.C. § 608c(15) (A) states in total:

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

1 to regulations promulgated by the Secretary of Agriculture with
2 the approval of the President.

3 In this suit, the regulations of 7 C.F.R. § 900.50-71
4 titled "Rules of Practice Governing Proceedings on Petitions to
5 Modify or To Be Exempted From Marketing Orders" are regulations
6 governing the filing of such a petition, including, but not
7 limited to, regulations on service of a petition (§ 900.52(a)),
8 the contents of a petition (§ 900.52(b)), motions to dismiss
9 petitions (§ 900.52(c)), judges (§ 900.55), depositions (§
10 900.61) and applications to reopen hearings (§ 900.68). Under
11 these regulations, a petition may be subject to a motion to
12 dismiss before a hearing is conducted. If the Administrator of
13 the AMS files a motion to dismiss because it is "of the opinion
14 that the petition, or any portion thereof, does not
15 substantially comply, in form or content, with the act or with
16 the requirements of paragraph (b) of this section [§ 900.52(b)],
17 or is not filed in good faith, or is filed for purposes of
18 delay...", 7 C.F.R. § 900.52(c), and the motion to dismiss is
19 granted with prejudice, there will be no hearing.

20 Here, a motion to dismiss was filed by the Administrator
21 against Lion's November Petition pursuant to § 900.52(b) and (c)
22 on the ground that a matter of policy was raised, that the bar
23 of *res judicata* applies, and that the petition factually does
24 not comply with specific pleading requirements. If the motion
25 to dismiss was properly granted, then a hearing was not
26 required. Plaintiff does not assert the regulations governing a
27 petition hearing are arbitrary, capricious and not in accordance
28 with law.

1 Although technical pleading issues could have been
2 satisfied by amendment in accordance with AMA Rules, *res*
3 *judicata* bars the Petition for Hearing for the reasons stated
4 above. It is unnecessary to remand on the ground that the
5 issues raised addresses now justiciable policies. The Judicial
6 Officer's decision not to hold a hearing is in accordance with
7 the law.

8 C. Motion to Strike

9 The USDA also moves for summary judgment claiming that the
10 Judicial Officer properly ordered that Lion's February Amended
11 Petition be stricken. On February 9, 2005, before the ALJ ruled
12 on the pending motion to dismiss the November Petition, Lion
13 filed an amended petition, the February Amended Petition. (AR
14 2005, Tab 9). On February 14, 2005, the AMS filed a motion to
15 strike Lion's February Amended Petition as premature and not in
16 accordance with the applicable Rules of Practice. (AR 2005, Tab
17 11) On March 7, 2005, the ALJ issued an order striking Lion's
18 February Amended Petition as premature. (AR 2005, Tab 13) The
19 ALJ also provided Lion with leave to file an amended petition.
20 (AR 2005, Tab 13 at p. 3) On March 11, 2005, AMS appealed the
21 ALJ's decision. (AR 2005, Tab 17)

22 On April 25, 2005, the Judicial Officer's Decision and
23 Order not only dismissed the November Petition with prejudice
24 but granted the motion to strike the February Amended Petition
25 on the basis that it was premature. (AR 2005, Tab 24)

26 Lion alleges in its Complaint that the Judicial Officer's
27 decision to strike the February Amended petition was arbitrary
28 and capricious and Lion should have been permitted to address

1 any remaining issues that the Judicial Officer had with the
2 November Petition and to file the February Amended Petition
3 pursuant to § 900.52b. (Doc. 1, Complaint ¶ 27)

4 USDA rejoins that when a motion to dismiss is filed, the
5 Rules of Practice provide that a petitioner may file an amended
6 petition only after the ALJ has issued an order dismissing all
7 or a portion of the petition. USDA contends the Judicial
8 Officer properly ordered Lion's petition stricken because it was
9 filed prematurely -more than one month before the ALJ issued a
10 decision on the pending motion to dismiss.

11 The motion to dismiss provisions, provide in part:

12 (2) Decision by the Judge. The Judge, after due
13 consideration, shall render a decision upon the motion
14 stating the reasons for his action. Such decision
15 shall be in the form an order and shall be filed with
16 the hearing clerk who shall cause a copy therefore to be
17 served upon the petitioner and a copy thereof to be
18 transmitted to the Administrator.. Any such order shall
19 be final unless appealed pursuant to § 900.65:
20 Provided, That within 20 days following the service
21 upon the petition of a copy of the order of the Judge
22 dismissing the petition, or any portion thereof, on the
23 ground that it does not substantially comply in form
24 and content with the act or with paragraph (b) of this
25 section, the petitioner shall be permitted to file an
26 amended petition.

27 7 C.F.R. § 900.52(c) (2) .

