

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,)	
)	
Respondents)	Decision and Order

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 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

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 (memorandum of RA Paris, Office of the Hearing Clerk, dated October 30, 2002); (2) Respondent Lion Raisin Company on October 23, 2002 (United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8985 0676); (3) Respondent Lion Packing Company on October 22, 2002 (United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8985 0669); (4) Respondent Al Lion, Jr., on October 22, 2002 (United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8985 0690); (5) Respondent Jeff Lion on October 22, 2002 (United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8985 0683); (6) Respondent Bruce Lion on October 23, 2002 (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 (United States Postal Service Domestic Return Receipt for Article Number 7099 3400 0014 4581 8175).

complaint.² On October 29, 2002, Respondents filed a request for an extension of time to 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

²7 C.F.R. § 1.136(a).

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.

Default” in which Respondents contend Complainant’s Motion for Default Decision should be denied because Respondents’ Motion to Dismiss Complaint, filed December 20, 2002, 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, Respondents 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] denied Complainant’s Motion for Default Decision, granted Respondents’ request to file Respondents’ Answer to Complaint, and accepted Respondents’ Answer to Complaint for filing as of February 12, 2003.⁹

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

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.

⁹“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.”

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.

On February 9, 2004, I vacated the ALJ's denial of Complainant's Motion for Default Decision and remanded the proceeding to the ALJ to issue a decision in accordance with the Rules of Practice.¹⁰ On remand, the ALJ: (1) ruled Respondents filed meritorious objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision; (2) denied Complainant's Motion for Default Decision and Complainant's Proposed Default Decision; (3) granted Respondents' request to file their answer to the Complaint; and (4) accepted for filing Respondents' Answer to Complaint filed February 12, 2003.¹¹

On April 16, 2004, Complainant filed "Complainant's Appeal Petition." On May 12, 2004, Respondents filed "Respondents' Response to Complainant's Appeal Petition." On May 14, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

¹⁰*In re Lion Raisins, Inc.*, 63 Agric. Dec. ____ (Feb. 9, 2004) (Order Vacating the ALJ's Denial of Complaint's Motion for Default Decision and Remand Order).

¹¹"Ruling Denying Stay; Ruling on Remand from the Judicial Officer; and Ruling Granting Respondents' Request to File an Answer."

Based upon a careful consideration of the record, I disagree with the ALJ's determination that Respondents filed meritorious objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. Therefore, I:

(1) reverse the ALJ's February 27, 2004, rulings (a) denying Complainant's Motion for Default Decision and Complainant's Proposed Default Decision, (b) granting Respondents' request to file their answer to the Complaint, and (c) accepting for filing Respondents' Answer to Complaint filed February 12, 2003; and (2) issue this Decision and Order based upon Respondents' failure to file a timely answer to the Complaint.

APPLICABLE STATUTES AND REGULATIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

**CHAPTER 38—DISTRIBUTION AND MARKETING OF
AGRICULTURAL PRODUCTS**

....

§ 1622. Duties of Secretary relating to agricultural products

The Secretary of Agriculture is directed and authorized:

....

**(h) Inspection and certification of products in interstate commerce;
credit and future availability of funds; investment; certificates as
evidence; penalties**

To inspect, certify, and identify the class, quality, quantity, and condition of agricultural products when shipped or received in interstate commerce, under such rules and regulations as the Secretary of Agriculture may prescribe[.]

7 U.S.C. § 1622(h) (1994).

7 C.F.R.:

TITLE 7—AGRICULTURE

....

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

**CHAPTER I—AGRICULTURAL MARKETING SERVICE
(STANDARDS, INSPECTIONS, MARKETING PRACTICES),
DEPARTMENT OF AGRICULTURE**

....

**SUBCHAPTER C—REGULATIONS AND STANDARDS UNDER
THE AGRICULTURAL MARKETING ACT OF 1946**

....

**PART 52—PROCESSED FRUITS AND VEGETABLES,
PROCESSED PRODUCTS THEREOF, AND CERTAIN
OTHER PROCESSED FOOD PRODUCTS**

**SUBPART—REGULATIONS GOVERNING INSPECTION
AND CERTIFICATION**

....

MISCELLANEOUS

....

§ 52.54 Debarment of service.

(a) The following acts or practices, or the causing thereof, may be deemed sufficient cause for the debarment, by the Administrator, of any person, including any agents, officers, subsidiaries, or affiliates of such person, from any or all benefits of the Act for a specified period. The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes set forth in §§ 1.130 through 1.151 of this title and the Supplemental Rules of Practice in part 50 of this chapter shall be applicable to such debarment action.

(1) *Fraud or misrepresentation.* Any misrepresentation or deceptive or fraudulent practice or act found to be made or committed in connection with:

- (i) The making or filing of an application for any inspection service;
- (ii) The submission of samples for inspection;
- (iii) The use of any inspection report or any inspection certificate, or appeal inspection certificate issued under the regulations in this part;
- (iv) The use of the words “Packed under continuous inspection of the U.S. Department of Agriculture,” any legend signifying that the product has been officially inspected, any statement of grade or words of similar import in the labeling or advertising of any processed product;
- (v) The use of a facsimile form which simulates in whole or in part any official U.S. certificate for the purpose of purporting to evidence the U.S. grade of any processed product.

