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10 UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF CALIFORNIA

12) Case No.: TBD
13	LION RAISINS, INC.,)
14	Plaintiff,) COMPLAINT FOR DECLARATORY AND
15	vs.) INJUNCTIVE RELIEF; STAY OF
16	UNITED STATES DEPARTMENT OF) ADMINISTRATIVE PROCEEDINGS;
17	AGRICULTURE,) TEMPORARY RESTRAINING ORDER; and
18	Defendant.) ATTORNEY'S FEES [FREEDOM OF
19) INFORMATION ACT]

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21 PLAINTIFF Lion Raisins, Inc. ("Lion" or "Plaintiff") by and through its undersigned attorney,
22 alleges as follows:

23 **I. COMPLAINT**

24 1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C.A. § 552, for
25 temporary restraining order; injunctive and declaratory relief; expedited processing; sanctions for
26 contempt; fee waiver; expedited proceedings; attorney fees and costs; stay of administrative
27 proceedings; close court supervision; and other appropriate relief seeking the disclosure and release
28 of agency records improperly withheld from Plaintiff by defendant United States Department of

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF;
STAY OF ADMINISTRATIVE PROCEEDINGS;
TEMPORARY RESTRAINING ORDER; ATTORNEY
FEES [FREEDOM OF INFORMATION ACT]

1 Agriculture (“Defendant” or “USDA”) and its components Agricultural Marketing Service (“AMS”)
2 and Office of General Counsel (“OGC”), as well as its administrative arm Raisin Administrative
3 Committee (“RAC”) and the local Fresno Inspection Office of the USDA.

4 II. JURISDICTION AND VENUE

5 2. This Court has subject matter jurisdiction over this action and personal jurisdiction over the
6 parties pursuant to 5 U.S.C. § 552(a)(4)(B). This court also has jurisdiction over this action pursuant
7 to 28 U.S.C. §§ 1331 and 1346. Venue lies in this district under 5 U.S.C.A. § 552(a)(4)(B).

8 3. Plaintiff/Lion is a California corporation in good standing with its principal place of business
9 located in Selma, County of Fresno, State and Eastern District of California. Lion was formally
10 known as Lion Enterprises and has been a family-owned business since 1903. Lion is the largest
11 independent packer/handler of raisins produced from grapes grown in California.

12 4. Defendant USDA is an agency of the United States, as defined in 5 U.S.C. § 552(f), that
13 performs inspection and grading services for raisin handlers. The USDA retains and has possession
14 of the records Plaintiff seeks, which are: (a) disposition plans for two series of USDA forms (“FR”
15 and “RAC”); (b) a record of documents that the USDA destroyed; (c) inspection and reinspection
16 records; (d) worksheets for USDA Certificates; (e) warning letter and compliance cases for marketing
17 order violations; and (f) physical access to USDA records by plaintiff’s forensic document examiner.

18 III. BACKGROUND

19 5. Paragraphs 1 through 4 are incorporated herein as if fully set forth below.

20 6. As a raisin handler, Lion is regulated by a federal marketing order¹ (“Marketing Order”)
21 under which Lion obtains mandatory USDA inspection and grading services.²

22 7. In 1997 and 1998, USDA entrusted Lion with stacks of blank USDA inspection certificates
23 (“Certificates”) that Lion was required to type from a Certificate worksheet (“Worksheet”) which had
24 been prepared by a USDA Inspector (“Inspector”) from various source documents, typically a “line
25 check sheet.”

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28 ¹ 7 C.F.R. § 989.1 *et seq.* promulgated under the Agricultural Marketing Agreement Act of 1937,
as amended (7 U.S.C. §§ 601, *et seq.*).

² 7 C.F.R. §§ 989.58, 989.59, 989.158 & 989.159
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF;
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1 8. When Inspectors failed to ensure that Lion's production specifications were certified,
2 Inspectors informally corrected the Certificate or communicated reinspection results by (a) word of
3 mouth, (b) changing the original Worksheet, or (c) preparing a new Worksheet, from which Lion
4 typed a replacement Certificate that Inspectors (i) failed to document on the line check sheet or
5 Certificate Accountability Ledger and (ii) misfiled in USDA records or destroyed for fear of
6 discipline and/or as a courtesy to Lion.

7 9. In February 1998, the USDA received an anonymous tip alleging that Lion's then-vice
8 president had falsified USDA Certificates to export buyers. On information and belief, the tip came
9 from Ken Turner. The U.S. District Court found Ken Turner to be a biased, disgruntled ex-employee
10 with a motive to misrepresent his allegations, and that he had been fired under adverse conditions
11 attributable to himself. (Ken Turner later committed perjury at the administrative proceedings.)

12 10. The AMS prepared an investigative report dated May 26, 1999 in which Lion allegedly
13 altered the grade on one Certificate and forged two other Certificates to misrepresent the moisture
14 percentage. (There were at least 1,270 Certificates issued by the USDA from 1995 through 2000 on
15 approximately 30,000 shipments of raisins). The two alleged forgeries were supposedly stolen from
16 the USDA and are among 13 "blanks" in the Certificate accountability ledger ("Certificate
17 Accountability Ledger") (i.e. unaccounted for Certificates) for which Lion received the blame.

18 11. Acting under the *guise* of the anonymous tip, the USDA raided Lion's corporate
19 headquarters over 2 ½ years later in October 2000. Without warning, armed federal agents from the
20 OIG seized export shipping files.

21 12. Lion shipping files included copies of USDA Certificates. The U.S. District found that (a)
22 Pat Fries (Ken Turner's best friend) was convicted of embezzlement from Lion by forging company
23 checks, (b) had been terminated by Lion under adverse conditions, (c) had a motive to misrepresent
24 about Lion, and (d) was biased against Lion. Pat Fries was recently placed on Fresno's Most Wanted.

25 13. Lion shipping files were taken into custody by the U.S. Attorney to which USDA had access
26 through AMS investigator, David W. Trykowski ("AMS INVESTIGATOR TRYKOWSKI"). AMS
27 INVESTIGATOR TRYKOWSKI unlawfully transferred shipping files to Washington, D.C. On
28 information and belief, he took them without the knowledge or consent of the U.S. Attorney to

1 prevent Lion from having an allegedly forged document analyzed by Lion's expert because it was
2 probably signed by an Inspector.

3 14. After learning of USDA's allegations, Lion insisted that Inspectors begin typing their own
4 Certificates. USDA made an industry-wide policy change in November 2000 for Inspectors to type
5 Certificates—not the handler.

6 15. Prior to the raid, Lion had filed a lawsuit seeking millions in damages for money lost through
7 misappropriation by the RAC and Lion's then-vice president had publicly criticized the Marketing
8 Order and USDA inspection services. (Lion later filed a lawsuit seeking millions in damages for
9 admittedly false inspection results reported by Inspectors.) On information and belief, the true reason
10 for the OIG raid was in retaliation for Lion's pre-raid lawsuit and public criticism.

11 16. In January 2001, Kenneth C. Clayton ("ASSOC. ADMIN. CLAYTON"), Associate
12 Administrator of the AMS, attempted to punish Lion by (a) suspending Lion from bidding on
13 government contracts, alleging lack of present business integrity; (b) filing an administrative
14 complaint debarment seeking to debar Lion, without authority or mandatory pre-litigation notice,
15 from USDA inspection services required under the Marketing Order; and (c) publishing a defamatory
16 letter that Lion customers had been "victimized." Both administrative actions were based on the three
17 allegedly falsified Certificates identified in the May 1999 AMS Report. Both administrative actions
18 shall only be for remedial purposes—not for punishment.

19 17. The suspension was temporarily enjoined by the U.S. District Court, in part, because (a)
20 ASSOC. ADMIN. CLAYTON ignored the numerous and good faith remedial steps Lion had taken to
21 prevent any potential misconduct from occurring in the future and (b) the USDA had since made
22 several affirmative findings that Lion possesses the present business integrity to do business with the
23 government. The suspension was then set aside by the Court of Federal Claims as arbitrary,
24 capricious, and not in accordance with the law after findings that the rationale for the suspension was
25 partially contrived and appeared to be in the nature of illegal punishment.

26 18. In spite of the fact that the suspension was set aside, ASSOC. ADMIN. CLAYTON gave
27 orders to march on with the debarment proceeding. During the course of the hearing, Lion made a
28 number of FOIA requests for USDA and Lion documents required for Lion to prove that

1 undocumented Certificates (a) were informally altered and signed by Inspectors and (b) accurately
2 represent reinspection results taken by Inspector. Acting on the advice of AMS INVESTIGATOR
3 TRYKOWSKI and/or OGC counsel prosecuting the debarment proceedings, Colleen Carroll (“OGC
4 ATTORNEY CARROLL”), USDA systematically denied Lion FOIA requests, falsely claiming that
5 disclosure could reasonably interference with allegedly ongoing criminal or administrative
6 investigation; 5 U.S.C. § 552(b)(7)(A) (“Exemption 7(A)”). The FOIA denials were made in bad
7 faith and intended for the purpose of substantial delay and to conceal evidence. During the
8 subsequent FOIA litigation, for example, AMS INVESTIGATOR TRYKOWSKI committed perjury
9 in an apparent attempt to justify withholding Worksheets.

10 19. USDA inspection records are typically in the custody and control of the USDA at the local
11 Fresno Field Office to which AMS INVESTIGATOR TRYKOWSKI has had unfettered access.
12 Some USDA inspection records responsive to Lion’s FOIA requests were illegally and arbitrarily
13 destroyed. On information and belief, Worksheets were illegally transferred by AMS
14 INVESTIGATOR TRYKOWSKI to Washington D.C.

15 20. On December 2, 2003, the Ninth Circuit Court of Appeal ordered the USDA to release
16 Certificates and Line Check Sheets after finding that USDA’s concerns were “speculative and
17 farfetched,” and concluding that USDA’s actions were again arbitrary, capricious, and contrary to
18 law. Among over 12,000 USDA records released, Lion discovered materially exculpatory evidence.
19 For example, Inspectors (a) informally corrected inspection records (b) informally signed the name of
20 other Inspectors on Certificates and in the Certificate Accountability Ledger, (c) misplaced
21 Certificates that were not recorded on the Certificate Accountability Ledger, and (d) failed to
22 document reinspection results. Meanwhile, Lion also discovered that USDA and/or AMS
23 INVESTIGATOR TRYKOWSKI contemptuously withheld materially exculpatory Check Sheets.

24 21. Through other inspection records eventually released by the USDA through FOIA, Lion also
25 discovered that the USDA probably destroyed, altered, substantially delayed and withheld other
26 critical inspection documents required for Lion’s defense; such actions were in bad faith, an abuse of
27 discretion; arbitrary, capricious, and contrary to law. In fact, the USDA was cited for contempt by the

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1 Court of Federal Claims after OGC ATTORNEY CARROLL disclosed Lion's records in an effort to
2 debar Lion from inspection services.

3 22. Meanwhile, the USDA filed two additional debarment complaints on October 11, 2002 and
4 November 20, 2003. The former is scheduled for hearing in June 2008. Lion has filed petitions to
5 reopen evidence in the other two administrative proceedings on issues of USDA's misuse,
6 suppression, destruction, and alteration of evidence. Collectively, the three debarment proceedings
7 have created an exceptional, compelling and urgent need for expedited processing of Lion's FOIA
8 requests by the USDA; otherwise, Lion faces the imminent threat and potential jeopardy of
9 debarment, without due process, from mandatory USDA inspection and will be forced to close its
10 door to nearly 500 fulltime employees and 2,000 part-time employees, many of whom are low-
11 income minorities, as well as to hundreds of raisin growers and thousands of satisfied customers.
12 Disclosure of the requested records is urgently needed to inform the public concerning the conduct of
13 the USDA.

14 23. While Congress authorized a fine of \$1,000 and jail up to one year—not debarment—no
15 indictments were issued as a result of the AMS or OIG investigations. The five-year criminal statute
16 of limitations has expired on allegations results from acts that allegedly occurred from 1995 to 2000.
17 As such, there is no longer an ongoing criminal investigation on which the USDA may withhold
18 records under Exemption 7(A). Likewise, there are no reasonable grounds on which the USDA may
19 claim Exemption 7(A) based on ongoing administrative proceedings, as recognized by the U.S.
20 District Court in September 2005, or on an ongoing administrative investigation.

21 **IV. COUNT ONE: REFUSAL TO PRODUCE**

22 **DISPOSITION PLANS FOR "FR" AND "RAC" FORMS (FOIA NO. 97-07)**

23 24. Paragraphs 1 through 23 are incorporated herein as if fully set forth below.

24 25. By letter dated August 1, 2007, Lion submitted a FOIA request to the USDA for
25 USDA/AMS policies and procedures for the storage, archiving, transferring, retrievability, access
26 controls, retention, and disposal of records that were created from 1995 through 2000.

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1 26. By letter dated August 30, 2007, the USDA assigned FOIA No. 97-07 and made only a
2 partial disclosure by releasing a disposition plans for the "F&V" forms. The USDA also failed to
3 perform an adequate search for the requested records.

4 27. The USDA decided to withhold disposition plans for "FR" and "RAC" forms in bad faith for
5 the purpose of substantial delay and to conceal materially exculpatory evidence.

6 28. By way of voice mail and letter to the USDA dated September 26, 2007, Lion made a
7 supplemental request for the disposition plans for the "FR" and "RAC" series of forms. By telephone
8 of September 26, 2007, the USDA falsely and in bad faith represented that all responsive records had
9 been released.

10 29. By letter dated October 11, 2007, Lion filed a timely appeal to the AMS, USDA
11 Administrator.

12 30. As part of Lion's appeal, Lion attached documentation indicating that the USDA did have
13 records relating to the subjects outlined in FOIA Request No. 97-07. For example, Lion cited and
14 attached federal regulations (and agency directives) under which the AMS of the USDA must have a
15 records management program that includes an inventory of all records, the period of time for which
16 the agency needs each records series, as well as written retention and disposition instructions for each
17 record series that is approved by National Archives and Records Administration.

18 31. As part of Lion's appeal dated October 11, 2007, Lion attached:

- 19 a. An excerpt of transcript in which AMS INVESTIGATOR TRYKOWSKI testified that
20 there is a three-year retention policy for two "FR" forms. Specifically, he referred to Line
21 Check Sheets [form "FR-21"] and Worksheets for Certificates [form "FR-146-10"].
- 22 b. A declaration from Lion's general manager to whom the USDA's local officer-in-charge
23 represented that the Red Tag Ledger [form "FR-41"] had been retained since December
24 2002.
- 25 c. A prior response from the USDA to FOIA No. 60-07 in which the FOIA Officer claimed
26 that certain "FR" and "RAC" documents had been destroyed in accordance with agency
27 file requirements (Exhibit "H" to the Appeal).

1 32. As part of Lion's appeal dated October 11, 2007, Lion also referred to "RAC" forms, as well
2 as other "FR" forms, that had been retained for a number of years by the USDA's Compliance Office
3 (e.g. Daily Pack-Out Reports [form "RAC-15"]).

4 33. By letter dated January 28, 2008, the USDA assigned AMS FOIA Appeal No. 01-08 and
5 released an additional 16 pages responsive to the Lion's August 1, 2007 request; however, the USDA
6 continues to withhold the disposition plans for the "FR" and "RAC" forms in bad faith and for the
7 purpose of substantial delay.

8 **V. COUNT TWO: REFUSAL TO PRODUCE**

9 **TRANSFER AND DESTRUCTION RECORDS (FOIA NO. 96-07)**

10 34. Paragraphs 1 through 33 are incorporated herein as if fully set forth below.

11 35. By letter dated July 31, 2007, Lion submitted a FOIA request to the USDA for records
12 related to the disposition of inspection documents prepared for Lion since 1995, including, but not
13 limited to, "what agency had custody of the documents, what documents were destroyed, who
14 destroyed them, how they were destroyed, and where were they destroyed." The request included an
15 inventory of 32 forms identified by form name and, in most cases, the form series and number (e.g.
16 "FR-41," "F&V 146" or "RAC-100").

17 36. By letter dated August 2, 2007, USDA acknowledged receipt of the FOIA request and
18 assigned FOIA Number 96-07.

19 37. By letter dated August 30, 2007, the USDA falsely and in bad faith claimed the requested
20 records had been destroyed pursuant to the retention period stated in the disposition plan. The truth is
21 that only four of the 32 forms identified in FOIA Request No. 96-07 are identified in the disposition
22 plan released to Lion pursuant to FOIA Request No. 97-07. All four are "F&V" forms including
23 Certificates [form F&V-146] and reinspection Memorandum Reports of Inspection [form F&V-490].
24 The USDA also failed to perform an adequate search for the requested records.

25 38. By the same letter dated August 30, 2007, the USDA falsely and in bad faith claimed, "There
26 are no records either created or maintained regarding the destruction of the documents in your letter."
27 Assuming the truth of the claim, the actions of the USDA was illegal and violation of the Archival
28 Administration Act, 44 U.S.C. §2101, *et seq.*; the Records Management by Federal Agencies Act, 44

1 U.S.C. § 3101, *et seq.*; and the Disposal of Records Act, 44 U.S.C. § 3301, *et seq.* The claim was
2 intentionally crafted as an alternative to admitting that the records were illegally destroyed.

3 39. By letter dated October 11, 2007, Lion filed a timely appeal with the AMS, USDA
4 Administrator.

5 40. As part of Lion's appeal, Lion attached documentation indicating that the USDA has the
6 records requested. For example, Lion cited and attached federal regulations (and agency directives)
7 under which (a) federal records cannot be destroyed except in accordance with such regulations, (b)
8 "Agencies must also create and maintain records that document the destruction of temporary records
9 [see 36 C.F.R. § 1220.36(b)] and (c) violators may receive "a maximum criminal penalty of a \$2,000
10 fine, 3 years I prison, or both." Lion identified ASSOC. ADMIN. CLAYTON as having been
11 delegated the oversight and responsibility for USDA's records management program.

12 41. By letter dated January 28, 2008, the AMS, USDA Administrator assigned AMS FOIA
13 Appeal No. 01-08 and improperly and in bad faith upheld "the agency's previous determination."

14 **VI. COUNT THREE: REFUSAL TO PRODUCE LINE CHECK SHEETS**
15 **AND MEMORANDUM REPORTS OF INSPECTION (FOIA NO. 184-001)**

16 42. Paragraphs 1 through 41 are incorporated herein as if fully set forth below.

17 43. By letter dated April 9, 2007, Lion submitted a FOIA request to the USDA for a
18 supplemental disclosure of (a) Line Check Sheets [form "FR-21"] that were withheld for any reason
19 and (b) Memorandum Reports of Inspection [form "FV-490"] between August 1996 through
20 November 1999 that are being withheld in violation of a Ninth Circuit Order. (The original request
21 was FOIA No. 184-001.)

22 44. By letter dated April 23, 2007, the USDA acknowledged receipt of Lion's April 9, 2007
23 request and assigned FOIA No. 60-07 (perhaps incorrectly).

24 45. By letter dated June 13, 2008, the USDA only *re-released* 28 Line Check Sheets for
25 reconditioned raisins and four Line Check Sheets from June 25, 1998 that CARROLL unwittingly
26 exchanged in I&G Docket No. 04-0001, marked for identification therein as CX38. At minimum, the
27 USDA withheld additional Line Check Sheets for recondition, Afghan, and Chilean raisins. The
28 USDA also failed to perform an adequate search for the requested records.

1 46. By the same letter dated June 13, 2008, the USDA only *re*-released 24 Memorandum
2 Reports of Inspection dated from January 4, 2000 to November 13, 2000, and falsely claimed that
3 they had not been previously released. The truth is that all but one (i.e. 23 of 24) had been previously
4 released to Lion. The USDA withheld every Memorandum Report of Inspection prepared from July
5 1996 through November 1999, the time period that the alleged Lion misconduct occurred. The USDA
6 also withheld up to 30 Memorandum Reports of Inspection from December 1999 through August
7 2000. The USDA also failed to perform an adequate search for the requested records.

8 47. By letter dated June 28, 2007, Lion filed a timely appeal with the AMS, USDA
9 Administrator.

10 48. As part of Lion's appeal, Lion:

- 11 a. Attached or referred to documentation indicating that the USDA has the requested
12 records. For example, Lion identified each of the 15 Memorandum Reports of Inspection
13 that were attached to Line Check Sheets also released from June 1996 through December
14 1996. Lion explained that the missing timeframe coincides with the allegations in the
15 debarment and suspension complaints, and that the Memorandum Reports of Inspection
16 are being withheld because they are materially exculpatory evidence of Reinspection
17 results.
- 18 b. Lion identified approximately 30 Memorandum Reports of Inspection prepared after
19 November 1999, ten of which were recorded on a Line Check Sheet, but are also being
20 withheld from Lion. Lion identified each record by date, the FOIA number of the released
21 Line Check Sheet, and the serial number of the Memorandum.
- 22 c. Lion identified three remarks on Line Check Sheets that indicate that a Memorandum
23 Report of Inspection should have been prepared but was not recorded on the Line Check
24 Sheet or released.
- 25 d. Lion identified references on the Report of Meeting Lots Ledger that would indicate that a
26 separate Line Check Sheet had been prepared for reconditioned raisins but was withheld.

27 49. By letter dated September 4, 2007, the USDA, AMS Administrator assigned FOIA Appeal
28 No. 5-07 and improperly and in bad faith upheld the agency's previous decision.

VII. COUNT FOUR: FAILURE TO RESPOND TO APPEAL

RE: RENEWED REQUEST FOR WORKSHEETS (FOIA NO. 85-04)

50. Paragraphs 1 through 49 are incorporated herein as if fully set forth below.

51. By letter dated May 13, 2004, Lion submitted a FOIA request to the USDA for Certificate Worksheets from January 1995 through December 2000.

52. By letter dated June 23, 2004, USDA denied the request under the law enforcement exemption based on an ongoing administrative investigation under Exemption 7(A).

53. AMS INVESTIGATOR TRYKOWSKI declared that there are approximately 1,270 responsive Worksheets.

54. By letter dated July 12, 2004, Lion filed a timely appeal with the USDA, AMS Administrator.

55. As part of the appeal, Lion explained that the Worksheets should be the exact duplicate of the Certificates that the USDA released to Lion pursuant to the Ninth Circuit Order, and that the Worksheets had been voluntarily disseminated to Lion for typing Certificates.

56. After dragging his feet for nearly six months, in a letter dated January 3, 2005 ASSOC. ADMIN. CLAYTON upheld the decision of the FOIA officer, claiming that disclosure "could reasonably be expected to interfere with the Agency's pending administrative enforcement action."

57. On September 22, 2005 USDC Judge Singleton held that the USDA's administrative proceedings against Lion had "progressed beyond the point where the government could shield the documents as part of a civil or administrative investigation" (Case No. CV-F-02-5064-JKS/DLB).

58. By letter dated September 20, 2007, Lion renewed its May 13, 2004 FOIA request for approximately 1,270 Certificate Worksheets from January 1995 through December 2000.

59. By letter dated September 20, 2007, Lion provided information that any law enforcement exemption, based on an ongoing administrative investigation, for the previously withheld Worksheets is no longer applicable because:

- a. Evidence in I&G Docket Nos. 01-0001 and 04-0001 has been closed;
- b. In I&G Docket No. 03-0001, CARROLL (i) exchanged the Worksheet in support of the only allegation, which is time-barred by the five-year statute of limitations, and (ii) introduced the Worksheet during rebuttal in I&G Docket No. 01-0001; and

1 c. USDC Judge Singleton ruled on September 22, 2005 that the proceedings had progressed
2 beyond the point of exemption.

3 60. In a letter dated October 19, 2007, the USDA denied Lion's September 20, 2007 renewed
4 FOIA request for Worksheets, claiming in bad faith, and for the purpose of substantial delay, that
5 disclosure could reasonably be expected to interfere with the administrative proceedings.

6 61. In a letter dated November 6, 2007, Lion filed a timely appeal to the USDA, AMS
7 Administrator. Lion provided additional information that the law enforcement exemption is no longer
8 applicable. Lion explained that if the Lion's petitions to reopen I&G Docket Nos. 01-0001 and 04-
9 0001 are granted, the scope of the hearing would be limited to issues of AMS' misuse, suppression,
10 destruction and/or alteration of evidence, and that interference therewith is not a legally recognized
11 justification for withholding the documents. The USDA failed to timely answer the appeal.

12 62. Since January 7, 2008, Lion has made repeated efforts to confirm the existence of the
13 responsive Worksheets for fear that they will be or have been improperly destroyed or "scrubbed" to
14 conceal materially exculpatory evidence, i.e. Worksheets would likely prove that the alleged
15 alteration, forgeries and misrepresentations reflect USDA results recorded by Inspectors on corrected,
16 revised and/or newly prepared Worksheets.

17 63. In bad faith, and for the purpose of substantial delay and/or to alter or destroy evidence, the
18 Worksheets were arbitrary, capriciously, and illegally transferred from the Fresno Field Office in
19 Fresno and taken into the custody by and control of AMS INVESTIGATOR TRYKOWSKI at the
20 AMS Office in Washington, D.C. The USDA refuses in bad faith, and for the purpose of substantial
21 delay, to confirm or deny the existence of the Worksheets.

22 64. Meanwhile, Lion had filed a complaint in the USDC for judicial review of ASSOC. ADMIN.
23 CLAYTON'S January 3, 2005 decision. On October 20, 2005, the USDC issued an order granting
24 summary judgment in favor of the USDA (Case No.: 1:05-CV-00062 REC SMS). On September 24,
25 2007, Lion filed a motion for relief from the USDC judgment that is scheduled for hearing on
26 February 25, 2008.

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**VIII. COUNT FIVE: FAILURE TO RESPOND TO REQUEST
FOR DISPOSITION RECORDS FOR WORKSHEETS**

65. Paragraphs 1 through 64 are incorporated herein as if fully set forth below.

66. By letter dated September 20, 2007, Lion submitted a FOIA request for the disposition schedule and all records related to the destruction and/or transfer of Worksheets, from January 1995 through December 2000. (The request was included with the renewed request for Worksheets, FOIA No. 85-04, pleaded above.)

67. In a letter dated October 19, 2007, the USDA falsely claimed that the request for "disposition records for the Worksheets is being answered in a separate response." The truth is that the USDA in bad faith, and for the purpose of substantial delay, illegally failed to timely answer the request.

68. Since January 7, 2007, Lion has made repeated efforts to confirm the existence of the Worksheets. The USDA FOIA Officer communicated to Lion that the FOIA Appeal had been forwarded to the USDA OGC. Lion then contacted the OGC, which communicated that the OGC did not have the appeal or the Worksheets. The USDA transferred the documents for the purpose of substantial delay and refuses in bad faith, and for the purpose of substantial delay, to confirm or deny the existence of the Worksheets, or reveal the location thereof.

IX. COUNT SIX: FAILURE TO RESPOND TO APPEAL

RE: WARNING LETTERS AND COMPLIANCE CASES (FOIA NO. 61-01)

69. Plaintiff incorporates by reference, paragraphs 1 through 68 above, as though fully set forth.

70. In a letter dated February 8, 2002 Lion submitted a FOIA request to the USDA for mandatory copies, redacted if necessary, of mandatory reports from the RAC to the USDA of alleged violations of the Marketing Order.

71. In a letter dated March 14, 2002, the USDA acknowledged receipt of Lion's request and assigned FOIA number AMS 61-02.

72. In a letter dated March 28, 2002, the USDA identified approximately 1,000 pages of responsive documents described as 1) warning letters, 2) compliance plans and 3) compliance cases. The USDA withheld approximately 500 pages, claiming Exemption 7 for "information compiled for

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1 law enforcement purposes” and “commercial information.” The USDA estimated the fee of \$1,240
2 for disclosure of the other documents.

3 73. In a letter dated April 11, 2002, Lion requested at least 10 examples of the documents that
4 the USDA considers “compliance plans” in order to determine if the documents are responsive to the
5 request. In a letter dated April 30, 2002, the USDA released the requested examples.

6 74. In a letter dated May 14, 2002, Lion modified the original FOIA request to exclude
7 “compliance plans.” In a letter dated June 7, 2002, the USDA informed Lion that there were now 855
8 responsive pages and revised the fee estimate. Lion submitted payment with a confirming letter dated
9 June 21, 2002.

10 75. In a letter dated July 18, 2002 USDA confirmed receipt of payment and began processing
11 now 700 pages of responsive documents.

12 76. Beginning in a letter dated August 22, 2002, and continuing through January 7, 2003, the
13 USDA released six batches of records alleging that information would be redacted to protect trade
14 and financial secrets, privacy and law enforcement purposes under 5 U.S.C. § 552(b)(6), (b)(4),
15 (b)(7)(A) and (b)(7)(C).

16 77. In a letter dated February 21, 2003, Lion filed a timely appeal to the AMS, USDA
17 Administrator on the grounds that the USDA failed to identify the redactions with “some notation or
18 indication as to why it is redacted, indicating the type of information (not just code sections of
19 exemptions) being redacted.”

20 78. The USDA failed to timely answer the appeal.

21 **X. COUNT SEVEN: REFUSAL TO PROVIDE ACCESS**

22 **TO ORIGINAL RECORDS (FOIA NOS. 22-06, 23-06, 25-06 AND 27-06)**

23 79. Plaintiff incorporates by reference, paragraphs 1 through 78 above, as though fully set forth.

24 80. In a letter dated October 26, 2005, Lion requested physical access by Lion’s expert forensics
25 document examiner to photograph original Certificates, Line Check Sheets, Worksheets, Voided
26 Certificates, Letters and/or Memorandum Reports of Inspection prepared for product inspected at
27 Lion’s facility in 1997 and 1998, including (a) 20 to 50 original signatures each of approximately ten
28 Inspectors; (b) original blue-tissue “Copy” of Certificates; (c) original Line Check Sheets; and (d)
original “Void” Certificates.

1 81. In a letter dated January 9, 2006, the USDA requested ten additional days to respond. The
2 USDA also assigned FOIA No. 22-06 to the request for original signatures; FOIA No. 23-06 to the
3 request for the original blue-tissue "Copy" of Certificates; FOIA No. 25-06 to the request for original
4 Line Check Sheets; and FOIA No. 27-06 to the request for original "Void" Certificates.

5 82. In a letter dated February 10, 2006, the USDA represented that it had identified
6 approximately 15,000 and claimed that "a large portion of the requested records are currently in the
7 possession of the Compliance and Analysis Programs," The USDA estimated the fee for search and
8 review and required prepayment of \$6,822.80.

9 83. The USDA previously released 10,055 Line Check Sheets and Memorandum Reports of
10 Inspection (inclusively); copies of the original blue-tissue "Copy" of 1,270 Certificates; and 534
11 Original "Void" Certificates pursuant to the Ninth Circuit Order. Each of those documents was and
12 are in the custody and control of the Fresno Field Office. On information and belief, none of the
13 15,000 records identified as responsive to Lion's FOIA requests were transferred (legally or illegally)
14 to USDA's Compliance and Analysis Programs, other than approximately 1,270 Worksheets taken
15 into custody and control of AMS INVESTIGATOR TRYKOWSKI to which he would not have
16 given access.

17 84. In a letter dated March 27, 2006, Lion filed a timely appeal with the USDA Administrator
18 regarding the denial of FOIA Nos. 22-06, 23-06, 25-06 and 25-07. Lion reminded the Administrator
19 that the records had been "previously produced in an earlier FOIA request" and that "the costs
20 associated with the further processing of the requests are unreasonably excessive" and is tantamount
21 to "an outright denial."

22 85. In a letter dated June 7, 2006, the USDA improperly upheld the FOIA Officers March 227,
23 2006 decision.

24 **XI. COUNT NINE: BAD FAITH BY THE USDA**

25 86. Paragraphs 1 through 85 are incorporated herein as if fully set forth below.

26 87. The USDA's refusal to produce documents pursuant, and failure to respond, to the requests
27 identified above was individually and collectively arbitrary, capricious, and contrary to law.

1 88. The USDA's refusal to produce documents pursuant, or failure to respond, to the requests
2 identified above was individually and collectively a bad faith attempt to substantially delay
3 processing of Lion's FOIA request and to conceal materially exculpatory evidence.

4 89. Lion exhausted all applicable administrative remedies, with respect to each FOIA requests
5 identified above, pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

6 90. The USDA has wrongfully denied or failed to respond to each of the FOIA requests
7 identified above.

8 **XII. COUNT EIGHT: VIOLATION OF ADMINISTRATIVE PROCEDURE ACT**

9 91. Plaintiff incorporates by reference, paragraphs 1 through 90 above, as though fully set forth.

10 92. The USDA's actions were and continue to be arbitrary and capricious under the
11 Administrative Procedure Act, 5 U.S.C. § 551.

12 **XIII. REQUEST FOR DECLARATOR AND INJUNCTIVE RELIEF**

13 93. Plaintiff incorporates by reference, paragraphs 1 through 92 above, as though fully set forth.

14 94. USDA violated the Freedom of Information Act by (a) refusing to make the requested
15 records promptly available for inspection and copying pursuant to 5 U.S.C. § 552(a)(3)(A); (b) failing
16 to make reasonable efforts to search for the records pursuant to 5 U.S.C. § 552(a)(3)(C); (c) failing to
17 make a timely determination of Lion's FOIA request pursuant to 5 U.S.C. § 552(a)(6)(A)(i); (d)
18 failing to make a timely determination of Lion's FOIA appeal pursuant to 5 U.S.C. §
19 552(a)(6)(A)(ii); and refusing to comply with the order of the court in violation of 5 U.S.C.A. §
20 552(G).

21 95. USDA violated the Freedom of Information Act by failing to make publicly available upon
22 request, reference material or a guide for requesting records or information from the agency pursuant
23 to 5 U.S.C. § 552(g)(2).

24 96. USDA personnel acted arbitrarily and capriciously with respect to the withholdings in
25 violation of the Freedom of Information Act pursuant to 5 U.S.C. § 552 (a)(4)(F)(i).

26 97. Plaintiff is entitled to declaratory relief, and a mandatory injunction, requiring USDA to
27 provide Plaintiff with the requested documents pursuant to 5 U.S.C. § 552 (a)(4)(B).

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XIV. REQUEST FOR STAY OF ADMINSTRATIVE PROCEEDINGS

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2 98. Plaintiff incorporates by reference, paragraphs 1 though 97 above, as though fully set forth.

3 99. Lion will suffer irreparable harm unless the first debarment proceeding in I&G Docket No.
4 01-0001 is stayed in which a petition to reopen evidence is pending before the Administrative Law
5 Judge on issues of USDA, AMS' misuse, suppression, destruction and alteration of evidence.

6 100. Lion will suffer irreparable harm unless the first debarment proceeding in I&G Docket No.
7 03-0001 is stayed in which exhibit exchange deadlines are set this March and April and a hearing is
8 scheduled in June, 2008.

9 101. Lion will suffer irreparable harm unless the first debarment proceeding in I&G Docket No.
10 04-0001 is stayed in which a petition to reopen evidence is pending before the Judicial Officer on
11 issues of USDA, AMS' misuse, suppression, destruction and alteration of evidence.

12 102. Should a stay of the administrative proceedings be ordered, no other person will suffer
13 substantial harm because the alleged misconduct has been remedied.

14 103. Should a stay of the administrative proceedings be ordered, Lion will probably succeed with
15 disclosure of the requested documents because it will prove that USDA's recordkeeping system is
16 untrustworthy; further impeach the credibility of AMS INVESTIGATOR TRYKOWSKI; establish
17 that the debarment proceedings are arbitrary, capricious and contrary to law; and prove that ASSOC.
18 ADMIN. CLAYTON, CARROLL and/or AMS INVESTIGATOR TRYKOWSKI acted in bad faith.

19 104. Disclosure of the requested documents under the FOIA is in the public interest because it
20 relates to the quality and condition of food products.

21 **XV. REQUEST FOR TEMPORARY RESTRAINING ORDER**

22 105. Plaintiff incorporates by reference, paragraphs 1 though 104 above, as though fully set forth.

23 106. Lion has a strong likelihood of prevailing on the merits because Lion has shown that the
24 records requested exist and Exemption 7(A) is no longer applicable to such records.

25 107. Lion would be irreparably injured without such relief because the records probably contain
26 materially exculpatory evidence required for its defense against debarment from mandatory
27 inspection services by the USDA under the Marketing Order.

28 ///

1 108. An injunction would not substantially harm the government or other interested parties
2 because the USDA has already presented its cases-in-chief in I&G Docket Nos. 01-0001 and 04-
3 0001, and has already presented the evidence it intends to introduce in I&G 03-0001, which is also
4 time-barred by the five-year statute of limitations.

5 109. The public interest will not be significantly harmed because Lion has already remedied the
6 alleged misconduct.

7 **XVI. REQUEST FOR RELIEF**

8 WHEREFORE, Plaintiff respectfully requests that this Court:

9 1. Issue a temporary order restraining and preliminary injunction enjoining defendant USDA from
10 destroying any inspection and grading record related product handled by Lion from 1995 to the
11 present.

12 2. Issue an order permanently enjoining defendant USDA from:

13 (a) withholding agency records and

14 (b) relying on Exemption 7(A) to justify withholding records from 1995 through 2000.

15 3. Issue written findings that:

16 (c) Lion has demonstrated that it will probably succeed on the merits in the disputed
17 administrative proceedings;

18 (d) The defendant USDA illegally failed to respond to the Plaintiff's request;

19 (e) The defendant USDA illegally failed to produce documents;

20 (f) The defendant USDA actions were in bad faith, intended for substantial delay, intended to
21 conceal evidence, arbitrary, capricious, and contrary to law;

22 (g) The defendant USDA contemptuously failed to comply with the order of the Ninth Circuit
23 Court of Appeals to release records;

24 (h) Exemption 7(A) under 5 U.S.C. § 552(b) is no longer applicable to administrative
25 enforcement proceedings I&G Docket Nos. 01-0001, 03-0001 or 04-0001, or any other
26 enforcement proceedings that are the result of alleged misconduct from 1995 through 2000.

27 4. Issue a written referral to the Special Counsel for investigation;

28 5. Issue orders for defendant USDA to:

- 1 (a) search for the requested records and, for records that cannot be located, disclose in writing
- 2 which files were searched, by whom the search was done, what systematic search procedures
- 3 were tried, and why further searches would be unreasonable;
- 4 (b) produce to Plaintiff, in their entirety, all requested records that are located;
- 5 (c) provide for expedited processing of Lion's requests for records;
- 6 (d) provide close court supervision to ensure compliance herewith; an
- 7 (e) waive all fees and reproduction costs incurred in producing the requested documents.

8 6. Issue an order:


- 9 (a) imposing of sanctions for contempt against defendant USDA and the responsible personnel
- 10 for withholding Line Check Sheets and
- 11 (b) to provide for expeditious proceedings in this action.

12 7. Award Plaintiff Lion costs and reasonable attorney's fees incurred during the administrative

13 proceedings and in this action pursuant to 5 U.S.C. (a)(4)(E)(i); and

14 8. Grant Plaintiff Lon such other and further relief as the Court may deem just and proper.

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16 Dated: March 12, 2008

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19 _____
20 Wesley T. Green, JD MBA
21 Corporate Counsel, Plaintiff Lion Raisins, Inc.
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