28 The Judicial Officer ruled on USDA's motion to strike the
February Amended Petition stating:

Section 900.52(c) (2) of the Rules of Practice (7 C.F.R.
§ 900.52(c) (2)) provides, when a motion to dismiss has
been filed, a petitioner may file an amended petition
after the Hearing Clerk serves the petitioner with the
[ALJ's] order dismissing the petitioner's petition or
any portion of the petitioner's petition. Petitioner
filed the Amended Petition on February 9, 2005, 33 days
prior to the date the Hearing Clerk served the Petition
with the ALJ's March 3, 2005, Order dismissing
Petitioner's Petition. Therefore, Petitioner's Amended
Petition should be stricken as premature.

1 (2005, A.R. Tab 24 at pp. 9-10 (fn. Omitted))

2 Plaintiff claims that the Judicial Officer applied the
3 wrong Rule of Practice and the applicable rule is § 900.52b
4 governing amended pleadings which states:

5 At any time before the close of hearing the petition or
6 answer may be amended, but the hearing shall at the
7 request of the adverse party, be adjourned or recessed
8 for such reasonable time as the judge may determine to
9 be necessary to protect the interests of the parties.
10 Amendments subsequent to the first amendment or
11 subsequent to the filing of an answer may be made only
12 with leave of the judge or with the written consent of
13 the adverse party.

14 7 C.F.R. § 900.52b.

15 Lion contends that based on § 900.52b it had the right to
16 file the February Amended Petition as there was no hearing or
17 answer filed by Defendant USDA and the February Amended Petition
18 was its first amended petition. USDA responds that "It would be
19 unfair, and a waste of resources, to allow a petitioner to
20 postpone administrative decisions on faulty petitions by
21 prematurely amending them. A petition could repeatedly attempt
22 to revise his petition through piecemeal amendment, while the
23 Secretary would be required to expend departmental resources
24 seeking dismissal of multiple faulty petitions -with no final
25 decision in sight." (Doc. 36, USDA's MSJ, p. 22:16-23). USDA's
26 argument is misplaced. The regulations governing amended
27 petitions only permit one amended petition to be filed before
28 the filing of an answer or a hearing, not serial amendments.
Any further amended petitions require with leave of the judge or
consent of the adverse party. USDA's concern that continuing
amendments would prevent a decision if Lion were permitted to
amend its petition before the ALJ issued a decision on the

1 motion to dismiss is incorrect. While the case cited by
2 Plaintiff, *In re: Handlers Against Promoflor*, FCFGPIA Docket No.
3 96-0001, 56 Agric. Dec. 1529, 1997 WL 57747 (U.S.D.A. September
4 8, 1997), did not directly address this issue, the Court in
5 passing noted that after the USDA had filed a motion to dismiss
6 under Section 900.52(c)(2), the petitioner in the suit filed two
7 amendments to cure deficiencies under Section 900.52b. The
8 Court did not take issue with the first amended petition and
9 noted that the second amended petition was filed with leave. It
10 denied leave to file a third amended complaint. *Id.* at * 9.

11 The Judicial Officer had no reason to ignore the
12 regulations regarding amendments to petitions, particularly, a
13 petitioner's right to file a first amended petition before USDA
14 filed an answer or a hearing has been conducted, pursuant to §
15 900.52b. "As a general rule, courts attribute to the words of a
16 statute their ordinary meaning. Similarly administrative
17 orders, like statutes, are not to be given strained and
18 unnatural constructions." *Reddi-Wip Co. of Philadelphia v.*
19 *Hardin*, 315 F.Supp. 1117, 1118 (E.D. Pa. 1970). Section 900.52b
20 provides for the "orderly conduct of administrative cases" by
21 requiring leave or consent to file a second amended petition.
22 It appears, the Judicial Officer ignored the plain meaning of §
23 900.52b, did not analyze the provision, and solely based the
24 decision on § 900.52(c)(2), which governs when an amended
25 petition can be filed after an ALJ decision is filed (in a
26 motion to dismiss).

27 At oral argument, USDA's counsel argued that although the
28 Judicial Officer did not address in its order the right of Lion

1 to file an amended petition under § 900.52b, based on the
2 February Amended Petition, allegedly filed pursuant to §
3 900.52b, it was not appropriate to do so due to the fact that
4 the February Amended Petition was substantially the same as the
5 dismissed November Petition.

