

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**NICK KORETOFF)
dba NICK KORETOFF RANCHES)
8025 W. KEARNEY BLVD.)
FRESNO, CA 93706)**

**SAM CABRAL)
6643 COUNTY ROAD 10)
ORLAND, CA 95963)**

CIVIL CASE NO.

**CYNTHIA LASHBROOK)
dba RIVERDANCE FARMS)
12230 LIVINGSTON-CRESSEY ROAD)
LIVINGSTON, CA 95334)**

**JOHN PRYOR AND PAULA ECHABARNE)
dba MALLARD BEND FARMS)
4395 BUCKEYE LANE)
ATWATER, CA 95301)**

**MARK MCAFFEE)
dba ORGANIC PASTURES)
7221 SOUTH JAMESON AVE.)
FRESNO, CA 93706)**

**JOHN BAYER)
9727 BALLICO AVE.)
BALLICO, CA 95903)**

DAN HYMAN)
dba D & S RANCHES)
7486 E. NEBRASKA AVE.)
SELMA, CA 93662)
)
JOHN LARKIN)
dba LARKIN RANCH)
8221 COUNTY ROAD 23)
HAMILTON CITY, CA 95951)
)
STEPANIAN FARMS, INC.)
10072 EAST ELKHORN)
SELMA, CA 93662)
)
STAN AND LESLIE BARTH)
dba STAN BARTH FARMS)
14650 COUNTY ROAD 87)
ESPARTO, CA 95627)
)
VALLEY ALMOND HULLER INC.)
dba SHERMAN THOMAS RANCH)
25810 AVE. 11)
MODESTO, CA 93637)
)
MICHAEL BARNARD)
dba BARNARD ORGANIC FARMS)
5318 S. FAITH HOME ROAD)
TURLOCK, CA 95380)
)
HARMON BECKNER)
dba BECKNER FARMS)
4448 NORTH AVE.)
MODESTO, CA 95385)
)
HENDRIK FEENSTRA)
dba RIVERVIEW ORCHARD)
6162 COUNTY ROAD 200)
ORLAND, CA 95963)
)
PURITY ORGANICS, INC.)
14900 W. BELMONT AVE.)
KERMAN, CA 93630)
)
--PLAINTIFFS,)

)
)
VS.)
)
EDWARD SCHAEFER, SECRETARY)
UNITED STATES DEPARTMENT OF)
AGRICULTURE)
1400 INDEPENDENCE AVE., S.W.)
WASHINGTON, D.C. 20250)
)
--DEFENDANT.)

**COMPLAINT
 FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs, Nick Koretoff, Sam Cabral, Cynthia Lashbrook, John Pryor, Paula Echabarne, Mark McAfee, John Bayer, Dan Hyman, John Larkin, Stepanian Farms, Inc., Stan and Leslie Barth, Valley Almond Huller, Inc., Michael Barnard, Harmon Beckner, Hendrik Feenstra, and Purity Organics, Inc. for their complaint state as follows:

SUMMARY OF ACTION

1. Plaintiffs, growers, grower-handlers, and handlers of almonds in the State of California challenge the Final Rule of the United States Department of Agriculture (“USDA”) that unlawfully establishes outgoing quality control requirements on almonds grown in California. 72 Fed. Reg. 15021 (March 30, 2007), codified at 7 C.F.R. § 981.442(b) (“Final Rule”). The Final Rule restricts the available markets for Plaintiff almond growers’ almond crop, depriving them of revenue for their almonds in whole or in part. For the Plaintiff handlers, the Final Rule has resulted in the foreclosure of long-established markets for their almonds and in the most severe cases will result in the financial ruin of these growers’ operations. Similarly, the Final Rule has operated to reduce the amount that handlers of almonds can

garner from the ultimate sale of their product and has eliminated established markets for untreated almonds.

2. The marketing of almonds is governed by a marketing order issued under the authority of the Agricultural Marketing Agreement Act of 1937, as amended (“AMAA”). 7 U.S.C. § 601 et seq. Ultimate authority over the almond marketing order is vested in the Secretary of USDA.
3. The AMAA provides the Secretary of USDA with limited authority to establish marketing orders for agricultural crops, including almonds. The AMAA, unlike many administrative statutes, does not grant general authority but instead carefully sets forth the terms that may be included in marketing orders. In the case of almonds, the permissible provisions are set forth at 7 U.S.C. § 608c(6) and (7).
4. Plaintiffs seek a declaration that the outgoing quality regulations adopted by the Final Rule: (1) exceed the authority granted by 7 C.F.R. § 981.42, upon which USDA has premised the Final Rule and thus constitutes an ultra vires act; (2) if within the authority of the Secretary, creates a substantive rule adopted without the use of a formal rulemaking process and grower referendum, as required by the AMAA; and (3) exceeds the limited authority granted to the Secretary under the AMAA to regulate the outgoing quality of covered commodities and thus constitutes an ultra vires act.
5. Plaintiffs further seek a declaration that the Secretary’s actions are unlawful and should be set aside by the Court pursuant to the Administrative Procedure Act, 5 U.S.C. §706, on the grounds that the Final Rule is arbitrary, capricious and not in

accordance with law.

JURISDICTION AND VENUE

6. This Court has jurisdiction of this action pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1337 as this action arises under the laws of the United States and because the complaint is based exclusively upon interpretation of federal law (to wit: Agricultural Marketing Agreement Act, 7 U.S.C. §§601-674 and the Administrative Procedure Act, 5 U.S.C. §701 et seq.
7. This Court also has jurisdiction under the Declaratory Judgment Act, 28 U.S.C. §§2201 in order to settle an actual controversy between the Plaintiffs and the Secretary involving an interpretation of federal law and regulations.
8. Venue in this Court is proper because an agency of the United States is a defendant and its primary office is located in the District of Columbia. 28 U.S.C. §§1391(b)&(e).

PARTIES

9. Nick Koretoff is a grower of almonds as defined by the Almond Order. He operates his farm business under the name Nick Koretoff Ranches.
10. Sam Cabral is a grower of almonds as defined by the Almond Order.
11. Cynthia Lashbrook is a grower of almonds as defined by the Almond Order. She operates her farm business under the name Riverdance Farms.
12. John Pryor and Paula Echabarne are growers of almonds as defined by the Almond Order. They operate their farm business under the name Mallard Bend Farms.
13. Mark McAffee is a grower of almonds as defined by the Almond Order. He operates his farm business under the name Purity Organics.

14. John Bayer is a grower of almonds as defined by the Almond Order.
15. Dan Hyman is a grower of almonds as defined by the Almond Order. He operates his farm business under the name D & S Ranches.
16. John Larkin is a grower of almonds as defined by the Almond Order. He operates his farm business under the name Larkin Ranch.
17. Stepanian Farms, Inc. is a grower of almonds as defined by the Almond Order. It is a corporation organized under the laws of the State of California.
18. Leslie Barth is both a grower and handler of almonds as defined by the Almond Order. She operates her farm business under the name Capay Canyon Ranch.
19. Valley Almond Huller, Inc. is both a grower and handler of almonds as defined by the Almond Order. It is a corporation organized under the laws of the State of California. Its farm business is operated under the name Sherman Thomas Ranch.
20. Michael Barnard is an almond grower and handler of almonds as defined by the Almond Order. He operates his farm business under the name Barnard Organic Farms.
21. Harmon Beckner is both a grower and a handler of almonds as defined by the Almond Order. He operates his farm business under the name Beckner Farms.
22. Hendrik Feenstra is a handler of almonds as defined by the Almond Order. He operates his farm business under the name Riverview Orchard.
23. Purity Organics, Inc. is a handler of almonds as defined by the Almond Order. It is a corporation organized under the laws of the State of California.