(2) *Wilful violation of the regulations in this subpart.* Wilful violation of the provisions of this part of the Act.

(3) *Interfering with an inspector, inspector’s aid, or licensed sampler.* Any interference with, obstruction of, or attempted interference with, or attempted obstruction of any inspector, inspector’s aide, or licensed sampler in the performance of his duties by intimidation, threat, assault, bribery, or any other means—real or imagined.

7 C.F.R. § 52.54.

DECISION

Statement of the Case

Respondents failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) and the failure to deny or otherwise respond to an allegation of the complaint shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer constitutes a

waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Lion Raisins, Inc., is a California corporation formerly known as Lion Enterprises, Inc., and doing business as a producer, packer, and seller of processed raisins. On September 13, 1999, Lion Enterprises, Inc., changed its registered name to Lion Raisins, Inc., by filing a Certificate of Amendment (Amendment No. AO532208) with the California Secretary of State. Respondent Lion Raisins, Inc.'s principal place of business is and was 3310 E. California Avenue, Fresno, California 93702. Respondent Lion Raisins, Inc.'s agent for service of process is Al Lion, 3310 E. California Avenue, Fresno, California 93702.

2. Respondent Lion Raisin Company is a partnership or unincorporated association doing business as a producer, packer, and seller of processed raisins, and located at 9500 South DeWolf Avenue, Selma, California 93662. Respondent Al Lion, Jr., Respondent Dan Lion, Respondent Bruce Lion, and Respondent Jeff Lion are principals of Respondent Lion Raisin Company.

3. Respondent Lion Packing Company is a partnership or unincorporated association doing business as a producer, packer, and seller of processed raisins, and located at 9500 South DeWolf Avenue, Selma, California 93662. Respondent Al Lion, Jr.,

Respondent Dan Lion, Respondent Bruce Lion, and Respondent Jeff Lion are principals of Respondent Lion Packing Company.

4. Respondent Al Lion, Jr., is an individual whose business mailing address is 9500 South DeWolf Avenue, Selma, California 93662. At all times material to this proceeding, Respondent Al Lion, Jr., was president of Respondent Lion Raisins, Inc., and a partner in, or principal of, Respondent Lion Raisin Company and Respondent Lion Packing Company.

5. Respondent Dan Lion is an individual whose business mailing address is 9500 South DeWolf Avenue, Selma, California 93662. At all times material to this proceeding, Respondent Dan Lion was a vice president of Respondent Lion Raisins, Inc., and a partner in, or principal of, Respondent Lion Raisin Company and Respondent Lion Packing Company.

6. Respondent Jeff Lion is an individual whose business mailing address is 9500 South DeWolf Avenue, Selma, California 93662. At all times material to this proceeding, Respondent Jeff Lion was a vice president of Respondent Lion Raisins, Inc., and a partner in, or principal of, Respondent Lion Raisin Company and Respondent Lion Packing Company.

7. Respondent Bruce Lion is an individual whose business mailing address is 9500 South DeWolf Avenue, Selma, California 93662. At all times material to this proceeding, Respondent Bruce Lion was a vice president of Respondent Lion Raisins, Inc.,

and a partner in, or principal of, Respondent Lion Raisin Company and Respondent Lion Packing Company.

8. On or about August 26, 1997, Respondents caused the issuance of a false inspection certificate (Certificate of Quality and Condition) with respect to raisins sold by Respondents to purchaser Ka Vo Mao, Iec Cong Si, in Macau, by altering, or causing to be altered, the moisture content reading as determined by a United States Department of Agriculture inspector, in willful violation of section 203(h) of the Agricultural Marketing Act (7 U.S.C. § 1622(h)) and section 52.54(a)(2) of the Regulations (7 C.F.R. § 52.54(a)(2)).

9. On or about August 26, 1997, Respondents caused the issuance and use of a facsimile form which simulated an official U.S. inspection certificate (Certificate of Quality and Condition (Processed Foods)), and which falsely purported to evidence the quality and moisture content of raisins sold by Respondents to purchaser Ka Vo Mao, Iec Cong Si, in Macau, as having been determined by a United States Department of Agriculture inspector, in willful violation of section 203(h) of the Agricultural Marketing Act (7 U.S.C. § 1622(h)) and section 52.54(a)(2) of the Regulations (7 C.F.R. § 52.54(a)(2)).

10. On or about August 26, 1997, Respondents engaged in misrepresentation or deceptive or fraudulent practices or acts in connection with the use of at least one inspection certificate, in violation of section 52.54(a)(1)(iii) of the Regulations (7 C.F.R. § 52.54(a)(1)(iii)).

11. The acts and practices of Respondents, described in findings of fact numbers 8, 9, and 10, constitute sufficient cause for the debarment of each Respondent from the benefits of the Agricultural Marketing Act, including inspection and grading services, for a specified period, in accordance with section 52.54(a) of the Regulations (7 C.F.R. § 52.54(a)).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. By reason of the facts set forth in the findings of fact, Respondents violated section 203(h) of the Agricultural Marketing Act (7 U.S.C. § 1622(h)) and section 52.54(a) of the Regulations (7 C.F.R. § 52.54(a)).

