PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

In re: ANDERSHOCK FRUITLAND, INC., AND JAMES A. ANDERSHOCK, d/b/a AAA RECOVERY.
PACA Docket No. D-95-0531.
Order Lifting Stay filed January 20, 1999.

Eric Paul, for Complainant.
Mark A. Amendola, Cleveland, Ohio, for Respondents.
Order issued by William G. Jenson, Judicial Officer.

On September 12, 1996, I issued a Decision and Order: (1) concluding that Andershock Fruitland, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499b(4)) [hereinafter the PACA]; (2) concluding that James A. Andershock, d/b/a AAA Recovery, is not entitled to a PACA license; (3) revoking Andershock Fruitland, Inc.'s PACA license; (4) denying the application for a license filed by James A. Andershock, d/b/a AAA Recovery; and (5) ordering the publication of the facts and circumstances of the decision. *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1212-13, 1233 (1996). On September 26, 1996, Andershock Fruitland, Inc., and James A. Andershock, d/b/a AAA Recovery [hereinafter Respondents], filed a petition for reconsideration, which I denied. *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

On January 22, 1997, Respondents filed a Motion for Stay pending disposition of Respondents' petition for review filed with the United States Court of Appeals for the Seventh Circuit. On March 4, 1997, I granted Respondents' Motion for Stay. *In re Andershock Fruitland, Inc.*, 56 Agric. Dec. 1029 (1997) (Stay Order).

On December 7, 1998, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed Complainant's Request for Order Lifting Stay Order which states, as follows:

> The final Order of the Secretary having been upheld by the United States Court of Appeals for the Seventh Circuit and the time for further judicial review having run, Complainant requests that the attached Order Lifting Stay Order be issued.

Complainant's Request for Order Lifting Stay Order and Complainant's proposed Order Lifting Stay Order were served on Respondents on December 17, 1998.[1] Respondents failed to file a response to Complainant's Request for Order Lifting Stay Order within 20 days after service, as required by section 1.143(d) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.143(d)).

On January 15, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Complainant's Request for Order Lifting Stay Order.

The United States Court of Appeals for the Seventh Circuit denied Respondents' petition for review on August 10, 1998. *Andershock's Fruitland, Inc. v. United States Dep't of Agric.*, 151 F.3d 735 (7th Cir. 1998), and the time for further judicial review has run.

For the forgoing reasons, Complainant's Request for Order Lifting Stay Order is granted. The Stay Order issued March 4, 1997, *In re Andershock Fruitland, Inc.*, 56 Agric. Dec. 1029 (1997) (Stay Order), is lifted, and the Order issued in *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204 (1996), is effective as follows:

Order

1. Andershock Fruitland, Inc.'s PACA license is revoked, effective 30 days after service of this Order on Andershock Fruitland, Inc.

2. The application for a PACA license filed by James A. Andershock, d/b/a AAA Recovery, is denied, effective upon service of this Order on James A. Andershock, d/b/a AAA Recovery.

3. The facts and circumstances set forth in *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204 (1996), shall be published.

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[1]Domestic Return Receipt for Article Number P 368 428 508.

In re: MICHAEL J. MENDENHALL.
PACA-APP Docket No. 97-0008.
Stay Order filed January 28, 1999.

Eric Paul, for Respondent.
Stephen P. McCarron, Washington, D.C., for Petitioner.
Order issued by William G. Jenson, Judicial Officer.

On November 10, 1998, I issued a Decision and Order: (1) concluding that Michael J. Mendenhall [hereinafter Petitioner] was responsibly connected with Mendenhall Produce, Inc., during the period of time that Mendenhall Produce, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and (2) subjecting Petitioner to the employment and licensing restrictions provided under sections 4(b) and 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)). *In re Michael J. Mendenhall*, 57 Agric. Dec. ___, slip op. at 65 (Nov. 10, 1998). The Hearing Clerk served Petitioner with the Decision and Order on November 13, 1998,[1] and the Order subjecting Petitioner to the employment and licensing restrictions provided under sections 4(b) and 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)) became effective on January 17, 1999.

On January 28, 1999, the Acting Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service [hereinafter Respondent], filed Respondent's Request for a Stay Order, requesting a stay of the November 10, 1998, Order pending the outcome of proceedings for judicial review. Petitioner's counsel, Stephen P. McCarron, informed me, in a telephone call, conducted on January 28, 1999, that Petitioner does not oppose Respondent's Request for a Stay Order.

On January 28, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondent's Request for a Stay Order.

Respondent's Request for a Stay Order is granted. The Order issued in this proceeding on November 10, 1998, *In re Michael J. Mendenhall*, 57 Agric. Dec. ___ (Nov. 10, 1998), is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order is issued *nunc pro tunc* and is effective January 17, 1999. This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

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[1]Domestic Return Receipt for Article Number P 093 174 724.

In re: LIMECO, INC.
PACA Docket No. D-97-0017.
Order Lifting Stay filed February 22, 1999.

Andrew Y. Stanton, for Complainant.
J. Randolph Liebler, Miami, Florida, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On August 18, 1998, I issued a Decision and Order: (1) concluding that Limeco, Inc. [hereinafter Respondent], willfully, flagrantly, and repeatedly violated sections 2(4), 2(5), and 9 of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499b(4), (5), 499i); and (2) suspending Respondent's Perishable Agricultural Commodities Act license for 45 days, effective 60 days after service of the Order on Respondent. *In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 10-11, 37 (Aug. 18, 1998).

On October 16, 1998, Respondent filed Motion to Stay Decision and Order [hereinafter Motion for a Stay], requesting a stay of the August 18, 1998, Order pending the outcome of proceedings for judicial review. On October 26, 1998, I granted Respondent's Motion for a Stay. *In re Limeco, Inc.*, 57 Agric. Dec. ___ (Oct. 26, 1998) (Stay Order).

On February 19, 1999, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed Motion to Lift Stay Order stating that "[o]n January 28, 1999, Respondent's appeal was dismissed by the United States Court of Appeals for the Eleventh Circuit for want of prosecution." See *Limeco, Inc. v. United States Dep't of Agric.*, No. 98-5571 (Jan. 28, 1999) (Entry of Dismissal). On February 19, 1999, I telephoned J. Randolph Liebler, counsel for Respondent, who informed me that Respondent does not intend to seek further judicial review of *In re Limeco, Inc.*, 57 Agric. Dec. ___ (Aug. 18, 1998), and that Respondent does not oppose Complainant's Motion to Lift Stay Order.

For the foregoing reasons, Complainant's Motion to Lift Stay Order is granted. The Stay Order issued October 26, 1998, *In re Limeco, Inc.*, 57 Agric. Dec. ___ (Oct. 26, 1998) (Stay Order), is lifted and the Order issued in *In re Limeco, Inc.*, 57 Agric. Dec. ___ (Aug. 18, 1998), is effective, as follows:

Order

Respondent's PACA license is suspended for a period of 45 days, effective 14 days after service of this Order on Respondent.

In re: FRESH PREP, INC.
PACA Docket No. D-98-0014.
In re: MARY LECH.
PACA-APP Docket No. 99-0001.
In re: MICHAEL RAAB.
PACA-APP Docket No. 99-0002.
Ruling on Certified Question filed March 11, 1999.

Motion to withdraw complaint — With prejudice — Without prejudice — Federal Rules of Civil Procedure.

The Judicial Officer ruled, in response to a question certified by Administrative Law Judge Baker, that Complainant's motion to withdraw its complaint without prejudice should be granted. The Judicial Officer stated that while reference to the Federal Rules of Civil Procedure may provide some guidance with respect to the Rules of Practice, the Federal Rules of Civil Procedure are not applicable to administrative proceedings that are conducted before the Secretary of Agriculture, under the PACA, in accordance with the Rules of Practice. The Judicial Officer concluded that while the circumstances of each case must be examined to determine the proper disposition of a motion to withdraw a complaint, generally, a complainant's motion to withdraw a complaint in a proceeding instituted under the Rules of Practice should not result in dismissal with prejudice, unless: (1) the complainant moves to withdraw the complaint with prejudice; (2) error is apparent on the face of the complaint such that the complainant should be precluded from refiling essentially the same flawed complaint; (3) allowing the complainant to reinstitute the same proceeding would result in substantial legal prejudice to the other litigants; or (4) the complainant has filed multiple motions to withdraw, followed in each case by the refiling of essentially the same complaint.

Kimberly D. Hart, for Complainant.
Stephen P. McCarron, Washington, D.C., for Fresh Prep, Inc., and Mary Lech.
Richard G. Tarlow, Calabasas, California, for Michael Raab.
Ruling issued by William G. Jenson, Judicial Officer.

The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted *In re Fresh Prep, Inc.*, PACA Docket No. D-98-0014, pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and the 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], by filing a Complaint on February 20, 1998.

The Complaint: (1) alleges that Fresh Prep, Inc., engaged in commercial bribery during approximately the period June 17, 1992, through August 30, 1995 (Compl. ¶ III); and (2) requests a finding that Fresh Prep, Inc., willfully, flagrantly,

and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and the issuance of an order revoking Fresh Prep, Inc.'s PACA license (Compl. at 4).

Fresh Prep, Inc., filed Answer to Complaint on March 18, 1998, in which it denied the material allegations of the Complaint and asserted affirmative defenses. On July 20, 1998, Complainant filed a Motion to Assign a Date for Oral Hearing, and on July 31, 1998, Fresh Prep, Inc., filed a Motion for In-Person Oral Hearing and a Memorandum In Support of Motion for In-Person Oral Hearing.

On August 25, 1998, Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] conducted a pre-hearing conference with Kimberly D. Hart, Office of the General Counsel, United States Department of Agriculture, Washington, D.C., who represented Complainant, and Stephen P. McCarron, McCarron & Associates, Washington, D.C., who represented Fresh Prep, Inc. The parties agreed that the hearing would commence January 26, 1999, and that they would exchange copies of anticipated exhibits and a list of anticipated witnesses on or before November 18, 1998. The parties informed the ALJ that they expected that the hearing would require 3 or 4 days. (Notification to Parties of Certification and Summary, filed February 26, 1999 [hereinafter Certification and Summary], at 2.) On August 26, 1998, the ALJ issued an order scheduling the hearing to commence January 26, 1999 (Designation of Oral Hearing Date).

Subsequent to the ALJ's August 26, 1998, Designation of Oral Hearing Date, the ALJ was informed that the hearing could take up to 9 days and that Complainant did not wish to have the hearing fragmented. On December 2, 1998, the ALJ, "with agreement of the parties," changed the date of hearing to commence February 9, 1999 (Change in Oral Hearing Date From January 26, 1999 to February 9, 1999).

On January 20, 1999, pursuant to section 1.137(b) of the Rules of Practice (7 C.F.R. § 1.137(b)), the ALJ consolidated *In re Fresh Prep, Inc.*, PACA Docket No. D-98-0014, with *In re Mary Lech*, PACA-APP Docket No. 99-0001, and *In re Michael Raab*, PACA-APP Docket No. 99-0002. *In re Mary Lech, supra*, and *In re Michael Raab, supra*, were each instituted by a petition for review of a determination by the Chief of the PACA Branch, Agricultural Marketing Service, United States Department of Agriculture, that an individual was responsibly connected with Fresh Prep, Inc., during the period that Fresh Prep, Inc., is alleged in the Complaint to have violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The ALJ's order consolidating the three proceedings provides that the hearing for the consolidated proceeding would commence February 9, 1999 (Notification to the Parties).

On January 20, 1999, Petitioner Michael Raab requested a continuance of the hearing stating that "I have previously discussed this [request for a continuance] with Ms. Hart who has indicated that she is not opposed to . . . a continuance" (Letter from Richard G. Tarlow, counsel for Petitioner Michael Raab, to the ALJ, filed January 20, 1999). The ALJ telephoned Ms. Hart who indicated that she had not agreed to a continuance (Certification and Summary at 4). The ALJ then issued an order giving all parties an opportunity to file responses to Petitioner Michael Raab's request for a continuance on or before January 25, 1999 (Relative to Request for Continuance). On January 25, 1999, Fresh Prep, Inc., and Petitioner Mary Lech jointly filed Opposition of Fresh Prep, Inc. and Mary Lech to the Request for Continuance of the Responsibly Connected Case Against Michael Raab. Complainant filed no response to Petitioner Michael Raab's request for a continuance. On January 26, 1999, the ALJ denied Petitioner Michael Raab's request for a continuance. (Continuance Denied.)[1]

On February 5, 1999, Complainant orally requested a continuance of the hearing on the ground that Fresh Prep, Inc.'s counsel had raised an "alternative defense theory" in a meeting held with Complainant's counsel on January 15, 1999, and that Complainant was unable to investigate the merits of Fresh Prep, Inc.'s "alternative defense theory" prior to the date of the scheduled hearing. The ALJ orally denied Complainant's oral request for a continuance. (Certification and Summary at 5.)

On February 5, 1999, after the ALJ denied Complainant's request for a continuance, Complainant filed Complainant's Request for a Voluntary Dismissal Without Prejudice of the Administrative Complaint [hereinafter Motion to Withdraw Complaint].[2] On February 8, 1999, the ALJ canceled the hearing scheduled for February 9, 1999 (Cancellation of Oral Hearing), and gave the parties

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[1]Complainant contends that it has not been served with Petitioner Michael Raab's request for a continuance, and Complainant did not become aware of Petitioner Michael Raab's request for a continuance until January 28, 1999, after the ALJ denied Petitioner Michael Raab's request for a continuance (Complainant's Response to Judge Baker's Order Issued Relative to Request for Continuance).

[2]The ALJ states that Complainant's Motion to Withdraw Complaint was filed "literally minutes after the denial of [Complainant's] request for a continuance" (Certification and Summary at 6). Complainant admits that the Motion to Withdraw Complaint resulted from the ALJ's denial of Complainant's February 5, 1999, request for a continuance and Complainant's need for additional time to assure itself of the persuasiveness of its case and its support by a preponderance of the evidence (Complainant's Brief in Support of Motion for Voluntary Dismissal Without Prejudice of Administrative Complaint at 5).

until February 17, 1999, to respond to Complainant's Motion to Withdraw Complaint (Response Time as to Motion to Dismiss Without Prejudice).

On February 17, 1999: (1) Complainant filed Complainant's Brief in Support of Voluntary Dismissal Without Prejudice of the Administrative Complaint; and (2) Fresh Prep, Inc., and Petitioner Mary Lech filed a Memorandum In Support of Denial of Complainant's Request for Dismissal Without Prejudice and Affidavit of Stephen P. McCarron, seeking dismissal of the Complaint with prejudice.

On February 18, 1999, the ALJ granted a request that the parties be given an opportunity to file responses to the February 17, 1999, filings (Additional Filing Time). On February 25, 1999: (1) Fresh Prep, Inc., and Petitioner Mary Lech jointly filed (a) Reply to Complainant's Brief in Support of Motion for Voluntary Dismissal Without Prejudice, and (b) Limited Objection to Complainant's Request for Dismissal Without Prejudice and Request for Dismissal With Prejudice; (2) Petitioner Michael Raab filed Notice of Objection to Dismissal Without Prejudice; and (3) Complainant filed (a) Complainant's Reply to Memoranda Filed by Respondent and Petitioner Michael Raab Regarding Complainant's Motion for Voluntary Dismissal Without Prejudice, and (b) Affidavit of Kimberly D. Hart.

On February 26, 1999, pursuant to section 1.143(e) of the Rules of Practice (7 C.F.R. § 1.143(e)), the ALJ certified Complainant's Motion to Withdraw Complaint to the Judicial Officer (Certification to Judicial Officer), and on March 2, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on the ALJ's Certification to Judicial Officer.

The ALJ states that the question for determination and certification is whether the Complaint should be dismissed with prejudice or dismissed without prejudice.

As an initial matter, I note that in her February 8, 1999, order giving the parties time to respond to Complainant's Motion to Withdraw Complaint, the ALJ directed the attention of the parties to Rule 41 of the Federal Rules of Civil Procedure, as follows:

> . . . [B]efore ruling on whether the Complaint in Fresh Prep[,] Inc., should be dismissed without prejudice, the parties hereto are granted until February 17, 1999, within which to file a response to said Motion to Dismiss Without Prejudice.
>
> Although the F.R.C.P. are not necessarily applicable in administrative proceedings, nevertheless, guidance can be achieved by reference to Rule 41, relating to dismissal of actions and the circumstances and conditions

under which Complaints are dismissed with prejudice and without prejudice.

Response Time as to Motion to Dismiss Without Prejudice.

While I agree with the ALJ that reference to the Federal Rules of Civil Procedure may provide some guidance with respect to the Rules of Practice, the Federal Rules of Civil Procedure are not applicable to administrative proceedings that are conducted before the Secretary of Agriculture, under the PACA, in accordance with the Rules of Practice.[3]

The right of a party instituting a proceeding under the Rules of Practice to voluntarily withdraw a complaint and reinstitute the proceeding should be

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[3]*See generally Morrow v. Department of Agric.*, 65 F.3d 168 (Table) (per curiam), 1995 WL 523336 (6th Cir. 1995), *printed in* 54 Agric. Dec. 870 (1995) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *Mister Discount Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *In re Anna Mae Noell*, 58 Agric. Dec. ___, slip op. at 23 (Jan. 6, 1999) (stating that the Federal Rules of Civil Procedure are not applicable to administrative proceedings which are conducted before the Secretary of Agriculture under the Animal Welfare Act, in accordance with the Rules of Practice); *In re United Foods, Inc.*, 57 Agric. Dec. 329, 348 (1998) (stating that the Federal Rules of Civil Procedure are not applicable to proceedings which are conducted before the Secretary of Agriculture under the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended, and in accordance with the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Research, Promotion and Education Programs); *In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 413, 421-22 (1998) (Order Denying Pet. for Recons.) (stating that the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture proceedings conducted before the Secretary of Agriculture, under the Agricultural Marketing Agreement Act of 1937, as amended, and in accordance with the Rules of Practice Governing Proceedings To Modify or To Be Exempted From Marketing Orders); *In re Dean Byard*, 56 Agric. Dec. 1543, 1559 (1997) (stating that while respondent's reference to the "standard" Rules of Civil Procedure is unclear, no rules of civil procedure govern a proceeding instituted under the Horse Protection Act of 1970, as amended, and the Rules of Practice); *In re Far West Meats*, 55 Agric. Dec. 1045, 1055-56 (1996) (Clarification of Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture proceedings conducted under the Rules of Practice); *In re Far West Meats*, 55 Agric. Dec. 1033, 1039-40 (1996) (Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture proceedings conducted under the Rules of Practice); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087, 1096-99 (1994) (stating that the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture disciplinary proceedings conducted in accordance with the Rules of Practice), *aff'd*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re Shasta Livestock Auction Yard, Inc.*, 48 Agric. Dec. 491, 504 n.5 (1989) (holding that the Federal Rules of Civil Procedure are not followed in proceedings before the United States Department of Agriculture).

preserved, except under rare circumstances. My reasons for this view are as follows. First, a dismissal with prejudice has the same effect as a decision adverse to complainant issued by an administrative law judge after full consideration of the merits of the case; viz., the judicial act of dismissal with prejudice is generally res judicata of the merits, even if the merits have not been considered.[4] In contested cases, strong policy reasons favor a decision on the merits, rather than a dismissal with prejudice based on a complainant's motion to dismiss the complaint without prejudice.

Second, generally, the party instituting a proceeding pursuant to the Rules of Practice is an administrative official representing the government acting in its sovereign capacity and having the responsibility for achieving the congressional purpose of a statute which has allegedly been violated. Under such circumstances, which are applicable to the proceeding, *sub judice*, an administrative law judge should be reluctant to bar future prosecution of a potentially meritorious case based solely upon the complainant's request to withdraw the complaint without prejudice. Moreover, the Secretary of Agriculture is charged with administering a large

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[4]See, e.g., *Aungst v. Continental Machines, Inc.*, 90 F.R.D. 348, 350 (M.D. Pa. 1981) (stating that dismissal with prejudice acts as a bar to further action upon the same claims); *Hicks v. Allstate Ins. Co.*, 799 S.W.2d 809, 810 (Ark. 1990) (stating that dismissal of an action with prejudice is as conclusive of the rights of the parties as if there were an adverse judgment as to the plaintiff after trial); *People v. Creek*, 447 N.E.2d 330, 333 (Ill. 1983) (stating that dismissal of an information with prejudice has the same effect as a final adjudication on the merits and constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action); *Schuster v. Northern Co.*, 257 P.2d 249, 252 (Mont. 1953) (stating that the term *with prejudice*, as used in a judgment of dismissal is the converse of the term *without prejudice*, and a judgment or decree of dismissal with prejudice is as conclusive of the rights of the parties as if the suit had been prosecuted to a final adjudication adverse to the plaintiff; the terms *with prejudice* and *without prejudice* have been recognized as having reference to, and being determinative of, the right to bring a future action); *Harris v. Moye's Estate*, 202 S.W.2d 360, 362 (Ark. 1947) (stating that the words *with prejudice*, when used in an order of dismissal, indicate that the controversy is thereby concluded); *Bryant v. Ryburn*, 174 S.W.2d 938, 939 (Ark. 1943) (stating that the "suit having been dismissed with prejudice by the plaintiffs therein, such action was as conclusive of the rights of the parties as would an adverse judgment after trial"); *Fenton v. Thompson*, 176 S.W.2d 456, 460 (Mo. 1943) (stating that the term *with prejudice* is the converse of the term *without prejudice* and is as conclusive of the rights of the parties as if the suit had been prosecuted to a final adjudication adverse to the plaintiff); *Union Indemnity Co. v. Benton County Lumber Co.*, 18 S.W.2d 327, 330 (Ark. 1929) (stating that the term *with prejudice* is the converse of the term *without prejudice* and is as conclusive of the rights of the parties as if the suit had been prosecuted to a final prosecution adverse to the plaintiff).

number of statutes that are adjudicated pursuant to the Rules of Practice.[5] Barring a complainant from presenting the complainant's case thwarts the Secretary of Agriculture's proper administration of the statute that is the subject of the dismissed case.[6]

Third, if administrative law judges were, as a general matter, to dispose of motions to withdraw complaints without prejudice by dismissing the complaints with prejudice, complainants may become reluctant to file motions to withdraw complaints, even when such motions are appropriate. A case that is prosecuted by a complainant only because the complainant fears that a motion to withdraw the complaint will result in the complaint being dismissed with prejudice, could waste the time and resources of the participants in the proceeding. Limiting the circumstances under which a complaint is dismissed with prejudice should forestall any reluctance on the part of a complainant to file a motion to withdraw a complaint, if the complainant is not certain that it should proceed against the respondent.

Nonetheless, there are circumstances in which an administrative law judge should dismiss a complaint with prejudice. While the circumstances of each case must be examined to determine the proper disposition of a motion to withdraw a complaint, generally, a complainant's motion to withdraw a complaint in a proceeding instituted under the Rules of Practice should not result in dismissal with prejudice, unless: (1) the complainant moves to withdraw the complaint with prejudice; (2) error is apparent on the face of the complaint such that the complainant should be precluded from refiling essentially the same flawed complaint;[7] (3) allowing the complainant to reinstitute the same proceeding would

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[5]The Rules of Practice are applicable to all adjudicatory proceedings under the statutory provisions listed in 7 C.F.R. § 1.131(a) and the proceedings described in 7 C.F.R. § 1.131(b).

[6]While the same reasoning would not apply in a proceeding instituted by a petitioner in a responsibly connected case, an administrative law judge should be reluctant to bar future prosecution of a potentially meritorious responsibly connected case, based upon the petitioner's request to withdraw the petition without prejudice. A petitioner faces licensing and employment restrictions (7 U.S.C. §§ 499d(b), 499h(b)) and barring a petitioner from presenting his or her case, based solely upon the petitioner's motion to withdraw the petition without prejudice, would subject a petitioner to licensing and employment restrictions without an examination of the merits of the petitioner's case.

[7]*Cf. In re Midway Farms, Inc.*, 56 Agric. Dec. 102, 114 (1997) (dismissing with prejudice a petition filed in a proceeding instituted under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)); concluding that the petition, which

(continued...)

result in substantial legal prejudice to the other litigants; or (4) the complainant has filed multiple motions to withdraw, followed in each case by the refiling of essentially the same complaint.

Complainant has not moved to withdraw the Complaint with prejudice, Complainant's February 5, 1999, Motion to Withdraw Complaint is the first such motion filed by Complainant in this proceeding, and I do not find, and there is no allegation, that error is apparent on the face of the Complaint. However, Respondent, Petitioner Mary Lech, and Petitioner Michael Raab each contend that allowing Complainant to reinstitute the proceeding would legally prejudice them. I have carefully considered Respondent's and Petitioner Mary Lech's February 17, 1999, and February 25, 1999, filings, and Petitioner Michael Raab's February 25, 1999, filing, and I do not find that dismissing the Complaint without prejudice will result in substantial legal prejudice to any of these parties. Instead, it appears that, if Complainant files a complaint identical to the Complaint filed on February 20, 1998, Respondent, Petitioner Mary Lech, and Petitioner Michael Raab will have the same legal position they would have had, if Complainant had proceeded to hearing on February 9, 1999.[8]

Complainant's Motion to Withdraw Complaint, filed February 5, 1999, should be granted, and the Complaint, filed in this proceeding on February 20, 1998, should be dismissed without prejudice.[9]

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[7](...continued)
alleged that petitioner was not a handler, left petitioner no standing to institute an action under 7 U.S.C. § 608c(15)(A); and holding that the administrative law judge erred by dismissing the petition without prejudice because dismissal without prejudice would allow the petitioner to file the same flawed petition, but stating that there is precedent for allowing the petitioner to file a similar petition in which it alleges that it is a handler).

[8]While Respondent will face the threat of a second proceeding, I do not find that the threat of a second proceeding constitutes substantial legal prejudice.

[9]Complainant's argument that Respondent caused Complainant to file Complainant's Motion to Withdraw Complaint 4 days before the scheduled hearing is without merit. At least by January 11, 1999, Complainant knew of Respondent's "alternative defense theory," which is the basis for Complainant's Motion to Withdraw Complaint (Memorandum in Support of Denial of Complainant's Request for Dismissal Without Prejudice at 3; Affidavit of Stephen P. McCarron ¶ 8). Most of the delay between the time Complainant learned of Respondent's "alternative defense theory" and Complainant's Motion to Withdraw Complaint is inexplicable. Complainant should complete its investigation of the merits of Respondent's "alternative defense theory" as expeditiously as possible. If, based on its investigation, Complainant concludes that no complaint alleging that Respondent
(continued...)

In re: FRESH PREP, INC.
PACA Docket No. D-98-0014.
In re: MARY LECH.
PACA-APP Docket No. 99-0001.
In re: MICHAEL RAAB.
PACA-APP Docket No. 99-0002.
Dismissal of Complaint filed March 11, 1999.

In accordance with the Judicial Officer's "Ruling on Certified Question", the Complainant's Motion to Withdraw Complaint, filed February 5, 1999, is granted and the Complaint filed in *In re: Fresh Prep. Inc.*, PACA Docket No. D-98-0014, is dismissed without prejudice.

Copies hereof shall be served upon the parties.

GEORGE L. POWELL and JERALD POWELL, d/b/a POWELL FARMS v. GEORGIA SWEETS BRAND, INC., AND DEL MONTE FRESH PRODUCE, N.A., INC.
PACA Docket No. R-99-0035.
Order of Dismissal as to Respondent Del Monte Fresh Produce, N.A., Inc., filed June 22, 1999.

