

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: ) I & G Docket No. 01-0001  
)  
LION RAISINS, INC., a )  
California corporation formerly )  
known as LION ENTERPRISES, )  
INC.; 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 ) **Order Dismissing Appeal as to  
Al Lion, Jr., Dan Lion, and Jeff Lion**

On January 15, 2004, Al Lion, Jr., Dan Lion, and Jeff Lion [hereinafter Respondents] filed “Respondents’ Motion for Summary Judgment and/or Summary Disposition and/or Directed Verdict” [hereinafter Motion for Summary Judgment]. On February 4, 2004, and February 10, 2004, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed responses seeking denial of Respondents’ Motion for Summary Judgment.<sup>1</sup> On April 5,

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<sup>1</sup>“Complainant’s Response to ‘Respondents’ Motion for Summary Judgment (continued...)”

2004, Respondents filed a reply to Complainant's responses to Respondents' Motion for Summary Judgment.<sup>2</sup>

On June 17, 2004, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a "Ruling Denying Motion for Summary Judgment and/or Summary Disposition and/or Directed Verdict" [hereinafter Ruling Denying Respondents' Motion for Summary Judgment]. On July 13, 2004, Respondents appealed to the Judicial Officer seeking reversal of the ALJ's Ruling Denying Respondent's Motion for Summary Judgment.<sup>3</sup> On July 16, 2004, Complainant filed a response to Respondents' appeal petition in which Complainant requests dismissal of Respondents' appeal petition.<sup>4</sup> On July 20, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

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<sup>1</sup>(...continued)

and/or Summary Disposition and/or Directed Verdict' Filed on Behalf of Respondent Dan Lion" filed February 4, 2004; "Complainant's Response to 'Respondents' Motion for Summary Judgment and/or Summary Disposition and/or Directed Verdict' Filed By Respondents Al Lion, Jr., and Jeff Lion" filed February 10, 2004.

<sup>2</sup>"Respondents' Joint Reply to Complainant's Response to Respondents' Motion for Summary Judgment and/or Summary Disposition and/or Directed Verdict Filed By Respondents Al Lion, Jr., Jeff Lion and Dan Lion" filed April 5, 2004.

<sup>3</sup>"Respondents Al Lion, Jr., Dan Lion and Jeff Lion's Appeal From the ALJ Ruling Denying Respondents' Motion for Summary Judgment and/or Summary Disposition and/or Directed Verdict Rules of Practice, Rule 1.145(a)" filed July 13, 2004.

<sup>4</sup>"Complainant's Response to Appeal of Denial of Motion for Summary Judgment" filed July 16, 2004.

Based upon a careful consideration of the record, I find the ALJ's Ruling Denying Respondents' Motion for Summary Judgment is not a "decision" as defined in the rules of practice applicable to this proceeding.<sup>5</sup> The Rules of Practice provide for appeal solely of an administrative law judge's decision to the Judicial Officer. Therefore, the ALJ's Ruling Denying Respondents' Motion for Summary Judgment cannot be appealed to the Judicial Officer.

Section 1.145(a) of the Rules of Practice limits the time during which a party may file an appeal to a 30-day period after receiving service of an administrative law judge's written decision, as follows:

**§ 1.145 Appeal to Judicial Officer.**

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after the issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a).

The Rules of Practice define the word "decision" as follows:

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<sup>5</sup>"Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes" (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

### 1.132 Definitions.

As used in this subpart, the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:

.....

*Decision* means: (1) The Judge's initial decision made in accordance with the provisions of 5 U.S.C. 556 and 557, and includes the Judge's (i) findings and conclusions and the reasons or basis therefor on all material issues of fact, law or discretion, (ii) order, and (iii) rulings on proposed findings, conclusions and orders submitted by the parties; and

(2) The decision and order by the Judicial Officer upon appeal of the Judge's decision.

7 C.F.R. § 1.132.

The ALJ has not issued an initial decision in the instant proceeding in accordance with the provisions of 5 U.S.C. §§ 556 and 557, and the Rules of Practice do not permit interlocutory appeals.<sup>6</sup> Therefore, Respondents' appeal of the ALJ's Ruling Denying Respondents' Motion for Summary Judgment must be rejected as premature.

The United States Department of Agriculture's construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1)(A) and (B) of the Federal Rules of Appellate Procedure provides, as follows:

#### **Rule 4. Appeal as of Right—When Taken**

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<sup>6</sup>*In re Velasam Veal Connection*, 55 Agric. Dec. 300, 304 (1996) (Order Dismissing Appeal); *In re L.P. Feuerstein*, 48 Agric. Dec. 896 (1989) (Order Dismissing Appeal); *In re Landmark Beef Processors, Inc.*, 43 Agric. Dec. 1541 (1984) (Order Dismissing Appeal); *In re Orié S. LeaVell*, 40 Agric. Dec. 783 (1980) (Order Dismissing Appeal by Respondent Spencer Livestock, Inc.).

**(a) Appeal in a Civil Case.**

**(1) Time for Filing a Notice of Appeal.**

(A) In a civil case, . . . the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

Fed. R. App. P. 4(a)(1)(A)-(B).

The notes of the Advisory Committee on Rules regarding a 1979 amendment to Rule 4(a)(1) make clear that Rule 4(a)(1) is specifically designed to prevent premature as well as late appeals, as follows:

The phrases “within 30 days of such entry” and “within 60 days of such entry” have been changed to read “after” instead of “o[f].” The change is for clarity only, since the word “of” in the present rule appears to be used to mean “after.” Since the proposed amended rule deals directly with the premature filing of a notice of appeal, it was thought useful to emphasize the fact that except as provided, the period during which a notice of appeal may be filed is the 30 days, or 60 days as the case may be, following the entry of the judgment or order appealed from. . . .<sup>7</sup>

Notes of Advisory Committee on Rules—1979 Amendment.

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<sup>7</sup>*Accord Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (per curiam) (notice of appeal filed while timely motion to alter or amend judgment was pending in district court was absolute nullity and could not confer jurisdiction on court of appeals); *Willhauck v. Halpin*, 919 F.2d 788, 792 (1st Cir. 1990) (premature notice of appeal is a complete nullity); *Mondrow v. Fountain House*, 867 F.2d 798, 799-800 (3d Cir. 1989) (appellate court had no jurisdiction to hear appeal during pendency of motion for new trial timely filed in trial court).

Accordingly, Respondents' appeal of the ALJ's Ruling Denying Respondents' Motion for Summary Judgment must be dismissed, since the Rules of Practice do not permit interlocutory appeals.

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

**ORDER**

Respondents' interlocutory appeal filed July 13, 2004, is dismissed.

Done at Washington, DC

July 28, 2004

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William G. Jenson  
Judicial Officer