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28IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VAN CUREN,

Plaintiff,

v.

FEDERAL CROP INSURANCE
CORPORATION ET AL.,

Defendants.

No. C 13-04601 CRB

**ORDER DENYING MOTIONS
WITHOUT PREJUDICE AND
REMANDING CASE TO AGENCY**

Following remand from the Ninth Circuit, the parties each filed Motions for Partial Summary Judgment on Plaintiff's second claim for relief, which pertains to quality adjustments. See P MSJ 2C (dkt. 62); D MSJ 2C (dkt. 66). Both motions ask the Court to decide whether the National Appeals Division's (NAD's) decision, affirming Defendants' denial of certain quality adjustment claims, was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Id.; 5 U.S.C. § 706. NAD's decision was based on "the 75% Test," something that had not been the explicit basis for Defendants' denial. See Burnett Decl. (dkt. 68) Ex. 20 at 65; P MSJ 2C at 17–21. Plaintiff asserts: "[A]fter the entire record had been closed, long after Plaintiff's opportunity to address any would-be challenge under the 75% Test had passed, NAD itself raised the issue for the first time and

1 then denied Plaintiff’s claims for lack of evidence of compliance with the test.” P Reply
2 (dkt. 71) at 7.¹

3 The Court understands that the parties make alternative arguments not related to
4 Plaintiff’s claimed lack of notice that NAD would be employing the 75% Test. However, the
5 Court concludes that the proper course of action is for NAD to (1) reopen the record to allow
6 both parties to submit evidence relating to the 75% Test before (2) re-examining the quality
7 adjustment claims at issue in the second claim for relief. See Loma Linda Univ. v.
8 Schweiker, 705 F.2d 1123, 1127 (9th Cir. 1983) (reviewing court has inherent power to
9 remand a matter to agency; where agency failed to consider important evidence, proper to
10 remand).²

11 Plaintiff also recently filed a motion for partial summary judgment as to the third
12 claim for relief, which pertains to the Madera 0100 claim. See P MSJ 3C (dkt. 75). That
13 motion argues, among other things, that NAD affirmed Defendants’ denial of the Madera
14 0100 claim “on a completely new basis” and that “Plaintiff had no opportunity to refute that
15 basis, because it had never been presented by Defendants.” Id. at 16.³ In light of the Court’s
16 conclusion as to the second claim for relief, the Court takes the same approach here. NAD is
17 to (1) re-open the record to allow both parties to submit evidence relating to the allegedly late
18 harvest of the Madera 0100 grapes before (2) re-examining the Madera 0100 claim at issue in
19 the third claim for relief.

21 ¹ Defendants contend, among other things, that “the absence of a specific reference to the 75%
22 test as the specific basis for a denial of the quality adjustment claims in the 2010 or 2011 [insurer]
23 decisions” is not dispositive, and that Plaintiff was on notice that the 75% test was “Part and Parcel of
24 the Parties’ Dispute.” See D MSJ 2C at 15–16, 18–22. Defendants also claim that “Witnesses testified
at the [agency’s] hearing about the 75% test, although Plaintiff objected and blocked or simply declined
to develop the testimony at times.” Id. at 19.

25 ² See also Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985) (“If the record before the
26 agency does not support the agency action, if the agency has not considered all relevant factors, or if
27 the reviewing court simply cannot evaluate the challenged agency action on the basis of the record
before it, the proper course, except in rare circumstances, is to remand to the agency for additional
investigation or explanation.”).


28 ³ Defendant has not substantively responded to this or any argument in Plaintiff’s motion, but
has sought additional time in which to respond. See D Mot. to Enlarge Time (dkt. 77). That motion is
hereby DENIED as moot.

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Accordingly, the Court DENIES the parties' motions without prejudice and REMANDS the case to the agency for these limited purposes. The Court further DIRECTS the parties to file a status report in this case within 30 days of the final agency decision.

IT IS SO ORDERED.

Dated: October 5, 2016



CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE