

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	I & G Docket No. 03-0001
)	
LION RAISINS, INC., a)	
California corporation formerly)	
known as LION ENTERPRISES,)	
INC.; 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,)	Order Vacating the ALJ's Denial of
)	Complainant's Motion for Default
Respondents)	Decision and Remand Order

Kenneth C. Clayton, Associate Administrator, Agricultural Marketing Service,
United States Department of Agriculture [hereinafter Complainant], instituted this
disciplinary administrative proceeding by filing a "Complaint" on October 11, 2002.
Complainant instituted the proceeding under the Agricultural Marketing Act of 1946, as
amended (7 U.S.C. §§ 1621-1632 (1994)) [hereinafter the Agricultural Marketing Act]; the
regulations and standards 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].

Complainant alleges that on or about August 26, 1997, Lion Raisins, Inc.; Lion Raisin Company; Lion Packing Company; Al Lion, Jr.; Dan Lion; Jeff Lion; and Bruce Lion [hereinafter Respondents] violated the Agricultural Marketing Act and the Regulations (Compl. ¶¶ 8-10).

The Hearing Clerk served Respondents with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter dated October 11, 2002, during the period October 22, 2002, through November 5, 2002.¹ The Rules of Practice require that an answer must be filed with the Hearing Clerk within 20 days after service of the complaint.² On October 29, 2002, Respondents filed a request for an extension of time to

¹The Hearing Clerk served the Complaint, the Rules of Practice, and the October 11, 2002, service letter on: (1) Respondent Lion Raisins, Inc., on October 30, 2002 (see memorandum of RA Paris, Office of the Hearing Clerk, dated October 30, 2002); (2) Respondent Lion Raisin Company on October 23, 2002 (see United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8985 0676); (3) Respondent Lion Packing Company on October 22, 2002 (see United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8985 0669); (4) Respondent Al Lion, Jr., on October 22, 2002 (see United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8985 0690); (5) Respondent Jeff Lion on October 22, 2002 (see United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8985 0683); (6) Respondent Bruce Lion on October 23, 2002 (see United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8985 0713); and (7) Brian C. Leighton, attorney for Respondents, on November 5, 2002 (see United States Postal Service Domestic Return Receipt for Article Number 7099 3400 0014 4581 8175).

²See 7 C.F.R. § 1.136(a).

December 24, 2002, to respond to the Complaint.³ Chief Administrative Law Judge James W. Hunt granted Respondents' request for an extension of time.⁴

On December 20, 2002, Respondents filed "Respondents' Motion to Dismiss Complaint." On December 26, 2002, Complainant filed a "Motion for Adoption of Proposed Decision and Order" [hereinafter Motion for Default Decision] and a "Proposed Decision and Order Upon Admission of Facts by Reason of Default" [hereinafter Proposed Default Decision]. Complainant contends Respondents failed to file an answer to the Complaint within the time prescribed by Chief Administrative Law Judge James W. Hunt.⁵

The Hearing Clerk served Respondents with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on January 3, 2003.⁶ On January 8, 2003, Respondents filed "Respondents' Opposition to Complainant's Motion for Adoption of Proposed Decision and Order Upon Admission of Facts by Reason of Default" in which Respondents contend Complainant's Motion for Default Decision should be denied because Respondents' Motion to Dismiss Complaint, filed December 20, 2002,

³"Respondents' Motion to Continue Respondents' Time to Respond to the Complaint to December 24, 2002;" and "Declaration of Brian C. Leighton in Support of Respondents' Motion to Continue Respondents' Time to Respond to the Complaint to December 24, 2002."

⁴"Order Extending Time to File Answer to Complaint" filed December 24, 2002.

⁵Complainant's Motion for Default Decision at 2.

⁶United States Postal Service Domestic Return Receipt for Article Number 7099 3400 0014 4581 6461.

constitutes a timely response to the Complaint.⁷ On January 21, 2003, Complainant filed “Complainant’s Reply to Respondents’ Opposition to Complainant’s Motion for Decision and Order by Reasons of Default.” Complainant reiterates his contention that Respondents failed to file a timely answer to the Complaint and contends Respondents’ Motion to Dismiss Complaint is not an answer to the Complaint.⁸

On February 12, 2003, Respondent filed “Respondents’ Request to File Its Answer to Complaint” and “Respondents’ Answer to Complaint.” On November 28, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] filed a “Ruling Denying Complainant’s Motion for Adoption of a Default Decision; and Order to Show Cause Why Case Should Not Be Dismissed, Based on Respondents’ Third Affirmative Defense re: Statutes of Limitations” [hereinafter Ruling and Order to Show Cause]: (1) concluding Respondents failed to file a timely response to the Complaint and were in default; (2) concluding Respondents cured their default when, on February 12, 2003, they filed Respondents’ Request to File Its Answer to Complaint and Respondents’ Answer to Complaint; (3) granting Respondents’ request to file Respondents’ Answer to Complaint; (4) denying Complainant’s Motion for Default Decision; and (5) ordering the parties to show cause why the Complaint should not be dismissed as time barred by the statute of limitations.

⁷Respondents’ Opposition to Complainant’s Motion for Adoption of Proposed Decision and Order Upon Admission of Facts by Reason of Default at 2-3.

⁸Complainant’s Reply to Respondents’ Opposition to Complainant’s Motion for Decision and Order by Reasons of Default at 1-3.

On December 3, 2003, Complainant filed “Complainant’s Appeal Petition” requesting that: (1) I reverse the ALJ’s ruling denying Complainant’s Motion for Default Decision; or (2) I vacate the ALJ’s ruling denying Complainant’s Motion for Default Decision and remand the proceeding to the ALJ for issuance of a decision in accordance with the Rules of Practice. On December 23, 2003, Respondents filed “Respondents’ Response Complainant’s Appeal Petition.” On December 24, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Complainant contends the ALJ’s denial of Complainant’s Motion for Default Decision is error (Complainant’s Appeal Pet.). I agree with Complainant’s contention.

The Hearing Clerk served Respondents with the Complaint, the Rules of Practice, and the Hearing Clerk’s service letter dated October 11, 2002, during the period October 22, 2002, through November 5, 2002.⁹ The Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

§ 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint . . . , the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding

. . . .

(c) *Default.* Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for

⁹See note 1.

purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint informs Respondents of the consequences of failing to file a timely answer, as follows:

WHEREFORE, it is hereby ordered that for the purpose of determining whether respondents have in fact violated the Regulations, this complaint shall be served upon said respondents, each of whom shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing this proceeding, 7 C.F.R. §§ 1.130-.151 and §§ 50.1-50.40. The failure to file an answer to this complaint constitutes an admission of all of the material allegations contained therein.

Compl. at 4.

Similarly, the Hearing Clerk, in the October 11, 2002, service letter, informed Respondents that a timely answer must be filed pursuant to the Rules of Practice and that failure to file a timely answer to any allegation in the Complaint would constitute an admission of that allegation, as follows:

October 11, 2002

Mr. Al Lion
Lion Raisins, Inc.
3310 E. California Street
Fresno, California 93702

Lion Raisin Company
Lion Packing Company
9500 South DeWolf Avenue
Selma, California 93662

Mr. Al Lion, Jr.
Mr. Dan Lion
Mr. Bruce Lion
Mr. Jeff Lion
9500 South DeWolf Avenue
Selma, California 93662

Gentlemen:

Subject: In re Lion Raisins, Inc., a California corporation formerly known as Lion Enterprises, Inc.; 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 I&G Docket No. 03-0001

Enclosed is a copy of a Complaint, which has been filed with this office under the Agricultural Marketing Act, as amended.

Also enclosed is a copy of the rules of practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have **20 days from the receipt of this letter to file with the Hearing Clerk an original and four copies of your written and signed answer to the complaint.** It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not

deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case should be directed to the attorney whose name and telephone number appear on the last page of the complaint.

Sincerely,

/s/

Joyce A. Dawson
Hearing Clerk

Respondents failed to file a timely answer, and, instead, filed Respondents' Motion to Dismiss Complaint. The Rules of Practice provide that an answer must contain the following:

§ 1.136 Answer.

....

(b) *Contents.* The answer shall:

(1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defenses asserted by the respondent;
or

(2) State that respondent admits all the facts alleged in the complaint;
or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

7 C.F.R. § 1.136(b).

Respondents' Motion to Dismiss Complaint does not meet the requirements for an answer. Moreover, under the Rules of Practice, Respondents' Motion to Dismiss Complaint cannot be entertained.¹⁰ Therefore, I agree both with the ALJ's conclusion that Respondents' Motion to Dismiss Complaint, filed December 20, 2002, was not an answer to the Complaint, and with the ALJ's conclusion that Respondents were in default.¹¹

The ALJ further concluded that Respondents cured their default when, on February 12, 2003, Respondents filed Respondents' Request to File Its Answer to Complaint and Respondents' Answer to Complaint. I disagree with the ALJ's conclusion that Respondents' Request to File Its Answer to Complaint and Respondents' Answer to Complaint cured Respondents' default.

Respondents filed Respondents' Request to File Its Answer to Complaint and Respondents' Answer to Complaint on February 12, 2003, 50 days after Respondents' answer was due. Respondents' failure to file a timely answer to the Complaint is deemed, for purposes of this proceeding, an admission of the allegations in the Complaint and

¹⁰See 7 C.F.R. § 1.143(b)(1).

¹¹See the ALJ's Ruling and Order to Show Cause at 1.

constitutes a waiver of hearing.¹² Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) provides that, upon a failure to file an answer, the complainant shall file a proposed decision, along with a motion for the adoption of the proposed decision, both of which shall be served upon the respondent by the Hearing Clerk. Unless a respondent files meritorious objections to the complainant's motion and proposed decision, the administrative law judge is required to issue a decision without further procedure or hearing. Respondents raise one objection to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision: viz., Respondents were not in default because Respondents' Motion to Dismiss Complaint was a timely response to the Complaint.¹³ The ALJ found Respondents' objection to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision without merit and concluded that Respondents were in default.¹⁴ Therefore, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the ALJ is required to issue a decision without further procedure or hearing.

For the foregoing reasons, the following Order should be issued.

¹²7 C.F.R. §§ 1.136(c), .139, .141(a).

¹³See Respondents' Opposition to Complainant's Motion for Adoption of Proposed Decision and Order Upon Admission of Facts by Reason of Default at 2.

¹⁴See note 11.

ORDER

The ALJ's ruling denying Complainant's Motion for Default Decision filed November 28, 2003, is vacated. This proceeding is remanded to the ALJ to issue a decision in accordance with the Rules of Practice.

Done at Washington, DC

February 9, 2004

William G. Jenson
Judicial Officer