UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	Docket No. AMA M-08-0069
	)	
Hein Hettinga and Ellen Hettinga,	)	
d/b/a Sarah Farms, and GH Dairy,	)	
d/b/a GH Processing,	)	
	)	
Petitioners	)	**Decision and Order**

BACKGROUND

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [hereinafter the AMAA], empowers the Secretary of Agriculture to regulate persons who handle agricultural commodities, including milk, in order to establish and maintain orderly marketing conditions for those agricultural commodities, to protect consumers of agricultural commodities, and to avoid unreasonable fluctuations in supplies and prices by maintaining an orderly supply of agricultural products.[1] The AMAA authorizes the Secretary of Agriculture to issue milk marketing orders to regulate geographic regions of the country. Generally, pricing and pooling requirements established by federal milk marketing orders do not apply to entities that process their

[1] 7 U.S.C. § 602(1)-(2), (4).

own milk because these entities, which are referred to as "producer-handlers," are typically small and have little impact on the milk market.[2]

On February 24, 2006, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], issued a final rule amending the federal orders regulating the handling of "Milk in the Pacific Northwest Marketing Area" (7 C.F.R. pt. 1124 (2006)) and "Milk in the Arizona-Las Vegas Marketing Area" (7 C.F.R. pt. 1131 (2006)) to subject large producer-handlers in the two milk marketing areas to pricing and pooling obligations.[3] As a result of that final rule, Hein Hettinga and Ellen Hettinga, d/b/a Sarah Farms, who operate a large dairy business in Arizona, were required to comply with the pricing and pooling obligations that applied to other dairy businesses in the Arizona-Las Vegas marketing area.

On April 11, 2006, Congress enacted the Milk Regulatory Equity Act of 2005 [hereinafter the MREA], which amended and supplemented the AMAA.[4] The MREA

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[2]*Edaleen Dairy, LLC v. Johanns*, 467 F.3d 778, 780 (D.C. Cir. 2006). *See also Stew Leonard's v. Glickman*, 199 F.R.D. 48, 50 (D. Conn. 2001) (stating, typically, a producer-handler conducts a small family-type operation, processing, bottling, and distributing only his own farm production and the rationale for exempting the producer-handler from the pricing pool is that producer-handlers are so small that they have little or no effect on the pool), *aff'd*, 32 F. App'x 606 (2d Cir.), *cert. denied*, 537 U.S. 880 (2002).

[3]71 Fed. Reg. 9430 (Feb. 24, 2006).

[4]Section 2(a) of the MREA, Pub L. No. 109-215, 120 Stat. 328, 328-29, is codified at 7 U.S.C. § 608c(5)(M)-(O); section 2(b) of the MREA, Pub L. No. 109-215, 120 Stat. 328, 329, amends 7 U.S.C. § 608c(11)(C) and adds a new provision, 7 U.S.C. §

(continued...)

places volume limits on the applicability of the producer-handler exemption and requires the Secretary of Agriculture to issue a final rule regulating the sale of fluid milk into geographic regions with state-law minimum prices for milk by handlers located in federally-regulated milk marketing areas. Under this provision, milk handlers which import milk into a region governed by state minimum milk prices shall be subject to all the minimum and uniform price requirements of a federal milk marketing order applicable to the county in which the plant of the handler is located. On May 1, 2006, the Secretary of Agriculture issued a final rule amending the 10 federal milk marketing orders to implement the MREA.[5] As a result of that final rule, GH Dairy, d/b/a GH Processing, a partnership whose partners are Hein Hettinga, Ellen Hettinga, and Gerben Hettinga, were required to comply with the pricing requirements of the Arizona marketing area.[6]

Hein Hettinga and Ellen Hettinga, d/b/a Sarah Farms, and GH Dairy, d/b/a GH Processing [hereinafter the Hettingas], brought an action against the United States in the

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[4](...continued)
608c(11)(D); and section 2(c)-(d) of the MREA, Pub L. No. 109-215, 120 Stat. 328, 330 is set forth in 7 U.S.C. § 608c note.

[5]71 Fed. Reg. 25,495 (May 1, 2006).

[6]Pursuant to the MREA, the Administrator removed Clark County, Nevada, from the Arizona-Las Vegas milk marketing area (71 Fed. Reg. 25,495, 25,502 (May 1, 2006)). Subsequently, the Administrator published a final rule changing the name of the federal milk marketing order from "Milk in the Arizona-Las Vegas Marketing Area" to "Milk in the Arizona Marketing Area" and changing the name of the milk marketing area from the "Arizona-Las Vegas marketing area" to the "Arizona marketing area" (71 Fed. Reg. 28,248, 28,249 (May 16, 2006)).

United States District Court for the District of Columbia: (1) asserting that the MREA violates the Bill of Attainder Clause, the Due Process Clause, and the Equal Protection Clause; (2) seeking a declaration that two provisions of the MREA are unconstitutional; and (3) requesting the issuance of a permanent injunction against the application of the MREA to them.

The United States moved to dismiss for lack of subject matter jurisdiction arguing that the Hettingas' claims are barred because the Hettingas did not exhaust administrative remedies available through petition to the Secretary of Agriculture. The AMAA specifically provides that handlers may petition the Secretary of Agriculture for modification of, or exemption from, an order, as follows:

> **§ 608c. Orders**
> . . . .
> **(15) Petition by handler and review**
>
> (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom.

7 U.S.C. § 608c(15)(A).

On July 31, 2007, the United States District Court for the District of Columbia issued a Memorandum Opinion: (1) finding the MREA requires an order by the Secretary of Agriculture to be effective; (2) concluding, because the MREA cannot be implemented as to the Hettingas without an order by the Secretary of Agriculture, any challenge to the

validity of the MREA is essentially a challenge to the order issued by the Secretary of Agriculture; therefore, the mandatory exhaustion requirement of 7 U.S.C. § 608c(15)(A) applies; (3) granting the motion to dismiss filed by the United States; and (4) dismissing the case. *Hettinga v. United States*, 518 F. Supp.2d 58 (D.D.C. 2007). The Hettingas appealed to the United States Court of Appeals for the District of Columbia Circuit and that appeal is currently pending.

PROCEDURAL HISTORY

On March 7, 2008, the Hettingas instituted this administrative proceeding by filing a Petition[7] pursuant to 7 U.S.C. § 608c(15)(A) and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted from Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice]. The Hettingas allege the MREA violates the Bill of Attainder Clause, the Due Process Clause, and the Equal Protection Clause (Pet. ¶¶ 71-90) and seek a declaration that section 2(a) of the MREA is unconstitutional (Pet. at 19-20).

On April 7, 2008, the Administrator filed "Answer of Respondent" in which the Administrator: (1) denies the material allegations of the Petition; (2) states the Petition fails to state a claim upon which relief can be granted; (3) states the AMAA and the federal order regulating "Milk in the Arizona Marketing Area" (7 C.F.R. pt. 1131), as

[7]The Hettingas entitle their Petition "Petition For Declaratory Relief From Application Of The Milk Regulatory Equity Act And For Restitution" [hereinafter Petition].

interpreted by the Administrator, are fully in accordance with law and binding on the Hettingas; and (4) requests denial of the relief requested by the Hettingas and dismissal of the Petition.

On July 15, 2008, the Hettingas filed a Motion for Judgment on the Pleadings: (1) stating the Petition is a facial constitutional challenge to the MREA and the Secretary of Agriculture has no authority to relieve the Hettingas from the operation of the MREA and (2) requesting dismissal of the Petition and certification of the Hettingas' right to have their claims reviewed by a court pursuant to 7 U.S.C. § 608c(15)(B). On August 11, 2008, the Administrator filed a response to Petitioners' Motion for Judgment on the Pleadings in which the Administrator requested dismissal of the Hettingas' Petition with prejudice because the Hettingas failed to state a claim upon which relief can be granted.

On August 26, 2008, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Memorandum Opinion and Order dismissing the Petition for failure to state a claim upon which relief can be granted. On September 26, 2008, the Hettingas filed an "Appeal to the Judicial Officer and Request for Oral Argument" [hereinafter Appeal Petition]. On October 15, 2008, the Administrator filed "Respondent's Response to Appeal to the Judicial Officer and Request for Oral Argument." On October 20, 2008, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. On October 27, 2008, the Hettingas filed "Petitioners' Response To Department Request To Decide This Petition Without Oral Argument."

CONCLUSIONS BY THE JUDICIAL OFFICER

The Hettingas' Appeal Petition

The Hettingas state their Petition presents only a facial constitutional challenge to the MREA, and the statutory provision under which the Hettingas instituted the instant administrative proceeding, 7 U.S.C. § 608c(15)(A), is not applicable to this facial constitutional challenge (Appeal Pet. at 2). Moreover, the Hettingas agree with the ALJ's legal conclusion that the Secretary of Agriculture cannot provide the relief requested by the Hettingas (Appeal Pet. at 1). The Administrator states that the Hettingas' facial constitutional challenge to the MREA is a claim that cannot be raised administratively and urges, in his response to the Hettingas' Appeal Petition, that I affirm the ALJ's Memorandum Opinion and Order dismissing the Hettingas' Petition.

I agree with the Hettingas, the Administrator, and the ALJ. The Hettingas' March 7, 2008, Petition fails to state a claim upon which relief may be granted in this forum. Therefore, I affirm the ALJ's August 26, 2008, Memorandum Opinion and Order and dismiss the Hettingas' March 7, 2008, Petition with prejudice.

The Hettingas' Request for Oral Argument

The Hettingas' request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit,[8] is refused because the parties have

[8] 7 C.F.R. § 900.65(b)(1).

thoroughly briefed the issues and the issues are not complex. Thus, oral argument would serve no useful purpose.

The Hettingas' Reply to the Administrator's Response to the Hettingas' Appeal Petition and Request for Oral Argument

On October 27, 2008, the Hettingas filed a reply to the Administrator's response to the Hettingas' Appeal Petition and the Hettingas' request for oral argument. The Rules of Practice do not provide for a reply to a response to an appeal petition or for a reply to a response to a request for oral argument, and the Hettingas did not request the opportunity to file such a reply. Therefore, I strike the Hettingas' October 27, 2008, supernumerary filing.

For the forgoing reasons, the following Order is issued.

ORDER

The Hettingas' March 7, 2008, Petition is dismissed with prejudice for failure to state a claim upon which relief may be granted.

Done at Washington, DC

October 30, 2008

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William G. Jenson
Judicial Officer