[ORAL ARGUMENT HEARD JANUARY 11, 2010]

No. 09-5099

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PRIME TIME INTERNATIONAL COMPANY,
FORMERLY KNOWN AS SINGLE STICK, INC.,
Plaintiff-Appellant,

v.

THOMAS J. VILSACK, SECRETARY OF AGRICULTURE;
UNITED STATES DEPARTMENT OF AGRICULTURE,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLEES' PETITION FOR PANEL REHEARING

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For the following reasons, the Government respectfully requests that the panel amend its opinion to clarify that the Court did not decide whether the Information Quality Act ("IQA") creates judicially enforceable rights.

1. Among other claims, plaintiff asserted claims under the Information Quality Act, 44 U.S.C. § 3516 note. *See* Panel Op. 2 (attached as Exhibit A). The Government opposed these claims on two alternative grounds. The first, and narrower, ground was that the IQA does not apply to information distributed in the context of adjudicative processes. *See* Gov. Br. 26-28. The second ground — accepted by the district court — was that even when information has been "disseminated" and is thus covered by the statute, the IQA does not create any judicially enforceable rights. *Id.* at 29-33. Relying in part on the Fourth Circuit's decision in *Salt Institute v. Leavitt*, 440 F.3d 156 (4th Cir. 2006), the Government explained that the IQA simply "orders the Office of Management and Budget to draft guidelines concerning information quality and specifies what those guidelines should contain." Gov. Br. 29 (quoting *Salt*, 440 F.3d at 159).

2. This Court accepted the Government's first argument and held that the information at issue here is not covered by the IQA. *See* Panel. Op. 12-16. Accordingly, this Court did not reach the broader ground accepted by the district court and by the Fourth Circuit in *Salt*. That broader issue is presented in a case now pending before the Ninth Circuit. *See Americans for Safe Access v. HHS*, No. C 07-01049, 2007 WL 4168511, at *4 (N.D. Cal. Nov. 20, 2007) ("This order agrees that the IQA and OMB guidelines do not create a duty to perform legally required actions that are judicially reviewable."), *appeal pending*, No. 07-17388 (9th Cir.).

3. Although this Court's opinion did not address the Government's broader argument or the *Salt* decision, the Center for Regulatory Effectiveness ("CRE") has urged that this Court implicitly rejected the Government's position on its second argument. The CRE website declares: "D.C. Circuit Beats 9th Circuit to the Punch: The Data (Information) Quality Act is Subject to Judicial Review" and argues that this holding is implicit in this Court's decision. The CRE article is attached as Exhibit B to this petition and is available at

http://www.thecre.com/.

4. In our view, it is clear that this Court did not reach the broader issue of IQA enforcement or create an implicit conflict with *Salt*. Nonetheless, in an abundance of caution, we respectfully request that the Court amend its opinion to clarify that it did not reach the question whether the IQA creates judicially enforceable rights.

Respectfully submitted.

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APRIL 2010

EXHIBIT B

The CRE.com Center for Regulatory Effectiveness
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Reg History

D.C. Circuit Beats 9th Circuit to the Punch: The Data (Information) Quality Act is Subject to Judicial Review

In an opinion issued March 26, 2010, in *Prime Time Int'l Co. v. Vilsack*, the D.C. Circuit stated that the OMB guidelines issued under the IQA are "binding." The court stated: "[B]ecause Congress delegated to OMB authority to develop binding guidelines implementing the IQA, we defer to OMB's construction of the statute. *See United States v. Mead*, 533 U.S,. 218, 226-27 (2001)." At 14. The opinion is not yet published, and a pdf copy is attached below.

The citation of *Mead* at those particular pages is significant. The only statement by the Supreme Court in Mead that overlaps those two pages is the following: "We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." (Emphasis added)

Therefore if you connect the dots, the fact that the Court opined that OMB;s regulations are legally binding with the Court's link of this finding to *Mead*, you readily conclude that the DQA (IQA) is judicially reviewable.

Prime Time had filed an IQA petition with USDA, but USDA failed to respond, and Prime Time filed an APA claim for judicial review. The District Court dismissed the claim on the basis that the IQA did not create any legal right to a correction, relying on the 2006 opinion by the 4th Circuit in the *Salt Institute*

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case and the District Court opinion in *Americans for Safe Access v. HHS ("ASA")*. The *ASA* case is currently on appeal in the 9th Circuit, with oral argument having taken place a year ago.

In *Prime Time*, the D.C. Circuit ignored the District Court opinion's reasoning and embraced a new Government argument that the substantive USDA action at issue was an "adjudication," and therefore specifically exempt from the IQA under the OMB guidelines.

The issue of whether the IQA guidelines and the IQA itself create legal rights that make agency actions subject to judicial review is at issue in the *ASA* case.

The D.C. Circuit's opinion is definitive and puts to rest the 4th Circuit's unexplained IQA decision in the *Salt Institute* case and will presumably have to be taken into account by the 9th Circuit.

It should be noted that the DC Circuit Court decision will not result in an avalanche of litigation for a number of reasons. The plaintiff must demonstrate standing which includes a demonstration of injury and redressability..

With respect to standing, claiming the contents of one report, when there might be many others in existence which address the same topics, is a cause of injury will constitute a challenge. With respect to redressability the plaintiff will have to identify an action the court can take to address its injury resulting from a report subsequent to its publication- both of these tasks presents a significant challenge.

However, given that Tozzi v HHS expands the potential plaintiff base to include harm caused indirectly by third-parties, the potential for a wide range of injury claims will be considered by the courts. Nonetheless the standing arguments presented above will place a damper on legal actions unless the underlying DQA petitions comply with the letter of the law.

CRE believes that the Federal agencies have done an exemplary job in publishing their DQA guidelines and responding to the resultant requests for corrections. The *Prime Time* decision is definitive-in those few instances when federal agencies do not give an objective consideration to a well reasoned request for correction, the courts will.

- Click **here** to read court opinion

Information Collection Request of the Week

- **The Forest Service Seeks Customer Feedback On PA's Grey Tower**

The Department of Agriculture is seeking information

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5099 **September Term 2009**

1:06-cv-01077

Filed On: May 10, 2010

Prime Time International Company, formerly known as Single Stick, Inc.,

Appellant

v.

Thomas J. Vilsack, Secretary of Agriculture and United States Department of Agriculture,

Appellees

BEFORE: Rogers and Griffith, Circuit Judges, and Edwards, Senior Circuit Judge

O R D E R

Upon consideration of appellees' petition for rehearing filed April 30, 2010, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Laura Chipley
Deputy Clerk