

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	I & G Docket No. 03-0001
)	
Bruce Lion, an individual;)	
Alfred Lion, Jr., an individual;)	
Daniel Lion, an individual;)	
Jeffrey Lion, an individual;)	
Larry Lion, an individual;)	
Isabel Lion, an individual;)	
Lion Raisins, Inc., a California)	
corporation; Lion Raisin)	
Company, a partnership or)	Ruling Granting Complainant's
unincorporated association; and)	Motion Not To Consider Reply
Lion Packing Company, a)	to Complainant's Appeal Petition;
partnership or unincorporated)	and Order Vacating the
association,)	Administrative Law Judge's Initial
)	Decision and Remanding Proceeding
Respondents)	to the Administrative Law Judge

PROCEDURAL HISTORY

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 alleged that on August 26, 1997, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Lion Raisins, Inc.; Lion Raisin Company; and Lion Packing Company violated the Agricultural Marketing Act and the Regulations. Complainant requested debarment of Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Lion Raisins, Inc.; Lion Raisin Company; and Lion Packing Company from inspection and grading services under the Agricultural Marketing Act in accordance with section 52.54(a) of the Regulations (7 C.F.R. § 52.54(a)).¹

On December 20, 2002, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Lion Raisins, Inc.; Lion Raisin Company; and Lion Packing Company filed a motion to dismiss the Complaint on the ground that the Complaint alleged violations that occurred beyond the 5-year statute of limitations set forth in 28 U.S.C. § 2462.² On February 7, 2003, Complainant filed “Complainant’s Response to Respondents’ Motion to Dismiss Complaint” arguing that, under section 1.143(b)(1) of the Rules of Practice (7 C.F.R. §

¹Compl. ¶¶ 8-11.

²Respondents’ Motion to Dismiss at 1.

1.143(b)(1)), the December 20, 2002, motion to dismiss the Complaint cannot be entertained.

On October 28, 2003, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Lion Raisins, Inc.; Lion Raisin Company; and Lion Packing Company filed a motion to dismiss the Complaint on the ground that the Agricultural Marketing Act does not authorize the Secretary of Agriculture to demand debarment.³ On November 13, 2003, Complainant filed “Complainant’s Response to ‘Respondent’s [sic] Motion to Dismiss”” arguing that, under section 1.143(b)(1) of the Rules of Practice (7 C.F.R. § 1.143(b)(1)), the October 28, 2003, motion to dismiss the Complaint cannot be entertained.

On July 12, 2005, Complainant filed an Amended Complaint alleging that on August 26, 1997, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; Lion Raisins, Inc.; Lion Raisin Company; and Lion Packing Company [hereinafter Respondents] violated the Agricultural Marketing Act and the Regulations. Complainant requests debarment of Respondents from inspection and grading services under the Agricultural Marketing Act in accordance with section 52.54(a) of the Regulations (7 C.F.R. § 52.54(a)).⁴ On August 10, 2005, Bruce Lion; Alfred Lion, Jr.;

³Respondent’s [sic] Motion to Dismiss at 1, 5-14.

⁴Amended Compl. ¶¶ 11-14.

Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc., filed “Respondents’ Answer to the USDA’s Amended Complaint.”⁵

On December 9, 2005, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Memorandum Opinion and Order [hereinafter Initial Decision] granting the December 20, 2002, motion to dismiss the Complaint⁶ on the ground that the Complaint alleged violations that occurred beyond the 5-year statute of limitations set forth in 28 U.S.C. § 2462.⁷ On January 27, 2006, Complainant filed an appeal petition seeking an order vacating the ALJ’s Initial Decision. On March 20, 2006, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc., filed “Respondents’ Reply to Complainant’s Appeal Petition.” On April 6, 2006, Complainant filed “Complainant’s Motion to Strike or Not to Consider ‘Respondents’ Reply to Complainant’s Appeal Petition,’” and on April 26, 2006, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc., filed

⁵Lion Raisin Company and Lion Packing Company did not file an answer to the Amended Complaint; however, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc., assert Lion Raisin Company and Lion Packing Company have no formal existence (Respondents’ Answer to the USDA’s Amended Complaint ¶¶ 2-3).

⁶The ALJ states the proceeding was before him for resolution of “pending Motions” (Initial Decision at 1). Based on the record before me, I infer the ALJ’s reference to “pending Motions” is to the December 20, 2002, and October 28, 2003, motions to dismiss the Complaint. While the ALJ granted the December 20, 2002, motion to dismiss the Complaint, I cannot determine the ALJ’s disposition of the October 28, 2003, motion to dismiss the Complaint.

⁷Initial Decision at 4-5.

“Respondents’ Reply to ‘Complainant’s Motion to Strike or Not to Consider ‘Respondents’ Reply to Complainant’s Appeal Petition.’” On May 1, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

THE DECEMBER 20, 2002, AND OCTOBER 28, 2003, MOTIONS TO DISMISS

The operative pleading in this proceeding is the Amended Complaint filed by Complainant on July 12, 2005. The December 20, 2002, and October 28, 2003, motions to dismiss, which concern the Complaint, were rendered moot by Complainant’s filing the Amended Complaint, as the Complaint was no longer at issue.⁸

Moreover, even if I found that the December 20, 2002, and October 28, 2003, motions to dismiss had not been rendered moot by Complainant’s filing the Amended Complaint, I would conclude the ALJ erred in entertaining the motions to dismiss. Section 1.143(b)(1) of the Rules of Practice (7 C.F.R. § 1.143(b)(1)) provides that any motion will be entertained other than a motion to dismiss on the pleading. The December 20, 2002, and October 28, 2003, motions to dismiss are motions to dismiss on the pleading; therefore, the ALJ should not have entertained either the December 20, 2002, motion to dismiss or the October 28, 2003, motion to dismiss.

⁸See *In re Marjorie Walker*, ___ Agric. Dec. ___, slip op. at 46-48 (Aug. 10, 2006) (stating the operative pleading is the amended complaint, not the complaint, and the respondent’s response to the complaint does not operate as a response to the amended complaint); *In re Derwood Stewart* (Decision as to Derwood Stewart), 60 Agric. Dec. 570, 572 n.1 (2001) (stating the operative pleading is the amended complaint and the allegations in the complaint are no longer at issue), *aff’d*, 64 F. App’x 941 (6th Cir. 2003).

**COMPLAINANT’S MOTION TO STRIKE OR NOT TO CONSIDER
RESPONDENTS’ REPLY TO COMPLAINANT’S APPEAL PETITION**

Complainant asserts Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc., failed to file timely “Respondents’ Reply to Complainant’s Appeal Petition”; therefore, “Respondents’ Reply to Complainant’s Appeal Petition” must be struck or not considered.⁹

On February 9, 2006, the Hearing Clerk served Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc., with Complainant’s Appeal Petition.¹⁰ Section 1.145(b) of the Rules of Practice (7 C.F.R. § 1.145(b)) provides that any response to an appeal petition must be filed with the Hearing Clerk within 20 days after service of the appeal petition; therefore, Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc.’s response to Complainant’s Appeal Petition was due no later than March 1, 2006.¹¹

⁹Complainant’s Motion to Strike or Not to Consider “Respondents’ Reply to Complainant’s Appeal Petition.”

¹⁰United States Postal Service Domestic Return Receipt for Article Number 7003 1010 0003 0642 0304.

¹¹The Hearing Clerk served Lion Packing Company on March 14, 2006 (United States Postal Service Domestic Return Receipt for Article Number 7003 1010 0003 0642 1318), and Lion Raisin Company on March 21, 2006 (United States Postal Service Domestic Return Receipt for Article Number 7003 1010 0003 0642 0038). Neither Lion Packing Company nor Lion Raisin Company filed a response to Complainant’s Appeal Petition.

Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc., requested that I extend to March 17, 2006, the time for filing a response to Complainant's Appeal Petition.¹² On March 2, 2006, I granted Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc.'s request.¹³ Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc., assert they timely filed "Respondents' Reply to Complainant's Appeal Petition" on March 17, 2006, and provide as evidence of their assertion a transaction report indicating that they transmitted by facsimile "Respondents' Reply to Complainant's Appeal Petition" beginning on March 17, 2006, at 5:00 p.m., and ending on March 17, 2006, at 5:06 p.m.

Section 1.147(g) of the Rules of Practice provides the effective date of filing a document is the date the document reaches the Hearing Clerk, as follows:

§ 1.147 Filing; service; extensions of time; and computation of time.

....

(g) *Effective date of filing.* Any document or paper required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk; or, if authorized to be filed with another officer or employee of the Department it shall be deemed to be filed at the time when it reaches such officer or employee.

7 C.F.R. § 1.147(g).

¹²Respondents' Motion Request for Extension of Time to File Reply to Appeal Petition filed March 1, 2006.

¹³Informal Order Extending Time For Filing Respondents' Response To Complainant's Appeal Petition filed March 2, 2006.

The former Acting Chief Administrative Law Judge set the hours during which the Hearing Clerk's Office is open for the purpose of receiving documents, as follows:

January 28, 1999

TO: OALJ Staff

FROM: Edwin S. Bernstein
Acting Chief Administrative Law Judge

SUBJECT: New Hours of Operation

Effective February 1, 1999, the hours that the Hearing Clerk's Office will be open to receive documents will be 8:30 a.m. to 4:30 p.m., Monday through Friday, except for holidays.^[14]

However, the Rules of Practice do not set forth the hours during which the Office of the Hearing Clerk is open to receive documents. Moreover, I find no indication in the record that the Hearing Clerk provided Bruce Lion; Alfred Lion, Jr.; Daniel Lion; Jeffrey Lion; Larry Lion; Isabel Lion; and Lion Raisins, Inc., with the Acting Chief Administrative Law Judge's January 28, 1999, memorandum. Nonetheless, the most reliable evidence of the date a document reaches the Hearing Clerk is the date and time stamped by the Office of the Hearing Clerk on that document. The Office of the Hearing Clerk stamped "Respondents' Reply to Complainant's Appeal Petition" as having been received March 20, 2006. Therefore, I conclude "Respondents' Reply to Complainant's

¹⁴See also *In re Derwood Stewart* (Decision as to Derwood Stewart), 60 Agric. Dec. 570, 607 (2001), *aff'd*, 64 F. App'x 941 (6th Cir. 2003).

Appeal Petition” was late-filed, and I have not considered “Respondents’ Reply to Complainant’s Appeal Petition.”

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

ORDER

1. The ALJ’s December 9, 2005, Initial Decision is vacated.
2. This proceeding is remanded to the ALJ for further proceedings in accordance with the Rules of Practice.

Done at Washington, DC

December 5, 2006

William G. Jenson
Judicial Officer