6 The title to the two petitions are as follows:

7 November Petition Title:

8 Petition to Enforce and/or Modify Raisin Marketing
9 Order Provisions/Regulations and/or Petition to the
10 Secretary of Agriculture to Eliminate as Mandatory the
11 Use of USDA's Processed Products Inspection Branch
12 Services for All Incoming and Outgoing Raisins, as
13 Currently Required by 7 C.F.R. §§ 989.58 & 989.59, To
14 Exempt Petitioners from the Mandatory Inspection
15 Services by USDA for Incoming and Outgoing Raisins
16 and/or Any Obligations Imposed in Connection Therewith
17 That are Not in Accordance with Law

18 (AR 2005, Tab 24, p. 1)

19 February Amended Petition Title:

20 Amended Petition to Enforce and/or Modify Raisin
21 Marketing Order Provisions/Regulations; To Exempt
22 Petitioner from the Mandatory Inspection Services by
23 USDA for Incoming and Outgoing Raisins, To Preclude the
24 Raisin Administrative Committee and/or USDA from
25 Receiving the Raisin Administrative Committee and/or
26 USDA from Receiving the Otherwise Required Raisin
27 Administrative Committee Forms; Petition to Allow
28 Buyers and Producers to Call for Inspection Services,
and to Delete Certain Obligations Imposed in Connection
Therewith that are Now Not in Accordance with Law

(AR 2005, Tab 9, p. 1)

Plaintiff's February Amended Petition is largely similar to
the November Petition save for one additional allegation
regarding disclosure of confidential information. Plaintiff's
introductory paragraph to the petition titled "Nature of Action"
states:

4. This petition is brought because Petitioner believes
certain obligations imposed in connection with the

1 Raisin Order are not in accordance with law...For
2 example, Part 52 includes regulations regarding USDA
inspection and certification services required under
Section 989.58(d) and 989.59(d).

3 5. Petitioner must cause inspection and certification
4 of raisins upon acquiring them from its Producers, and
prior to shipping them to its Customers; Sections
5 989.58(d) and 989.59(d) respectively. Said inspections
and certification shall be made by a specific branch of
6 of the USDA, unless the Raisin Administrative Committee
(hereinafter "RAC") determines, and the Secretary of
7 Agriculture concurs, that "inspection by another agency
would improve the administration..."

8 6. Any "interested party" may apply for USDA inspection
and certification services. An "interested party" is
9 defined as any business entity with a "financial
interest in the commodity involved;" Section 52.2. It
10 is axiomatic that Petitioner, its Producers and
Customers are interested parties.

11 (AR 2005, Tab 9, pp. 2-3) Plaintiff's February Amended Petition
12 then provides a "Statement of Facts" which describes the same
13 issues of who can "cause" an incoming and outgoing inspection of
14 the raisins, negligent inspection results, and excessive
15 inspection charges being paid by Lion, including allegations of
16 being charged the same inspection fees per ton as "slower
17 handlers" and receiving the same number of inspectors as "slower
18 handlers." Plaintiff however, does alleges new facts regarding
19 disclosure of their confidential information by USDA and RAC
20 that were not alleged in the November Petition.

21 11. During the course of incoming and outgoing
22 Inspection services, USDA and RAC obtained and
disclosed Petitioner's nonexempt confidential
23 information in violation of Section 989.75; 7 U.S.C. §
608d; and 18 U.S.C. 1905...On or about January 10,
24 2005, a RAC employee disclosed Petitioner's
confidential information to one of Petitioner's chief
25 competitors.

26 (AR 2005, Tab 9, p. 4)

27 Plaintiff's February Amended Petition then provides a
28 "Statement of Grounds" which largely mirror the November

1 Petition⁷ except for additional grounds of disclosure of
2 Plaintiff's confidential information by RAC and USDA. The
3 section discusses the alleged unlawful disclosure by USDA and
4 RAC of Lion's confidential information. Lion states that it:

5 obligates Petitioner [Lion] to withhold paperwork that
6 is requested by USDA and/or RAC. Their conduct is
7 arguably a federal offense that calls for criminal
8 penalties and removal from office under 18 U.S.C. §
9 1905. Moreover their conduct is arbitrary, capricious,
10 abuse of discretion, and not otherwise in accordance
11 with law, including Section 989.75 and 7 U.S.C. § 608d.

12 (AR 2005, Tab 9, pp. 5-6)

13 The "Prayer for Relief" of Plaintiff's February Amended is
14 largely similar to the relief requested in the November
15 Petition, except for the additional relief sought to remedy
16 disclosure of Lion's confidential information. The ALJ and the
17 Judicial Officer should have addressed this additional
18 disclosure of confidential information claim, alleged in Lion's
19 February Amended Complaint.

20 The Judicial Officer's order striking Lion's February
21 Amended Petition is not in accordance with law and the suit is
22 remanded for further proceedings in accordance with this
23 decision to address the confidential disclosure of information
24 claim in the February Amended Petition.

25 //

26 //

27 //

28 ⁷ Plaintiff again discusses the issue of who can "cause" an
inspection of the incoming and outgoing raisins pursuant to §
989.58(d) and § 989.59(d); the high cost of inspection results;
the shortage of inspectors; and the negligent inspections.

CONCLUSION

For the reasons set forth above,

(1) Defendant USDA's motion for summary judgment is GRANTED IN PART AND DENIED IN PART. The February Amended Petition is remanded to the Judicial Officer for further proceedings in accordance with this decision.

(2) Plaintiff's cross-motion for summary judgment is DENIED.

IT IS SO ORDERED.

Dated: March 19, 2008

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE