RURAL COMMUNITY INSURANCE COMPANY, (1994 Crop Year Raisins)	)	**AGBCA No. 99-130-F**
Appellant	)	
Representing the Appellant:	)	
Daniel N. Rosenstein Raymond R. Mulera Levin & Rosenstein, P.C. 1130 17th Street, N.W. Suite 314 Washington, D.C. 20036	)	
Representing the Government:	)	
Robert J. Crockett Office of the General Counsel U.S. Department of Agriculture 33 New Montgomery, 17th Floor San Francisco, California 94105-4511	)	

RULING ON APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

December 14, 2000

Before HOURY, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge WESTBROOK. Separate Concurring Opinion by Administrative Judge VERGILIO.

This appeal arises out of a Standard Insurance Agreement (SRA) between the Rural Community Insurance Company (RCIC or Appellant) of Minneapolis, Minnesota, and the Federal Crop Insurance Corporation (FCIC). Under the SRA, RCIC sells and administers multi-peril crop insurance (MPCI) which insurance is reinsured by FCIC. The Risk Management Agency (RMA), an agency of the U. S. Department of Agriculture (USDA), is responsible for supervising FCIC and administering and overseeing programs authorized under the Federal Crop Insurance Act, 7 U.S.C. §§ 1501 *et seq*. (FCIA).

This appeal involves Compliance Case No. SA-EF00-236 relating to 32 1994 crop year raisin policyholders whose raisin crops were affected by rain during the fall of 1994. RMA issued separate undated Reports of Initial Findings (initial findings) on each one. Appellant was asked to provide responses by March 8, 1998 (Appeal File (AF) 95-1033). Final Determinations (determinations) were issued July 31, 1998 (AF 1076-1261). In most cases, the initial findings concluded that Appellant failed to follow FCIC procedures in adjusting the raisin claims of loss. At issue in many cases was the fact that Appellant released insured raisins for sale as distillery material rather than requiring producers reconditioning them. Subsequently, RMA learned that some raisins had been reconditioned by third-party purchasers.

At issue are final determinations the Sacramento Compliance Field Office (SCFO) signed and transmitted for the Director of Insurance Operations deciding that Appellant is liable for a total of $1,410,348 in indemnity overpayment and $5,392 in premium overstatement. Appellant requested reconsideration, but no further determinations were issued by RMA. This timely appeal followed.

The record contains USDA, Office of the Inspector General - Audit, Western Region, Audit Report No. 03099-3-SF issued September, 1996 (IG report). The audit was performed jointly by the Office of Inspector General (OIG) and the SCFO. Compliance determinations rely on this investigation.

APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Appellant's Motion for Partial Summary Judgment (MSJ) pertains to 31 of the 32 policyholders for whom compliance cases were initiated by the SCFO.[1] The compliance cases were based on the premise that Appellant failed to follow required loss adjustment procedures when it paid indemnities to these policyholders for raisin losses in 1994.

In its MSJ, Appellant argues that the determinations made by SCFO were in excess of contractual requirements. Specifically, Appellant argues that RMA's reliance in some cases on Appellant's failure to require policyholders to recondition a representative sample of not more than 10 tons was misplaced, there being no requirement on Appellant to do so. Appellant also contends that the loss adjustment procedures promulgated by RMA were inherently defective in that they gave responsibility for determining the capability of raisin reconditioning to interested third parties. Appellant argues that FCIC had known the procedures to be defective and subject to third-party abuse for over 2 years at the time the events in question occurred. Appellant also contends that an Informational Bulletin which the SCFO's determinations cited as having been violated in the 1994 raisin loss adjustments was not binding on Appellant.

[1] Payment to one of the 32 policyholders is unaffected by the motion. Payment to another is affected by the motion to the extent only as to reconditioning issues and not as to share or lease issues.

RMA'S OPPOSITION TO APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

RMA frames the appeal as one based, and capable of decision, on Appellant's contractual responsibility to perform certain acts and follow certain procedures when making loss adjustments for rain damaged raisins and its failure to do so. RMA states that it is entitled to judgment on Appellant's contractual obligations and failure to comply with them, but that it is not submitting a cross-motion for summary judgment "at this time."

FINDINGS OF FACT

1. The SRA requires Appellant to utilize loss adjustment standards, procedures, forms, methods, and instructions approved by FCIC. Its effective date was July 1, 1994. Appellant and FCIC are the parties to the SRA. (Supplemental Appeal File (SAF), Vol. A, page (p.) 36.)

2. The contractual loss adjustment standards and procedures were those in the FCIC's Raisin Handbook, Instructions for Loss Adjustment Forms Completion for the 1990 and Succeeding Crop Years (Raisin Handbook) (SAF, Vol. G, pp. 1902-54). The Raisin Handbook provided the following guidance for making a determination that raisins cannot be reconditioned: (a) document the severity of the damage from either a USDA inspection or courtesy inspection done from adjuster-selected samples; (b) contact local reconditioners with the results from the USDA inspection or courtesy inspection to conclude if raisin production is reconditionable; (c) obtain a packer release from the processor/buyer of the raisins; (d) if it is determined that the production cannot be reconditioned, determined if the production has any value as distillery material (DM) (the Raisin Handbook then directs the adjuster to the procedure for valuing DM); and (e) document sources and facts used to make the determination on form FCI-63-A or, if needed, FCI-6 (SAF, Vol. G, p. 1907).

3. The Raisin Handbook treats raisins with a moisture content in excess of 24.3% in the inspection guidelines for (1) raisins released for DM; (2) production which will not be boxed delivered and weighed as raisins; and (3) raisins that are not reconditionable because of the extent of excess moisture but are salvageable as DM. (SAF, Vol. G, pp. 1908, 1910, 1921).

4. Exhibit 8 to the Raisin Handbook is Form FCI-551, entitled "Raisin Reconditioning Pool Production-to-Count." This form provides two options to establish production of raisins damaged by rainfall, either by Option A, providing historic yield pools for certain pool categories, such as mold of various percentages, microorganisms and embedded sand, or by Option B where a grower may allow damaged raisins to be reconditioned by an independent reconditioner outside the cooperative and the actual recovery percentage used. (SAF, Vol. G, p. 1941.) In response to the IG recommendation to develop and implement a methodology to value raisins sold as salvage using historic yields based on defects, RMA expressed concern regarding technical feasibility. RMA stated that the use of historic reconditioning yields was developed as a means to value the production of the growers of a particular company (Sun-Maid) because it was "impossible for the company to track each grower's crop as it went through their large scale reconditioning process." (SAF, Vol. G, p.

1894.) However, there is evidence in the record tending to disprove the truth of the representation that Sun-Maid could not track the raisins of a particular grower within its process. See Findings of Fact (FF) 29 and 30 below.

5. Appellant and the various policyholders (or growers) were the parties to the MPCI policies. The Raisin Endorsement is a crop specific addendum to the MPCI. (AF, Vol. 1, pp. 84, 92-93). The Raisin Endorsement provides: "We may require you to recondition a representative sample of not more than 10 tons of raisins to determine if they meet RAC [2] standards for marketable raisins."

6. Section 12 j. of the Raisin Endorsement defines USDA inspection as the actual determination by a USDA inspector of all defects. Limited inspections or inspections on submitted samples are not considered USDA inspections. (AF, Vol. 1, p. 93.)

7. Exhibit 10 to the Raisin Handbook is a "Packer Raisin Release" whereby a packer who releases a given unit of raisins for insurance purposes states the understanding that the raisins are not reconditionable and that no attempt will be made to deliver the raisins to any raisin packer or reconditioner (SAF, Vol. G, p. 1951).

8. The SRA does not compel Appellant to exercise its discretion to require a grower to recondition a representative sample of raisins. RMA officials have acknowledged that in 1994 no requirement to recondition existed (SAF, Vol. G, p. 2016; Vol. H, p. 2083; Vol. I, pp. 2224, 2227). RMA's response to the IG recommendation discussed in FF 4 above states that selecting a 10-ton sample for reconditioning was "another approach" that could be implemented to determine whether a raisin crop can be reconditioned. (SAF, Vol. G, p. 1889.)

9. In addition to RMA, the reinsured companies and the growers, there are other players in the marketing of raisins from the field to the consumer. Packers are the only entities authorized by USDA to sell raisins in the retail marketplace. They are required to maintain records of all raisins they buy, sell or hold in their possession for the purpose of enforcement of USDA marketing orders. Salvage operators buy and sell "raisins" which are not "raisins" at all because they do not meet the USDA standards. They buy as is "raisins" which have been rejected by packers, store them, try to stop their deterioration and sell them to reconditioners. Reconditioners clean and dry failing raisins (or grapes) into raisin for resale to packers who sell them in the marketplace subject to USDA marketing orders. (AF, Vol. 2, p. 7.)

10. The rain experienced by the growers at issue in this appeal fell on September 23 and 28 and October 4, 1994 (SAF, Vols. C, D, E). FCIC and company representatives met on October 12, 1994, to discuss raisin loss issues. On October 13, 1994, FCIC issued an Informational Memorandum to provide clarification on issues related to the 1994 losses. The Memorandum was structured in question and answer format. The following question and answer included in the Memorandum has been cited in the compliance cases at issue as well as in the parties' filings before the Board:

---

[2] RAC is an acronym for Raisin Advisory Committee.

> Question: Reconditioning facilities have improved dramatically over the last decade. If the crop can be picked up and separated from the tray, it can be reconditioned. However, the return to the grower may be very little due to the amount of raisins lost in the process. At what point is the crop economically reconditionable?
>
> Answer: The crop can be considered non-reconditionable when:
>
> - Two reconditioners have determined that the product cannot be reconditioned; and
>
> - The estimated tonnage recoverable after reconditioning is estimated to be less than 50% of the insured tons on the unit; and
>
> - It is probable that the lot will not pass in first reconditioning. (If it is questionable that the lot will not pass, a sample should be reconditioned to make this determination).
>
> Company loss adjusters should properly document the above process and maintain it in the loss claim file.
>
> . . . .
>
> In addition to these questions, we have become aware of another situation which may occur. In some cases, an insured may pick up the crop, deliver it to a packer, and have the production rejected due to high moisture. The production cannot be stored or held because it will ferment. If the packer has a distillery facility, and a licensed USDA inspector visually inspects the production and determines that the crop cannot be reconditioned, the production can be released as DM to the packer without a full USDA inspection or Courtesy inspection. The USDA inspector must provide written documentation containing the following:
>
> - A statement that the production could not be reconditioned due to high moisture at that time, and verify that the production was sent to a distillery facility.

(AF, Vol. 1, p. 80-83.)

11. By letter of October 21, 1994, the Officer in Charge of the Agricultural Marketing Service (AMS) office in Fresno, California, wrote to the FCIC official who signed the Informational Memorandum informing him that the AMS inspectors were unable to provide the service required on page 3 of the Informational Memorandum (SAF, Vol. H, p. 2204). Appellee's Opposition to Appellant's Motion for Summary Judgment (Opposition) concedes that the Informational Memorandum is an interpretative document and has no effect on the rights of any party (Opposition, p. 17).

12. Compliance Case No. SA-EF00-236 involved Appellant's indemnity payments to 32 separate policyholders. Appellant's MSJ does not pertain to one of them (for which there were no reconditioning issues) and pertains to another only as to reconditioning issues and not to all of the issues on which SCFO made compliance findings. Appellant moves for summary judgment on 30 of the 32 policyholders. Were the Motion to be granted in toto, other issues would remain as to two of the policyholders.

13. The 1996 IG report inferentially indicates that RMA was aware that raisin producers were not required to recondition raisins and that current methodology for determining whether raisins can be reconditioned was open to third-party abuse outside the control of either the reinsured companies or the producers (SAF, Vol. G, pp. 1877, 1884-90). Earlier, in November 1992, the Director of the Sacramento Regional Service Office of FCIC, sent a Decision Memorandum to National Ag Underwriters and National Crop Insurance Services making recommendations to address OIG concerns on raisin losses in the 1989 crop year and soliciting comments thereon. In that memorandum he quoted OIG as feeling that the current procedure for determining whether raisins were reconditionable "left too much up to third parties whose interest could be benefited [sic] by the decision of whether or not the product could be reconditioned." (SAF, Vol. I, p. 2150.)

14. In response to the 1996 IG recommendation that RMA develop and implement a methodology to value raisins sold as salvage using historic yields based on defects, including a methodology to pull a representative sample of damaged raisins for inspection by AMS, RMA responded that use of historic reconditioning yields was developed to value the production of Sun-Maid growers because it was impossible for Sun-Maid to track each grower's crop as it went through Sun-Maid's process. The same response also indicates that there was no current requirement to recondition a sample of no more than 10 tons of damaged raisins for reconditioning. (SAF, Vol. G, p. 1889).

15. Appellant's motion contains factual allegations regarding some of the 32 with citations to the multi-volume AF and SAF. (MSJ, pp. 7, 8.) While many of the cases share general issues in common, few are identical. RMA's Opposition makes factual allegations as to 31 of the 32 policyholders, including the one not a subject of the motion and excluding one which was a subject of the MSJ. The specific allegations in the Opposition regarding each grower do not contain citations to the record, but generally reflect the SCFO determinations. RMA has presented the affidavit of Jamie Fjord, the chief investigator in the compliance investigation, in support of its contention that Appellant failed to follow required loss adjustment procedures. Mr. Fjord is the custodian of the records of the compliance case records and can testify to their content. He was also lead investigator in the compliance case. Although it is unclear to what extent he can testify of his own knowledge, it appears that he can do so to some extent. He relies on the October 13 Informational Memorandum which he refers to as having "established" when raisins could be considered non-reconditionable and having "established" a test for making that determination. (Exhibit A to Opposition.)

16. RMA's factual allegations concerning the individual cases for which it contends that Appellant is in non-compliance are contained in (1) initial findings (AF, Vol. 1, p. 95; Vol. 2, p. 1033); (2) the determinations (AF, Vol. 2, pp. 1076-1261); (3) the Opposition; and (4) Mr. Fjord's

declaration (Exhibit A to the Opposition). Appellant's factual allegations are contained in (1) its May 29, 1998 letter in response to the initial findings (AF 1035-75); and (2) the Memorandum in Support of Motion for Partial Summary Judgment. The initial findings were unsigned but were forwarded to Appellant by Raymond G. Boileau, Director of Insurance Operations, with a direction that questions should be addressed to Larry J. Piatz in the SCFO. The determinations were signed by Mr. Piatz for Mr. Boileau.

17. While RMA issued separate initial findings and determinations for each grower, Appellant provided a combined response with an overall argument pertaining to all the compliance cases followed by specific comments as to some of them. Appellant asserted that this compliance case is not about its adjusting losses so that full indemnities were paid, but pertains to its release of raisins for sale as salvage and its consequently paying reduced indemnities. Appellant provided a survey of the role of the various players in the production and marketing of raisins as described in FF 9 above. Appellant stated that industry market conditions are such that growers' and insurers' interests are best served when raisins are immediately sold at market price. The second most favorable situation is where they are reconditioned and then sold at market price. Selling "as is" and collecting/paying reduced indemnities is then preferable to disking. At harvest time, growers and insurers must balance the competing interests between leaving raisins on the vine longer to increase their sugar content and hence their value or harvesting earlier with the greater risk of rain damage. Appellant stated that packers will not accept rain damaged raisins which fail a single test, i.e., for moisture or mold or sand or microanalysis because they do not meet the legal definition of raisins. Packer inspection, according to Appellant, is final even if erroneous. Appellant also pointed out that the terms of the MPCI policies that it and other insurers sell are written by FCIC and cannot be varied by the insurers. Appellant's response discussed the fact that growers have few, if any, storage bins for raisins and have no cold storage or reconditioning facilities. (AF, Vol. 2, pp. 1034-45.)

18. Appellant contended that the growers affected by the September rain were those who delayed picking waiting for their raisins to reach the proper sugar content. In those cases where there was a packer contract and the packer rejected the raisins, Appellant contends that it also had limited choices, either to release the raisins for sale "as is" or it could require the growers to leave their raisins in trays in hope that October weather would be sunny and warm enough to dry the raisins. Those growers were affected by the September 28 and October 4 rains. Once the packers had rejected the raisins, Appellant had to weigh the possibility of more rain, which could have increased the raisins' moisture, decreasing the possibility of selling them "as is" and increasing the likelihood of having to disk them, resulting in higher indemnities and a possible failure to mitigate. Appellant stated that on or about October 20, 1994, it released 3,712.77 [sic] tons of raisins for sale "as is." Appellant averred that in each case it got from two reconditioners, or from a packer and a conditioner, written or verbal confirmation that the raisins could not be reconditioned. In addition, Appellant got bids from at least two reconditioners and in each case sold to the highest bidder. Further, Appellant submitted that subsequent rainfall confirmed that Appellant's course of action was prudent. Raisins left in the field for more drying would not have done so. Appellant argued that rain was the proximate cause of losses. Appellant also argued that RMA's interpretation of the Raisin Handbook was not only inconsistent with prior interpretations but also created an impossibility of performance. Appellant

provided a summary of the practical conditions facing the industry during the September-October 1994 time frame in support of its argument that industry resources were inadequate to allow the parties to follow the loss adjustment procedures as interpreted by RMA. (AF 1045-58.)

19. AMS test results on raisins grown by Van Ranch, Inc. (AF, Vol. 1, p. 709); William and/or Gary Morgan[3] (AF, Vol. 1, p. 537); Dennis Prosperi and/or Prosperi Farms, Inc.[4] (AF, Vol. 1, p. 148); Alkali Hollow Farms (AF, Vol. 1, p. 582) and Terranova Ranch (SAF, Vol. F, p. 1742) failed for having moisture content in excess of 24.3%. According to the Raisin Handbook, they were not reconditionable (AF, Vol. 2, pp. 1908, 1910, 1921). Appellant moves for summary judgment as to Prosperi Farms, William Morgan, and Van Ranch on the grounds that the loss adjustment manual authorized sale of raisins with moisture in excess of 24.3% to be sold as.

20. AMS inspections showed live infestation on the raisins of producers, William Morgan and/or Gary Morgan (SAF, Vol. D, pp. 1127, 1131); Satnam Dhalwal[5] (SAF, Vol. D, p. 1191); Terranova Ranch (SAF, Vol. F, p. 1742); and, Alkali Hollow Farms (AF, Vol. 1, p. 582). There is other evidence of live infestation in the raisins of growers, Melkonian Brothers (SAF,Vol. E, pp. 1502-03); Hansen/Hansen, McInt/Smith (SAF,Vol. F, p. 1633) and Mary Luis (SAF,Vol. D, pp. 1156-57). Appellant moves for summary judgment as to these policyholders on the ground that there is no record of expected shrink for raisins with live infestation and no evidence that raisins with live infestation are permitted to be sold for human consumption.

21. RMA has stated in interrogatory responses that active (live) infestation is the presence of a live insect that is living in or on raisins. The response cites the Handbook for Inspecting and Receiving of Natural Condition Raisins (August 1996) as stating that raisins "shall be free from active infestation." It further quotes the Processed Products file code 172-A-1 (August 1996) as directing inspectors finding the presence of insects (worms) in dried fruit not covered by others to contact their supervisors as FDA may not allow the reconditioning of the product. The individual responding to the interrogatory was not familiar with a shrink factor for "live infestations." (Motion, Appendix 17, p. 2.) The Raisin Handbook, M-8, contains Form FCI-551, Raisin Reconditioning Pool Production

---

[3] One RMA Report of Initial Finding in Compliance Case No. SA-EF00-236 lists the insured as William Morgan. Attached to the report are various exhibits some indicating a producer name of William Morgan and others the name of Gary Morgan. This is the only report identified by the name Morgan.

[4] Another Report of Initial Finding on its face identifies the insured as Denis Prosperi. Exhibits variously show the names of Terri Prosperi, Denis and Terri Prosperi, Victori Prosperi, Denis Prosperi, and Prosperi Farms, Inc. Two other Reports of Initial Finding identify the insured(s) as Proseri, one as Bill or Dan Prosperi and the other as Robert M. Prosperi Farms. Exhibits to the Bill or Dan Prosperi report are primarily in those names with a few references to Dennis Simonian. Exhibits to the Robert M. Prosperi Farms report reference Robert Prosperi (not the corporation), "Dennis Simonian (Robert Prosperi)," or Dennis Simonian.

[5] The SAF contains two AMS inspection reports for Satnam Dhalwal. One dated October 25, 1994, shows moisture at 15.9% and 24+ units of sand. The other, dated the previous day, shows moisture at 24.3% + and live infestation. Neither party has addressed the two different reports and the record does not reveal whether they pertain to two different units.

to Count, which provides that in the pool category, "microorganisms" there is a historic pool yield of 88% (SAF, Vol. G, p. 1941). The record is silent as to whether the terms "live infestation," "presence of insects (worms)" and "microorganisms" are synonymous. In its response to the initial findings, Appellant stated that RMA's statement that the shrinkage for live infestation is 12% is incorrect. Appellant avers that the shrinkage of 12% is for microanalysis, or dead bugs. (AF, Vol. 2, p. 1060.)

22. The initial findings concerning grower Robert Ruiz references two units of raisins, 0101 and 0102. The initial findings state that Appellant elected not to follow FCIC procedures in determining whether the raisins from unit 0101 could be reconditioned and the procedures used by Appellant were not inadequate. Raisins were delivered to Lion Packing on October 26, 1994. USDA memorandum reports dated the next day indicate that lot 10-1664 failed for mold 1.3%, moisture content of 20% as well as sand and fermentation (AF, Vol. 1, p. 426) and lot No. 19-1678 failed for mold of 5%, moisture of 17.5%, sand and fermentation (AF, Vol. 1, p. 427). On November 28, 1994, Lion Packing wrote Appellant stating that it agreed to purchase Ruiz off-grade raisins for $25 per ton, the DM price. Lots 10-1664 (48 bins) and 10-1678 (28 bins) were failing. Lion stated that its policy was to release growers from contracts to disk raisins into the ground or if they were picked up in Lion bins they must be delivered to Lion to either recondition or purchase. Lion had attempted to recondition USDA lot 10-1664 and was unable to get it to meet USDA standards. (AF, Vol. 1, p. 428.) The packer signed the Raisin Packers Release of Insured Raisins on 32 tons of raisins January 25, 1995 (AF, Vol. 1, p. 428). Lion then purchased the raisins. USDA Reconditioning Reports indicate that the raisins were reconditioned in February 1996 (AF, Vol. 1, pp. 431-32).

23. In the initial findings on the Robert Ruiz raisins, RMA stated that raisins failing for moisture are dried down to "a meeting level (16% or less) which does not result in shrink to the insured crop." The initial findings also recited the historic pool yield percentages for sand and the relevant mold range and concluded that Appellant should have known the raisins were reconditionable. The initial finding states that Appellant did not (1) contact local reconditioners with results of the AMS inspection; (2) obtain statements from at least two reconditioners to determine if the raisins were reconditionable; (3) determine that less than 50% of the crop would be recovered if reconditioned; and (4) require the insured to recondition a representative sample of not more than 10 tons of raisin to determine if they met RAC standards for marketable raisins. (AF, Vol. 1, pp. 420-22.)

24. Appellant's response, in addressing this grower specifically, states that the packer Lion Packing had one lot of raisins reconditioned. The raisins failed after reconditioning for 15% mold, 17.6% moisture, sand and fermentation. The packer advised Appellant that the raisins were not fit for human consumption. Appellant then released the raisins and Lion bought them. Subsequently, Lion reconditioned the raisins and afterwards signed a certificate that the raisins could not be reconditioned. Appellant speculates that the raisins may not have been reconditioned the first time and asserts that Appellant has no liability, if any exists. (AF, Vol. 1, p. 1071.)

25. The determination provides a lengthy generalized discussion addressing policyholders and packers in the plural. In essence, RMA states that packers did not release raisins. Rather, insureds

requested the release of raisins which packers wanted delivered, but released to keep growers happy. In addition, the determination avers that the October 13, 1994 Informational Memorandum explained that there was no need to pick up wet raisins. Appellant provided no documentation that "any insured" was unable to obtain cold storage. Obtaining labor was a problem but not an insured risk. Appellant provided no documentation that "any insured" was unable to obtain reconditioning. Appellant provided no documentation that any reconditioner denied a request to recondition raisins, regardless of the load size. The determination states when Appellant determined that the crop was not reconditionable, the Informational Memorandum required Appellant to document in the file that it was probable that the crop would not pass with one reconditioning. If questionable, a 10-ton sample should be reconditioned to make this determination. No documentation was provided to show how Appellant determined that the crop would not pass with one reconditioning. The determination also stated that Appellant provided no documentation to support its statement that problems with the policy definition of "USDA inspection" exist. (AF, Vol. 1, pp. 1153-54.)

26. Specific to this policyholder, RMA states that Appellant was required to determine if raisins could be reconditioned prior to releasing the crop for sale as salvage. Appellant should have obtained the reconditioning results of the raisins Lion stated it unsuccessfully attempted to recondition. According to the determination, Appellant did not provide documentation showing that "they"[6] met the requirements for determining if the raisins were reconditionable. RMA also states that Appellant provided no documentation showing that the insured raisins were not reconditioned. RMA does not suggest what sort of documentation might be expected to prove the absence of reconditioning. (AF, Vol. 1, pp. 1154-55.)

27. The initial findings relative to grower Dobbins Farms, Inc., recited that the adjustment procedures used by Appellant were not adequate to determine whether raisins could be reconditioned. Appellant did not (1) obtain an AMS inspection which determines the severity of the damage; (2) obtain statements from two reconditioners to determine if the raisins were reconditionable; (3) determine that less than 50% of the crop would be recovered if reconditioned; (4) require the insured to recondition a representative sample of not more than 10 tons of raisins to determine if they meet Raisin Administrative Committee (RAC) standards for marketable raisins. The findings state that Appellant released 343.13 tons of raisins to be sold "as is" and that Sun-Maid Growers of California purchased and reconditioned the raisins. RMA obtained "most" of the AMS reconditioning worksheets documenting the actual reconditioning of the raisins. The conclusion was that at least 56% of the raisins meeting RAC standards for reconditionable raisins and should have been valued at the insurance price. The initial findings found an obligation on the part of Appellant to determine if the raisin crop was reconditionable before releasing the raisin to salvage. (AF, Vol. 1, pp. 850-51.)

28. The determination reiterated the initial findings and provided a similar generalized conclusion to that provided in the Robert Ruiz determination above, i.e., that packers provided releases to keep growers happy, that as explained in the Informational Memorandum, there was no need to pick up wet raisins, Appellant had provided no documentation that any insured was unable to obtain cold

[6] The antecedent for "they" is unclear from the context.

storage, that any reconditioner denied a request to recondition. Further, RMA determined that when Appellant decided that a crop was not reconditionable, Appellant was required to document in the file that it was probable that the crop would not pass with one conditioning. If questionable, the determination holds, a sample should be reconditioned to make this determination. (AF, Vol. 1, p. 1244.)

29. Specific to this insured grower, RMA stated that no matter which packer the insured contracted with, Appellant was required to determine if the raisins were reconditionable prior to releasing the crop to be sold as DM (AF, Vol. 1, p. 1248). This is in reference to Appellant's response in which Appellant states that Sun-Maid growers were required to deliver their raisins to Sun-Maid whether failing or passing. According to the response, Sun-Maid failed Dobbins' raisins for moisture in excess of 24% and informed Appellant in writing that the raisins would be used for distillery material. AMS failed the raisins for 22.6% moisture and 5.9% mold. The response also states that the AMS inspector commented that the raisins were not fit for human consumption. The response also states that Sun-Maid paid Dobbins $82.96 for 315.94 tons of raisins characterized by Sun-Maid as Z grade, Sun-Maid's term for DM. An additional 183.04 tons were disked in the field. (AF, Vol. 1, p. 1063.)

30. Appellant's response points out that Sun-Maid had made representations to both Appellant and FCIC over the years to the effect that Sun-Maid commingled all growers' grade Z raisins, that they could not be reconditioned and that separate producer records were not kept. The initial determination indicates that Sun-Maid segregated the production by grower, kept records in the same way and reconditioned raisins it bought as DM. In its response, Appellant claims that responsibility for the reconditioning of these raisins lies with Sun-Maid, not Appellant. (AF, Vol. 1, p. 1063.)

31. In a February 14, 1997, Informational Memorandum to the Regional Inspector General, subject: Reconditioner Report on the 1994 Raisin Program, Larry Piatz, the SCFO Director, described Sun-Maid's initial representations to RAC that the Dobbins Farms' load was to go to the distiller for use other than human consumption and its subsequent representation that the same load was to be reconditioned. Weight tags were renumbered. At the time the load was said to be sent for reconditioning, it had a stated defect called "insurance."[7] The Memorandum alleged that Sun-Maid made false statements to the insurance company (Appellant), USDA and the RAC that the insured's raisins would go to the distiller. Further, the memorandum stated that if Sun-Maid had informed the insurance company that the raisins were reconditionable and the raisins were reconditioned, the indemnity payment of $310,601 would have been reduced to approximately $60,000. (SAF, Vol. H, pp. 239-41.)

32. As a result of the Sun-Maid's release of Dobbins Farms (and other) raisin crops as DM and its later purchase and reconditioning of the same raisins, the United States brought (or threatened to

[7] The records RMA examined and analyzed to reach these conclusions disproved Sun-Maid's long standing representations that all raisins purchased for DM were commingled and could not be traced as discrete loads. See FF 14 above.

bring) civil claims against Sun-Maid and "its related parties" under the False Claims Act, 31 U.S.C. § 3729 et seq., and common law. These claims were the result of representations and other acts and omissions made by Sun-Maid and its related parties relating to rain damage of the 1994 raisin crop. The United States contended that Sun-Maid and related parties wrongfully represented that certain raisins of 48 of its member and contract growers were not reconditionable because of rain damage, causing FCIC to pay reinsurance on claims from Sun-Maid's members and contract growers, and further that in spite of that representation Sun-Maid then purchased raisins from 14 of those members and contract growers at amounts less than full value, reconditioned them and sold portions of them at market value. To avoid litigating the claims, the United States and Sun-Maid entered into a settlement agreement, whereby Sun-Maid paid the United States $887,084.84. Kenneth D. Ackerman, signed the agreement as Manager, Risk Management Agency. (SAF, Vol. I, pp. 2125-36.)

33. Mary Luis and C. J. Emmert also were Sun-Maid growers whose raisins were declared unreconditionable by Sun-Maid which then bought them as DM and later reconditioned them for sale at the market price for raisins. The facts pertaining to those two growers are similar to those outlined above for Dobbins Farms. (AF, Vol. 1, pp. 294-332, 380-418, 1067, 1071, 1126-31, 1144-49.)

34. The initial findings relative to Alfred Clement recite that Appellant obtained a packer release prior to receiving an AMS inspection. The AMS inspection showed that the raisins failed for moisture and sand. According to the initial findings, raisins failing for moisture are dried down to a meeting level (16% or less) which does not result in shrink to the crop. The findings rely on the historical reconditioning chart in the Raisin Handbook to conclude that raisins failing for sand normally result in shrink of 9%. Also, the reconditioner statement indicates that shrink of 40% could have been expected to occur upon reconditioning. The findings conclude that Appellant should have known the crop was reconditionable. The findings recite that Appellant did not (1) contact two local reconditoners with results of the AMS inspections; (2) obtain statements from two reconditioners that the raisins were reconditionable; (3) determine that less than 50% of the crop would be recovered if reconditioned; and (4) require the insured to recondition a representative sample of not more than 10 tons of raisins to determine if they meet RAC standards for marketable raisins. In addition, the findings assert that RMA interviews with the reconditioners disclosed that AMS results were not provided when they were asked to determine if raisins were reconditionable. Appellant released 68.81 tons of raisins from unit 0200 to be sold "as is." Rosendahl Farms purchased and reconditioned the raisins. AMS reconditioning worksheets showed that 89% of the crop met RAC standards and should have been valued at market price. Appellant's response to the initial findings states that based on estimates received, it calculates that unit 0100 would have had a 58% shrink on the unit. (AF, Vol. 1, pp. 333-35.)

35. The determination recited the same general rationale as in Ruiz and Dobbins Farms above (FF 25, 28). Addressing this grower specifically, the determination held that RMA stated Appellant's response that total shrinkage, including discards, would have exceeded 50% was not the rationale used at loss time. Appellant obtained bid and the raisins were being boxed prior to Appellant's determination of the discarded tonnage. Thus, Appellant determined the raisins were not

reconditionable prior to and without estimating the tonnage recoverable after reconditioning. In addition, the determination states that Appellant did not provide documentation showing the raisins were not reconditionable or that they were not reconditioned. (AF, Vol. 1, pp. 1136-37.)

35. The MSJ does not make specific arguments relating to insureds other than those discussed in FF 17-33 above.

DISCUSSION

Standards for Summary Judgment

Granting a Motion for Summary Judgment is appropriate only where there are no material facts in dispute, so the moving party is entitled to judgment as a matter of law. Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987). All inferences are to be made in favor of the non-moving party. John R. Wood Trucking, Inc., AGBCA No. 97-158-1, 98-1 BCA ¶ 29,644.

Analysis

Material Questions of Fact

The numerous policyholder claims comprising the compliance case at issue here were adjusted separately and in most cases there are variations in the underlying facts. Appellant's MSJ alleges the existence of a number of undisputed material facts pertaining to regulations, policy provisions, industry customs and standards and the conduct of both parties in reacting to industry conditions. RMA has failed to explicitly state if it disputes the facts as set out by Appellant. Nonetheless, RMA's response makes sufficient factual allegations to allow the Board to conclude that material questions of fact exist. RMA's response relies heavily on the compliance findings. Appellant has raised questions whether, in some cases, the conclusions contained in those findings are supported by credible evidence.

The AF and SAF contain various documents pertaining to the loss adjustment of the individual policyholders. While their meaning may be perfectly clear to those engaged in the raisin growing and crop insurance industries, their meaning is not in every case apparent to the Board. Questions of fact which could be material are outstanding as to many of them.

Appellant argues that the required loss adjustment standards and procedures are so seriously flawed as to be unenforceable. Appellant asserts that RMA was aware of those flaws years in advance of the losses that are the subject of the compliance cases underlying this appeal. While RMA has not directly countered the legal argument that these compliance cases were based on enforcement of unenforceable standards, RMA has provided the affidavit of Jamie Fjord disputing the MSJ's premise that the required loss adjustment standards and procedures were employed by Appellant.

Questions of material fact also exist as to the meaning of live infestation, and whether raisins so affected can be reconditioned. The record contains contradictions regarding whether raisins that fail for moisture can be reconditioned. In fact, the record before the Board is replete with questions of material fact. The current record does not allow the Board to decide these issues on summary judgment. Further proceedings will allow the parties to develop the record to prove or disprove the allegations. The Board will expect the parties to present evidence relevant to each individual compliance case. Appellant should be prepared in each case to present evidence as to the extent to which it complied with the loss adjustment provisions of the Raisin Handbook in adjusting claims. In any cases in which it did not so comply, it should explain in testimony its reasons for failure to do so and whether the outcome was affected by those omissions.

Questions of Law

The existence of questions of material fact alone justifies denial of the Motion. However, in addition, this appeal presents several unique questions of law on which the Board might well be unwilling to rule without further legal argument even without the existence of disputed questions of material fact. For example, Appellant argues that the Raisin Handbook provisions cited in FF 3 are reasonably interpreted to mean that once an AMS inspection report classifies raisins as containing moisture in excess of 24.3%, no further adjustment is required. The Board will ask the parties to address what the provisions mean bearing in mind that if at all possible the SRA should be interpreted so as not to render any provision meaningless.

Appellant also argues that the contractual loss adjustment standards are inherently defective in requiring actions by the grower or the insurance company or both that they are unable to comply with in the context of industry custom. Appellant contends, with some support from the documents of both parties, that the loss adjustment scheme set up by RMA created internal conflicts of interest by requiring decisions concerning whether or not raisins are capable of being reconditioned to be made by packers and reconditioners. Appellant alleges that in some cases these entities declared raisins incapable of reconditioning and then purchased them for their own accounts for reconditioning and sale. The record indicates that USDA's Inspector General has so concluded. (FF 13.) The parties will be expected to argue whether as a matter of law loss adjustment standards drafted by RMA were either impossible of performance or commercially impracticable.

Questions of Law and Fact

On the present record, Appellant argues it had no contractual obligation to require growers to recondition a representative sample of raisins. The MPCIs between Appellant and producers gave Appellant the discretion to require representative samples. The SRA between FCIC and Appellant is silent on this subject. (FF 5, 8.) It appears from the present record that where any one or more of the compliance cases seeks reimbursement of indemnity and/or restatement of premium based solely on Appellant's failure to require a sample to be reconditioned, RMA may not be able to prove non-compliance. To prevail on this question, RMA must be prepared to show whether, as a matter of law, the SRA at issue here, in fact, required Appellant to compel a grower to recondition a representative

sample of raisins, or that no compliance case turns solely on the failure to require reconditioning of a representative sample.

The parties also dispute whether in 1994 there was a requirement that a reinsurance company seek a determination from two reconditioners that raisins were not reconditionable before considering them incapable of being reconditioned. RMA points to the Informational Memorandum which post-dates the losses. In addition, subsequent RMA discussions are to the effect that no such requirement then existed. (FF 13.) To the extent that the determinations that a particular grower's indemnity was overpaid and its premium overstated based solely on failure to recondition a representative sample or failure to seek determination from two reconditioners, the Board will ask that the parties address whether such a requirement existed when the losses in question occurred.

There also remains the question of the extent to which the compliance cases rely on procedures premised on what later proved to be false representations of a packer, Sun-Maid, and the effect, if any, of the falsity underlying those procedures.

By providing examples of questions of material fact, law or fact and law to enable the parties to better prepare for an evidentiary hearing on the merits, the Board does not imply, and the parties should not infer, that these are the only such questions which may exist.

RULING

Appellant's Motion for Partial Summary Judgment is denied.

_____
ANNE W. WESTBROOK
Administrative Judge

Concurring:

_____
EDWARD HOURY
Administrative Judge

Separate Concurring Opinion by Administrative Judge VERGILIO.

I write separately from the majority because I do not agree with all of the facts presented or the analysis. I find that the approach adopted by the insurance company in its motion and the majority in raising particular questions serves to misfocus the actual issues in dispute, which are grounded in the

contract between the parties and the obligations of the parties thereunder. I am hopeful that the parties will develop the record to address specifically the issues raised by the insurance company and my concerns expressed below.

Rural Community Insurance Company of Minneapolis, Minnesota, is the appellant in this action involving the respondent, the U. S. Department of Agriculture (USDA), Federal Crop Insurance Corporation (FCIC). This action arises under a Standard Reinsurance Agreement (SRA), under which the insurance company provided multiple peril crop insurance coverage, and the FCIC provided reinsurance to the insurance company. In a compliance case, No. SA-EF00-236, the Government concluded that the insurance company overstated the indemnity for thirty-two insureds and the premium for three of those insureds, producers of raisins in California. The insurance company brought this action, contending that it properly calculated premiums and indemnities.

Regulations, 7 C.F.R. §§ 24.4(b) and 400.169, authorize the Board to resolve this matter. The insurance company submitted a motion for partial summary judgment; the Government filed an opposition; the insurance company a reply. The parties further supplemented the record regarding the motion.

In its motion for partial summary judgment, the insurance company asks the Board to hold that the final determinations are not supported by a preponderance of the evidence and are contrary to law. IT asks the Board to hold that RMA's raisin endorsement, loss adjustment manual, and informational memorandum dated October 13, 1994, each constitute an error and omission within the meaning of statute, 7 U.S.C. § 1508(j)(3), which specifies that the FCIC "shall provide approved insurance providers with indemnifications, including costs and reasonable attorney fees incurred by the approved insurance provider, due to errors or omissions on the part of the [FCIC]." Further, the insurance company requests that the Board hold that the insurance company complied with all valid policy and procedure requirements.

I deny the motion for partial summary judgment. The existing record does not demonstrate that the Government acted contrary to a preponderance of the evidence or contrary to law in concluding that the insurance company failed to follow procedures in calculating indemnities.

The record does not demonstrate that errors or omissions on the part of the FCIC occurred, within the meaning of the statute. Contrary to the assumption of the insurance company, a report by the USDA Inspector General does not establish dispositive facts; the findings and recommendations do not absolve the insurance company from satisfying its obligations under the SRA.

The existing record falls far short of demonstrating that the insurance company complied with all requirements of the SRA. The insurance company fails to acknowledge and address the various bases asserted by the Government in reaching its conclusions. In summary, the Government maintains that the insurance company paid losses (1) when the insurance company failed to abide by SRA dictated procedures for documenting losses, (2) when raisins were reconditioned and not properly released, and (3) for uninsurable causes. The insurance company asserts that it cannot be held to standards

established in an Informational Memorandum, and then concludes that it correctly determined indemnities. The existing record does not demonstrate that the Informational Memorandum contained inapplicable standards or that the insurance company satisfied all of its obligations under the SRA in calculating and paying the indemnities.

The allegations raised by the insurance company do not provide a basis for the requested relief in the motion for partial summary judgment.

FINDINGS OF FACT

1. The Federal Crop Insurance Corporation (FCIC) and Rural Community Insurance Company of Minneapolis, Minnesota, entered into an SRA, which the parties contend covers the underlying raisins grown in the 1994 crop year (Exhibit 3) (all referenced exhibits are in the Supplemental Appeal File, unless otherwise noted). The SRA represents a cooperative financial assistance agreement to deliver multiple peril crop insurance under the authority of the Federal Crop Insurance Act, as amended, 7 U.S.C. §§ 1501 *et seq.* (Act) (Exhibit 3 at 22). The FCIC approved and accepted the SRA with a signature date of October 17, 1994 (Exhibit 3 at 44).

2. The SRA,

> including the Appendixes, all referenced documents and Federal Crop Insurance Corporation ("FCIC") Manual 13 and Manual 14 in effect at the start of the reinsurance year ("Agreement"), establishes the terms and conditions under which the FCIC will provide premium subsidy, expense reimbursement, and reinsurance on multiple peril crop insurance policies sold or reinsured by the [insurance company].

(Exhibit 3 at 22). The SRA incorporates by reference regulations, 7 C.F.R. Chap. IV, promulgated under the authority of that Act. Thus, the SRA and reinsured agreements issued by the insurance company incorporate terms and conditions of the general crop insurance policy and raisin endorsement. (Exhibit 3 at 22 (Preamble), 25-26 (¶ II.A.3)). The SRA dictates that the insurance company "must utilize loss adjustment standards, procedures, forms, methods, and instructions approved by FCIC" (Exhibit 3 at 36 (¶ V.E.4)). This makes applicable the Raisin Handbook, Instructions for Loss Adjustment Forms Completion for the 1990 and Succeeding Crop Years (Exhibit 72).

3. Applicable under the SRA, were the General Crop Insurance Regulations, Raisin Endorsement for the 1990 and subsequent crop years (7 C.F.R. § 401.142 (1995)), which specify, in a part dealing with claims for indemnity:

> In addition to the requirements in subsection 9.b of the general crop insurance policy, we will not pay any indemnity unless we are allowed in writing to examine and obtain any records pertaining to the production and marketing of any raisins in which you have a share from the raisin packer, raising reconditioner, Raisin Administrative

> Committee established under order of the United States Department of Agriculture, or any other party who may have such records. [(¶ 9.b)]
>
> Raisins damaged by rain, but which are reconditioned and meet the Raisin Administrative Committee (RAC) standards for raisins, will be valued at the insurance price. An allowance for reconditioning will be deducted from the value only if you obtained our written consent prior to reconditioning. [(¶ 9.f)]
>
> Raisins destroyed without USDA inspection or put to another use without our consent will be valued at the amount of insurance. [(¶ 9.i)]

Further, the Raisin Endorsement defines "USDA inspection" to mean "the actual determination by a USDA inspector of all defects. Limited inspections or inspections on submitted samples are not considered 'USDA inspections.'" (7 C.F.R. § 401.142 (¶ 12.j).)

4. The Raisin Handbook details inspection guidelines. Regarding reconditioned raisins, the handbook specifies:

> Raisins damaged by rain, but which have been reconditioned and meet the RAC standards for raisins, will be valued at the insurance price (field price) as shown on the FCI-35.

(Exhibit 72 at 1907 (¶ 4.C.1)). The following paragraph addresses the "[d]etermination that raisins cannot be reconditioned:"

> a Document the severity of the damage from either a USDA Inspection or Courtesy Inspection done from adjuster-selected samples;
>
> b Contact local reconditioners with the results from the USDA inspection or Courtesy Inspection to conclude if the raisin production is reconditionable.
>
> c Obtain a packer release from the processor/buyer of the raisins.
>
> d If it is determined that the production cannot be reconditioned, determine if the production has any value as distillery material (DM). If the production can be sold as DM, the production must be valued in accordance with procedure in subparagraph 4E below.
>
> e Document sources and facts used to make the determination on an FCI-63-A or, if needed, on an FCI-6.

(Exhibit 72 at 1907-08 (¶ 4.C.2).)

5. In an FCIC-issued Informational Memorandum dated October 13, 1994, the FCIC states that company representatives requested that FCIC provide clarification on several issues related to 1994 losses. The memorandum includes the following:

> 2. Question: Reconditioning facilities have improved dramatically over the last decade. If the crop can be picked up and separated from the tray, it can be reconditioned. However, the return to the grower may be very little due to the amount of raisins lost in the process. At what point is the crop not economically reconditionable?
>
> Answer: The crop can be considered non-reconditionable when:
>
> - Two reconditioners have determined that the product cannot be reconditioned; and
>
> - The estimated tonnage recoverable after reconditioning is estimated to be less than 50% of the insured tons on the unit; and
>
> - It is probable that the lost will not pass on first reconditioning. (If it is questionable that the lot will not pass, a sample should be reconditioned to make this determination).
>
> Company loss adjusters should properly document the above process and maintain it in the loss claim file.
>
> 4. Question: If the crop is in extremely poor condition at this time, can the company allow the product to be disked now?
>
> Answer: There is no reason to expedite disking of the crop at this time. The weather over the next 10 days will be critical in the determination of whether the crop can be boxed and stored until it can be reconditioned. . . . If the crop is released next week, company representative should do everything possible to ensure the crop is actually disked. Acreage which is released to be disked should be inspected to ensure crop was disked and not picked up. We recommend the NCIS-M915, CERTIFICATION FORM, be used for the insured to notify the company when the production has been put to another use.
>
> 5. Question: The NCIS Raisin Handbook, Inspection Guidelines, paragraph D.3., Raisins Released for Distillery Material, states:
>
> > Tonnage of high moisture raisins for DM must be established from tray weights in the field.

> At what point is the crop determined to be "high moisture" for this provision?
>
> Answer: This provision refers to raisins with a moisture content in excess of 24.3%. It is difficult to obtain accurate moisture percentages above this level.
>
> In addition to these question, we have become aware of another situation which may occur. In some cases an insured may pick up the crop, deliver it to a packer, and have the production rejected due to high moisture. The production cannot be stored or held because it will ferment. If the packer has a distillery facility, and a licensed USDA inspector visually inspects the production and determines that the crop cannot be reconditioned, the production can be released as DM to the packer without a full USDA inspection or Courtesy inspection. The USDA inspector must provide written documentation containing the following:
>
> - A statement that the production could not be reconditioned due to high moisture at that time, and
> - verify that the production was sent to a distillery facility.
>
> This deviation is approved in an effort to maximize the value of limited use production. This procedure deviation is applicable to the 1994 crop year only.

(Appeal File, Exhibit B.2.)

Raisin policies and the underlying compliance case

6. At issue in this appeal are thirty-two raisin policies for the 1994 crop year. These policy holders made claims for losses, said to result from rain occurring the latter part of September and early October 1994--before the issuance of the Informational Memorandum (Finding of Fact (FF) 5). The insurance company determined that insurable losses occurred, and assessed the indemnities paid to the policy holders. In a compliance case, the FCIC reviewed the premiums and indemnities for these policies.

7. The Government made initial findings in the underlying compliance case (Appeal File, Exhibit C), to which the insurance company provided responses (Appeal File, Exhibit D). Thereafter, the Government provided what it captions as "final determinations" in the compliance case (Appeal File, Exhibit E). Each of these determinations specify that if the insurance company does not agree with the determination, it may request reconsideration in accordance with regulation, 7 C.F.R. Part 400.169. (Exhibit E at 1060, 1084, 1093, 1100-01, et al.) As here relevant, the Government concluded that the insurance company made incorrect determinations regarding indemnity payments. Regarding many of the policies, the determinations state: "The procedures used by [the insurance company] were not adequate in determining whether the raisins could be reconditioned. [The insurance company] elected

not to follow FCIC's procedures in making this determination." (Exhibit E at 1076, 1089, 1096, 1102 (similar language), 1109, et al.) Moreover,

> [The insurance company] provided no documentation to support its statement that it was impossible to satisfy or that there are problems with the policy definition of "USDA inspection." The raisin policy definition in effect for 1994 states: "USDA inspection means the actual determination by a USDA inspector of all defects. Limited inspections or inspections on submitted samples are not considered "USDA inspections." [The insurance company] is confusing "USDA inspection" with inspections on submitted samples. [The insurance company] does not understand or know what USDA requires its inspectors to do. USDA inspectors do not simply determine if raisins pass or fail. USDA inspections determine the condition of the raisins. There are precise tolerances for each defect. No grower or packer would simply accept a failing determination without the test results showing exactly why and by how much the defect(s) caused the raisins to fail.
>
> . . . .
>
> In summary, [the insurance company] explained their rationale of why these claims were paid. [The insurance company] stated: "In short, the duty to mitigate damages was impossible to perform and therefore, excused." [The insurance company] had a contract with each policyholder and therefore had the ability to excuse contract requirements. However, [the insurance company] provided no documentation showing FCIC excusing [the insurance company] from any contract requirements.

(Exhibit E at 1079-80, 1092-93, 1099-1100, 1106-07, et al.)

8. The existing record suggests (viewing materials in a light most favorable to the non-moving party in the motion for partial summary judgment) that the insurance company approved indemnities for raisins which were ultimately reconditioned and met the RAC standards for raisins, or for which there is no documentation that a USDA or courtesy inspection occurred, or for raisins which were earmarked for destruction or to be put to another use without a USDA inspection or consent. It appears that, for various policy holders, the conclusion that an insurable loss occurred rests on USDA, Agricultural Marketing Service (AMS), documentation which expressly references an "Unofficial Sample of Natural Condition Raisins" and specifies: "We have completed the inspection of the following UNOFFICIAL SAMPLE(S) of Natural Condition Raisins that you submitted." The documentation states: "SAMPLE NOT OFFICIALLY DRAWN BY USDA OR AUTHORIZED REPRESENTATIVE OF USDA" and "SAMPLE SUBMITTED BY APPLICANT AND DOES NOT OFFICIALLY REPRESENT ANY LOT." (Appeal File, Exhibit 4.C at 148, 214, 217, 219, 338, 367, 537, 582, e.g.) The AMS sheets contrast with memorandum reports in the existing record for other lots of raisins which are expressly marked, with a date, as "OFFICIALLY SAMPLED U.S. Department of Agriculture, Fresno, Calif." (Appeal File, Exhibit 4.C at 439-42, e.g.)

Inspector General Report

9. With a date of September 1996, the United States Department of Agriculture Office of Inspector General -- Audit, Western Region, provided to program officials a report captioned "Risk Management Agency, 1994 Reinsured Raisin Losses in California." In the report, the Inspector General makes findings and recommendations, which the insurance company views as critical of the Government's practices and procedures. (Exhibit 70). The report states its objectives: "to evaluate RMA controls over the raisin crop insurance program. Specifically we determined whether 1994 raisin claims were adjusted in accordance with FCIC-approved procedures and whether FCIC reinsurance procedures or requirements were adequate to prevent or detect abuse." (Exhibit 70 at 1874). The record provides no basis to give the report dispositive weight in this proceeding, particularly when the report does not indicate a detailed review of the SRA or obligations, actions or inactions of the insurance company in the indemnity process.

The dispute

10. In its notice of appeal and complaint, the insurance company requests that the Board find that the Government's determinations are not supported by fact or law and that the insurance company is not liable for the identified indemnity overpayments. The insurance company asks the Board to grant the appeal from RMA's final determinations in the compliance case. (Exhibit H at 1274).

11. In its motion for partial summary judgment, the insurance company requests the Board to hold that RMA's final determinations are not supported by a preponderance of the evidence and are contrary to law. Further, it asks the Board to hold that RMA's raisin endorsement, loss adjustment manual, and informational memorandum dated October 13, 1994, each constitute an error and omission within the meaning of statute, 7 U.S.C. § 1508(j)(3), which specifies that the FCIC "shall provide approved insurance providers with indemnifications, including costs and reasonable attorney fees incurred by the approved insurance provider, due to errors or omissions on the part of the [FCIC]." Further, the insurance company requests that the Board hold that the insurance company complied with all valid policy and procedure requirements. Memorandum at 80-81.

DISCUSSION

A forum may grant a motion for summary judgment when no genuine issue of material fact remains and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 255 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The insurance company requests the Board to hold that RMA's final determinations are not supported by a preponderance of the evidence and are contrary to law. Based upon the record in existence for resolving this motion, I conclude that the final determinations do not lack support by a preponderance of the evidence and are not contrary to law. The SRA, including regulations and material incorporated therein, specifies the conditions under which an insurance company is to pay indemnities on raisins. The existing record does not demonstrate that the insurance company followed the specified

procedures. (FF 3, 4, 8.) The conclusions of the insurance company are not determinative regarding whether or not an insurable loss occurred. The SRA expressly requires determinations and documentation, which have not been presented in the record.

Further, the insurance company asks the Board to hold that RMA's raisin endorsement, loss adjustment manual, and informational memorandum dated October 13, 1994, each constitute an error and omission within the meaning of statute, 7 U.S.C. § 1508(j)(3). The statutory provision specifies that the FCIC "shall provide approved insurance providers with indemnifications, including costs and reasonable attorney fees incurred by the approved insurance provider, due to errors or omissions on the part of the [FCIC]." The record does not demonstrate that any of the three documents constitutes an error or omission on the part of the FCIC. More specifically, in resolving the motion, the FCIC has asserted with credible proof, that the insurance company failed to satisfy its obligations under the SRA. The insurance company places undue weight, particularly in its own motion, on the report by an Inspector General.

Further, the insurance company requests that the Board hold that the insurance company complied with all valid policy and procedure requirements. The existing record does not support the conclusion the insurance company asks the Board to make.

The Raisin Endorsement and the Raisin Handbook specify that raisins damaged by rain, but which are reconditioned and meet the RAC standards for raisins, will be valued at the insurance price, such that an indemnity is not appropriate, but for a reconditioning allowance when permitted in writing prior to reconditioning (FF 3, 4). Given this language, and the credible assertion by the Government that indemnities were paid for raisins which were satisfactorily reconditioned, the insurance company has not demonstrated that it paid some of the indemnities in accordance with the requirements of the SRA.

The Raisin Endorsement specifies that raisins destroyed without USDA inspection or put to another use without Government consent will be valued at the amount of insurance, such that an indemnity is not appropriate (FF 3). Given this language, and the credible assertion by the Government that the indemnities were paid for raisins which were destroyed without a USDA inspection, or were put to another use without Government consent, the insurance company has not demonstrated that it paid those indemnities in accordance with the requirements of the SRA.

The Raisin Handbook establishes procedures for the insurance company to comply with when determining that raisins cannot be reconditioned (FF 4). Given the language, and the credible assertion by the Government that the insurance company has not documented determinations as required or that the documentation does not support the determination, the insurance company has not demonstrated that it paid those indemnities in accordance with the requirements of the SRA.

The insurance company has not demonstrated that the Informational Memorandum adversely affected the procedures the insurance company was required to follow, or that it was entitled to pay indemnities in contravention of the guidelines contained in the memorandum, or that it complied with all requirements of the SRA, but for the Informational Memorandum, in paying any disputed indemnity.

I deny the insurance company's motion for partial summary judgment.

_____

JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
December 14, 2000