COMPLAINANT'S APPEAL PETITION

Complainant appeals the ALJ's February 27, 2004, ruling: (1) finding Respondents filed meritorious objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision; (2) denying Complainant's Motion for Default Decision and Complainant's Proposed Default Decision; (3) granting Respondents' request to file their answer to Complaint; and (4) accepting for filing Respondents' Answer to Complaint filed February 12, 2003.

Respondents objected to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on the ground that Respondents' Motion to Dismiss Complaint, filed December 20, 2002, constitutes a timely response to the

Complaint.¹² I find the ALJ erroneously found Respondents' objection meritorious and erroneously denied Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.

On October 11, 2002, Complainant filed a Complaint alleging Respondents violated the Agricultural Marketing Act and the Regulations. 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, 2002.¹³ 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 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

¹²Respondents' Opposition to Complainant's Motion for Adoption of Proposed Decision and Order Upon Admission of Facts by Reason of Default at 2.

¹³See note 1.

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. §§ 1.130-1.151 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).

Generally, a motion to dismiss is not considered to be a responsive pleading¹⁴ and Respondents' Motion to Dismiss Complaint does not meet the requirements in section 1.136(b) of the Rules of Practice (7 C.F.R. § 1.136(b)) for an answer. Moreover, under the Rules of Practice, Respondents' Motion to Dismiss Complaint cannot be entertained.¹⁵

¹⁴*Shaver v. Operating Engineers Local 428 Pension Trust Fund*, 332 F.3d 1198, 1201 (9th Cir. 2003) (stating a motion to dismiss is not a responsive pleading within the meaning of Fed. R. Civ. P. 15(a)); *In re Republic of the Philippines*, 309 F.3d 1143, 1151 (9th Cir. 2002) (stating a motion to dismiss is not a responsive pleading); *Crum v. Circus Circus Enterprises*, 231 F.3d 1129, 1130 n.3 (9th Cir. 2000) (stating a motion to dismiss is not a responsive pleading within the meaning of Fed. R. Civ. P. 15); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764, 788 (9th Cir. 2000) (stating a motion to dismiss is not a pleading), *aff'd*, 535 U.S. 302 (2002); *Miles v. Department of the Army*, 881 F.2d 777, 781 (9th Cir. 1989) (stating a motion to dismiss the complaint is not a responsive pleading).

¹⁵7 C.F.R. § 1.143(b)(1). *In re Judie Hansen*, 57 Agric. Dec. 1072, 1074-75 (1998) (stating under the Rules of Practice any motion will be entertained other than a motion to dismiss on the pleading), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam), *printed in* 59 Agric. Dec. 533 (2000); *In re Lindsay Foods, Inc.*, 56 Agric. Dec. 1643, 1650 (1997) (Remand Order) (stating 7 C.F.R. § 1.143(b)(1) prohibits administrative law judges and the judicial officer from entertaining a motion to dismiss on the pleading); *In re Far West Meats*, 55 Agric. Dec. 1045, 1049 (Clarification of Ruling on Certified Questions) (stating 7 C.F.R. § 1.143(b)(1) prohibits an administrative law judge from entertaining a motion to dismiss on the pleading); *In re All-Airtransport, Inc.*, 50 Agric. Dec. 412, 414 (1991) (Remand Order) (holding the administrative law judge erred in dismissing the complaint since the judicial officer and the administrative law judge are bound by the Rules of Practice which provide that any motion will be entertained other than a motion to dismiss on the pleading); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989) (Ruling on Certified
(continued...))

Respondents filed a request to file an answer to the 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 constitutes a waiver of hearing.¹⁶

Accordingly, there are no issues of fact on which a meaningful hearing could be held in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondents of rights under the due process clause of the Fifth Amendment to the Constitution of the United States.¹⁷

¹⁵(...continued)

Question) (stating the judicial officer, as well as the administrative law judge, is bound by the Rules of Practice, and under the Rules of Practice, the judicial officer has no discretion to entertain a motion to dismiss on the pleading). *Cf. In re Don Van Liere*, 34 Agric. Dec. 1641 (1975) (Order of Dismissal) (stating the purpose of 9 C.F.R. § 202.10(b), which provides that, in proceedings under the Packers and Stockyards Act, 1921, as amended and supplemented, any motion will be entertained "except a motion to dismiss on the pleadings," is to prevent a respondent from filing a motion to dismiss on the pleadings).

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

¹⁷*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding that a hearing was not required under the Fifth Amendment to the Constitution of the United States where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating that due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that

(continued...)

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

ORDER

Respondents, their agents, officers, subsidiaries, and affiliates, directly or indirectly through any corporate or other device, are debarred for 1 year from receiving inspection services under the Agricultural Marketing Act.

¹⁷(...continued)

the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

This Order shall become effective 30 days after service of this Order on Respondents.

Done at Washington, DC

May 24, 2004

William G. Jenson
Judicial Officer