George S. Whitten, Presiding Officer.
J. Michael Hall, Statesboro, GA, for Complainant.
Jesse C. Stone, Swainsboro, GA, for Respondent Georgia Sweets Brand, Inc.
Joseph P. McCafferty, Cleveland, Ohio, for Respondent Del Monte Fresh Produce, N.A., Inc.
Order issued by William G. Jenson, Judicial Officer.

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), in which Complainant seeks a reparation award from the Respondents in the amount of $193,217.80 in connection with multiple trucklots of onions shipped and sold in interstate commerce in accordance with a grower's agent agreement.

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[9](...continued)
engaged in commercial bribery during approximately the period June 17, 1992, through August 30, 1995, should be filed, Complainant should inform Respondent's and Petitioner Mary Lech's counsel and Petitioner Michael Raab's counsel of that fact immediately after reaching such a conclusion.

Counsel for Complainant and Counsel for Respondent Del Monte Fresh Produce, N.A., Inc. filed a Consent Order in which Complainant and Respondent Del Monte stipulate to the dismissal of Complainant's claims against Del Monte. Paragraph 3 of the Consent Order provides:

> Powell's claims against Del Monte are dismissed **without prejudice.** Should Complainants refile their claims or otherwise institute proceedings against Del Monte before the Secretary of Agriculture relating to the subject matter of this action, Del Monte agrees to **waive any objection or defense based on statute of limitations, or jurisdictional time limit;** (Emphasis added.)

Complainant and Respondent Del Monte have, by entering this stipulation, attempted to waive a jurisdictional limitation of the Secretary's authority to adjudicate reparation claims. Section 6(a)(1) of the PACA (7 U.S.C. § 499f(a)(1)) provides, in pertinent part:

> Any person complaining of any violation of any provision of section 2 by any commission merchant, dealer, or broker may, at any time within nine months after the cause of action accrues, apply to the Secretary by petition, ...

It has long been determined that the above-cited section of the PACA is a limit on the jurisdiction of the Secretary to hear reparation claims. *Cadenasso v. California-Mexico Distributing Co.*, 2 Agric. Dec. 751 (1943). This conclusion was based upon the Supreme Court's interpretation of a similar statutory provision in the Interstate Commerce Act in the case of *Louisville Cement Co. v. Interstate Commerce Commission,* 246 U.S. 638 (1918), where the Court found "that the two-year provision of the act is not a mere statute of limitations, but is jurisdictional, - is a limit set to the power of the Commission, as distinguished from a rule of law for the guidance of it in reaching its conclusions." *Id.*, 246 U.S. at 642. Since the provision in the PACA that requires that claims involving transactions in perishable agricultural commodities be filed within nine months of the date that the cause of action accrued is jurisdictional, the parties cannot alter or waive the time period. The jurisdiction of the Secretary cannot be waived or extended by agreement of the parties. *Cadenasso, supra.* Therefore, the intended waiver contained in Paragraph 3 of the Consent Order is ineffectual.

The dismissal of Complainant's claim against Respondent Del Monte effectively ends the Secretary's ability to exercise jurisdiction over the claim. Any attempt by Complainant to refile or institute a proceeding before the Secretary against Respondent Del Monte based on the same transactions involved in the current matter would be denied, notwithstanding the parties' attempted agreement to waive the application of the time limit. Jurisdictional issues can be raised in this forum *sua sponte*. *De Backer Potato Farms, Inc. v. Pellerito Foods, Inc.*, 57 Agric. Dec. 770 (1998); *Provincial Fruit Company Ltd. v. Brewster Heights Packing, Inc.*, 39 Agric. Dec. 1514 (1980). Because such a complaint would be filed well beyond the statutory time period, the Secretary would raise an objection to the complaint, even if the respondent did not, and dismiss the complaint for want of jurisdiction over the claim.

Accordingly, Complainant's claims against Respondent Del Monte will be dismissed, thereby extinguishing the jurisdiction of the Secretary to adjudicate its claims.

Order

Complainant Powell Farms' claims against Respondent Del Monte Fresh Produce, N.A., Inc., are hereby dismissed.

Complainant Powell Farms' claims against Respondent Georgia Sweets Brand, Inc., shall be adjudicated in the same manner and under the same procedure as if the Order of Dismissal had not been issued.