24. For purposes of jurisdiction and venue, all plaintiffs are residents of the State of California.

25. Defendant, Ed Schafer is the Secretary of the United States Department of Agriculture and is authorized by law to promulgate and administer regulations under the AMAA. This suit is brought against him in his official capacity as Secretary of Agriculture.

DESCRIPTION OF PLAINTIFFS' BUSINESSES AND MARKETS

26. Plaintiff almond growers have built their businesses by producing wholesome and high-quality almonds. In many cases, their almonds are certified organic, which had historically provided distinct advantages both in terms of available niche markets and higher prices paid by handlers for their crop.

27. Plaintiff handlers have built their businesses, in part, by marketing raw almonds to customers interested in buying food that is minimally processed, free from the use of chemicals, and not exposed to heat treatments, roasting, or other processes.

28. As a direct result of the Final Rule, Plaintiff almond growers found that the prices that handlers were willing to pay for their almonds were reduced by as much as 40% over previous crops because customers of their handlers, who would pay a premium for truly raw almonds would not pay the same prices for almonds that had been treated chemically or by steam treatment. Costs associated with the mandated treatment of almonds have further reduced their returns.

29. In some instances, Plaintiff almond growers were unable to sell their crop to handlers who had previously purchased their almonds for sale as raw almonds. The

purchasers of these almonds have largely turned to purchasing almonds grown overseas, which do not have to be treated and can be readily marketed as raw almonds.

30. Significant amounts of organically produced almonds from the 2007 crop year went unsold, and the 2008 crop year promises similar lost markets. The unsold organic almonds may have to be sold as conventionally grown almonds, at prices below their cost of production.
31. For the Plaintiff almond handlers, who market the almonds they handle as raw almonds, the Final Rule has functionally shut them out of the organic market. Many national retailers and smaller retailers of raw and organic almonds have ceased purchasing California organic almonds and replaced them with untreated foreign-grown almonds, which customers prefer based on the fact of non-treatment.
32. Similarly, handlers selling untreated almonds direct to consumers have been forced to cease such sales. Those almonds that can be sold directly are sold at severe discounts to the former price for untreated almonds.

BACKGROUND OF THE ALMOND MARKETING ORDER

33. The marketing order governing almonds produced in California (“Almond Order”) is authorized and governed by New Deal legislation, the Agricultural Marketing Agreement Act of 1937 (“AMAA” or “Act”), 7 U.S.C. § 601 et seq., as amended. 981.
34. The AMAA is not a statute of general authority. Rather its scope is carefully limited by the specification of enumerated terms that may be included in a marketing order.

35. The Secretary is specifically deprived of any authority to include in marketing orders any terms that are not specifically and explicitly enumerated in the AMAA.
36. With respect to outgoing quality regulations applicable to commodities other than milk, the AMAA authorizes the Secretary to include marketing order terms that permit the Secretary to allot the quantity of a specific quality of agricultural product that a handler may market. 7 U.S.C. § 608c(6)©).
37. The Almond Order issued by the Secretary of Agriculture was codified in 7C.F.R. Part 981. The Almond Order regulates the terms of dealing between almond growers (also called “producers”) and the businesses that purchase their almonds for placement into any channel of trade for human consumption (called “handlers”).
38. Nearly 100% of almonds produced domestically are grown in the State of California, and so the Almond Order governs the terms of marketing virtually all almonds grown in the United States. For the Plaintiff almond growers, their production of almonds must be marketed under the terms of the Almond Order.
39. In the event that almond growers choose to market their almond production themselves, those actions alone convert the growers into handlers of almonds subject to the regulations set forth in the Almond Order.
40. The Almond Order is administered by an agency of the Secretary, the Almond Board of California, whose duties are enumerated in the marketing order.
41. The procedure and decision making functions for promulgating marketing order or rule amendments are governed by the AMAA (7 U.S.C. §§ 608c(1)-(4) and (17)), the rulemaking and formal hearing requirements of the Administrative Procedure Act

(“APA”) (5 U.S.C. §§ 553, 556-557), and USDA’s Rules of Practice and Procedure Governing Proceedings to Formulate Marketing Agreements and Marketing Orders (“Rules of Practice”), 7 C.F.R. §§ 900.1–18, which implement the foregoing statutory requirements.

42. Pursuant to the AMAA, amendments to marketing orders, including the Almond Order, are promulgated using formal, on-the-record, rulemaking rather than notice and comment rulemaking.
43. In addition to adhering to formal rulemaking procedures, marketing order amendments must be approved, in a referendum or poll, by two-thirds of almond growers who qualify as eligible “producers” under the order. 7 U.S.C. §§ 608c(8), (9), and (19); 7 C.F.R. §§ 900.14, and 900.400 – 900.407.

**THE TERMS OF THE ALMOND ORDER GOVERNING INEDIBLE ALMONDS
AND QUALITY CONTROL**

44. Following the initial promulgation of the Almond Order in 1950, the production of almonds from growers increased. Production outstripped demand.
45. As the almond industry in California expanded, the traditional outlet for producers changed from handlers who would, in turn, sell to “industrial users who buy on specifications” to handlers who needed to sell directly to consumers. At the same time, the “percentage of defective kernels [nuts] in the crop [had] increased.” 41 Fed. Reg. 15341, 15342 (April 12, 1976).
46. The expressed purpose of the AMAA is to increase the revenues to producers of agricultural commodities by addressing through regulation the exact types of problems

- associated with oversupply of product and poor quality product as described above.
47. To address the problem of oversupply and to ensure orderly marketing of almonds, USDA convened a formal rulemaking to amend the Almond Order and establish definitions of “edible kernel,” “inedible kernel,” and to issue quality control regulations pursuant to the enumerated authorities of the AMAA. 40 Fed. Reg. 50289 (October 28, 1975).
 48. USDA defined “inedible kernel” as “. . . a kernel, piece, or particle of almond kernel with any defect scored as serious damage, or damage due to mold, gum, shrivel, or brown spot, as defined in the United States Standards for Shelled Almonds, or which has embedded dirt not easily removed by washing.” 41 Fed. Reg. 22075, 22082 (June 1, 1976) codified at 7 C.F.R. § 981.8. “Edible kernel” was defined in the negative as anything that is not inedible. *Id.* codified at 7 C.F.R. § 981.7.
 49. In that same formal rulemaking, USDA adopted incoming and outgoing quality control regulations tied to the goal of eliminating the introduction of inedible kernels into the stream of commerce. 41 Fed. Reg. 22075, 22083 (June 1, 1976) codified at 7 C.F.R. § 981.42.
 50. As part of the outgoing quality control regulations, producers granted the Almond Board of California limited authority to “. . . establish, with the approval of the Secretary, such grade and inspection requirements applicable to almonds to be handled or to be processed into manufactured items or products, as will contribute to orderly marketing or be in the public interest” and corresponding limited authority to “. . . establish rules and regulations necessary and incidental to the administration [of

the Board’s authority to prevent the marketing of inedible almonds].” 41 Fed. Reg. 22075, 22083 (June 1, 1976), codified at 7 C.F.R. § 981.42(b).

51. At the time of promulgation, the Secretary stated that this authority to regulate the outgoing quality of almonds is “. . . intended as a contingency for use only if the incoming regulation [prohibiting the handling of excess amounts of inedible almonds] should prove inadequate for industry needs.” 41 Fed. Reg. 22075, 22078 (June 1, 1976).
52. The rules governing the quality control regulations both for incoming almonds and for outgoing almonds, as evidenced by the rules themselves and the accompanying USDA discussion, concerned ensuring that almonds reaching the consuming public met the specified defined regulatory definitions of “edible kernels” and that “inedible kernels” were not sold to a consuming public that was increasingly purchasing almonds directly from handlers rather than purchasing manufactured goods containing almonds.
53. In 1976, Almond producers approved the definitions of “edible kernel,” “inedible kernel,” and the regulations concerning incoming and outgoing quality control in a producer referendum as required by the AMAA.
54. Since their approval by producer referendum in 1976, the definitions of “edible kernel,” “inedible kernel,” have not been amended.
55. Since their approval by producer referendum in 1976, the regulations pertaining to quality control had not been substantively amended prior to the Final Rule at issue in this case.

USDA AMENDS THE ALMOND ORDER WITHOUT A FORMAL HEARING

OR PRODUCER REFERENDUM

56. In 2006, USDA issued a Proposed Rule “to add to outgoing quality control requirements” to the Almond Order. 71 Fed. Reg. 70683 (December 6, 2006).
57. The stated purpose of the Proposed Rule was to “. . . provide[] for a mandatory program under the order to reduce the potential for *Salmonella* bacteria in almonds.” *Id.*
58. The Proposed Rule noted that the Almond Board of California had recommended “that a mandatory treatment program [for *Salmonella*] be implemented under the order, pursuant to the authority provided in § 981.42(b).” *Id.* at 70684.
59. The referenced authority contains only those quality control regulations approved by almond producers to prevent “inedible kernels” from being handled.
60. USDA proceeded to solicit comments on the proposed rule and ultimately amended the Almond Order to require handlers to treat all almonds by subjecting them to either a heat treatment or chemical treatment to reduce the incidence of *Salmonella* bacteria. Final Rule, 72 Fed. Reg. 15021 (March 30, 2007).
61. The Final Rule requires that, “[H]andlers must subject their almonds to a process that achieves a minimum 4-log reduction in *Salmonella* bacteria prior to shipment.” *Id.* at 15022, 15034, regulation codified at 7 C.F.R. § 981.442. Limited exceptions are made for handlers who export their almonds beyond North America or ship their almonds directly to other handlers who “agree to treat the almonds accordingly.” *Id.* Almonds grown outside of the United States are not subject to the Final Rule and the attendant treatment mandated for California almonds.

62. The Almond Order separately mandates that, “no handler shall handle or process almonds into manufactured items or products unless they meet the applicable requirements as evidenced by certification acceptable to the Board.” 7 C.F.R. § 981.42
63. Because all almonds produced in California, with the narrow exception of almonds sold by producers at roadside stands, must be marketed through the Almond Order, the Final Rule creates a quality classification for untreated almonds that renders those almonds unmarketable, in excess of the Secretary’s stated authority to impose marketing order terms allotting the quantity of almonds that may be marketed based on their “quality.” 7 U.S.C. § 608c(6)(c).
64. USDA conducted the entire process of promulgating the Final Rule using notice and comment rulemaking rather than formal rulemaking, as required by the AMAA.
65. USDA did not submit the Final Rule to almond producers for a referendum, as required by the AMAA. While USDA mailed or faxed copies of the proposed rule to all handlers, 72 Fed. Reg. at 15029, it made no similar effort to inform almond producers of the Proposed Rule.
66. Plaintiffs allege that the Secretary failed to adequately consider the following important impacts in the promulgation of the Final Rule and that his conclusions or lack thereof are not supportable:
 - a. The availability of suitable treatment capacity and the affordability of treatment.
 - b. The consumer appeal of almonds subjected to chemical and steam-heat pasteurization is comparable to that for untreated almonds.

- c. The economic impacts of growers and handlers of organic almonds, including the loss of markets to foreign-grown untreated almonds and a corresponding decline in demand for domestically-grown organic almonds, were not adequately considered, if at all.
67. Because the Final Rule was not issued through a formal rulemaking, interested parties, including Plaintiffs were denied the opportunity guaranteed to them by the AMAA to cross-examine the evidence offered in support of the Final Rule. Had such an opportunity been presented, interested parties could have cross-examined the evidence introduced on the foregoing topics and offered their own evidence in opposition.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION

[Declaratory and Injunctive Relief for Ultra Vires Agency Action]

68. Plaintiffs incorporate, as if fully rewritten herein, all allegations made in the previous paragraphs of this complaint.
69. The quality control regulations contained in the Almond Order, as described herein and as evidenced by the rules themselves and by the contemporaneous commentary and explanations from USDA in 1976 establish that the purpose of quality control was to prevent “inedible kernels” from entering the stream of commerce.
70. As approved by producers through a referendum following a formal hearing, “inedible kernel” includes those almonds that contain “any defect scored as serious damage, or damage due to mold , gum, shrivel, or brown spot, as defined in the United States Standards for Shelled Almonds, or which had embedded dirt not

easily removed by washing.” Inedible kernel does not include reference to bacteria, including *Salmonella*.

71. The Final Rule constitutes an ultra vires expansion of the quality control regulations by amending the Almond Order to distinguish among almonds on a basis other than the quality of the kernel, as that term is defined in the Almond Order.
72. Plaintiffs are entitled to a judgment declaring that the Secretary’s Final Rule exceeds the authority set forth in 7 C.F.R. § 981.42(b), upon which the Secretary has based the regulations and is otherwise arbitrary, capricious, and contrary to law.

SECOND CAUSE OF ACTION

[Declaratory and Injunctive Relief for Failure to Conduct a Formal Rulemaking]

73. Plaintiffs incorporate, as if fully rewritten herein, all allegations made in the previous paragraphs of this complaint.
74. Amendments to the terms of the Almond Order are subject to the provisions of the AMAA guaranteeing producers and handlers an on-the-record rulemaking, in which their interests can be fully presented and protected, where evidence in support of and in opposition to proposed changes is submitted under oath and subject to cross-examination.
75. Amendments to the terms of the Almond Order, if ultimately recommended by the Secretary following a formal rulemaking are subject to producer approval in a referendum.
76. Because the amendments, if permissible at all under the terms of the Almond Order

in existence at the time of the rulemaking, are not “rules and regulations necessary and incidental to the administration of [the quality control regulations]” but rather constitute a dramatic and significant expansion of the scope of quality control under the Almond Order cannot be issued through notice and comment. Accordingly, the use of notice and comment rulemaking in issuance of the Final Rule contravened the provisions of the AMAA.

77. Plaintiffs are entitled to a judgment declaring that the actions of the Secretary in promulgating the Final Rule without conducting a formal, on-the-record rulemaking including a producer referendum, violated the requirements for the proper promulgation of marketing order amendments under the AMAA, exceeded his statutory authority, and are otherwise arbitrary, capricious, and contrary to law.

THIRD CAUSE OF ACTION

[Declaratory and Injunctive Relief for Ultra Vires Agency Action]

78. Plaintiffs incorporate, as if fully rewritten herein, all allegations made in the previous paragraphs of this complaint.
79. The Final Rule exceeds the limited authority granted to the Secretary under the AMAA to regulate the outgoing quality of covered commodities.

FOURTH CAUSE OF ACTION

[Declaratory and Injunctive Relief for Issuance of An Arbitrary and Capricious Rule]

80. Plaintiffs incorporate, as if fully rewritten herein, all allegations made in the previous paragraphs of this complaint.

81. Plaintiffs state that the USDA issued a rule that is not supported by the record and is otherwise arbitrary and capricious.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief as follows:

A) For an Order declaring that the Secretary, in issuing the Final Rule and in so far as it requires the mandatory pasteurization of almonds grown in California and otherwise subject to the Almond Marketing Order acted in excess of his statutory authority, arbitrarily, capriciously, or otherwise contrary to law and that the Final Rule is null and void.

B) For an Order permanently enjoining the Secretary, his agents and attorneys and those persons in active concert or participation with them who receive actual notice of this Court's Order from mandating the sterilization of almonds marketed by growers under the terms of the Almond Marketing Order and require the Secretary to issue a rule in conformance thereto.

C) For a judgment for interest, attorneys fees, costs, and such other and further relief as the Court deems just and proper, including attorney fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412.

Respectfully submitted,

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