UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

M&T FARMS,

Plaintiff,

v.

FEDERAL CROP INSURANCE CORPORATION, et al.,

Defendants.

Case No. 21-cv-09590-SVK

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Re: Dkt. Nos. 25, 28, 29, 31

This is an action for judicial review of a final agency action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et seq.* This case is before the Court on cross-motions for summary judgment. Dkts. 25, 28. The Parties appeared before the undersigned for oral argument on January 24, 2023, after which the Court ordered supplemental briefing. Dkt. 33. Briefing is now complete, and the Parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c)(1). Dkts. 12, 16. For the reasons discussed below, the Court **DENIES** Plaintiff's motion for summary judgment and **GRANTS** Defendants' cross-motion for summary judgment.

I. ISSUE TO BE DECIDED

1. Whether the Defendants' conduct was arbitrary and capricious under the Administrative Procedure Act ("APA").

II. BACKGROUND

Although disputes involving farming insurance are uncommon in this court, the origin of this case springs from well-trodden ground: a plaintiff obtained insurance, suffered a loss, and the defendant insurance company refused to pay. Thus, this story begins.

Plaintiff M&T Farms ("M&T Farms" or "Plaintiff") is a general partnership consisting of

two partners, Gary Tognetti and Paul Missou, that operates a farm in Gilroy, California. Dkt. 1 at ¶¶ 7-8. Defendants are the Federal Crop Insurance Corporation ("FCIC") and the Risk Management Agency ("RMA") (collectively, "Defendants" or "the Agencies"). In its Complaint, Plaintiff seeks a declaratory judgment arising from administrative determinations issued by the RMA. Dkt. 1 at 9.

The Federal Crop Insurance Act ("FCIA"), 7 U.S.C. § 1501, *et seq.*, was enacted "to promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance and providing the means for the research and experience helpful in devising and establishing such insurance." 7 U.S.C. § 1502(a). Defendant FCIC is a federal government-owned corporation within the U.S. Department of Agriculture that was created to "carry out the purposes" of the FCIA. 7 U.S.C. § 1503; 31 U.S.C. § 9101(3). Defendant RMA supervises the FCIC and administers all programs authorized under the FCIC. 7 U.S.C. § 6933(a); 7 U.S.C. § 6933(b)(1)-(3); 7 C.F.R. § 400.701. "The United States Department of Agriculture Risk Management Agency ('RMA') administers FCIC. For all relevant and practical purposes, the RMA and the FCIC are one and the same." *William J. Mouren Farming, Inc. v. Great Am. Ins. Co.*, No. 05-cv-0031, 2005 WL 2064129, at *2 (E.D. Cal. Aug. 24, 2005).

Under the FCIA, FCIC is authorized to act as a reinsurer to Approved Insurance Providers ("AIPs"). 7 U.S.C. § 1508. An AIP is "a private insurance provider that has been approved by [FCIC] to provide insurance coverage to producers participating in the Federal crop insurance program established under this subchapter." 7 U.S.C. § 1502(b)(2). "In order to qualify for reinsurance through the FCIC, the policies written by [AIPs] must comply with the FCIA and its accompanying regulations." *Davis v. Producers Agric. Ins. Co.*, 762 F.3d 1276, 1284 (11th Cir. 2014). Accordingly, despite the fact that "the crop insurance policy is between the farmer and an approved insurance provider," the FCIA "generally establishes the terms and conditions of insurance[.]" *Id.*

One of the types of federal crop insurance is the Whole-Farm Revenue Protection ("WFRP") insurance, which protects against losses for all commodities on the farm under a single insurance policy. *See* AR 178. Here, M&T Farms purchased a WFRP Pilot Policy (the "WFRP

Policy" or "Policy") for the 2017 crop year from Producers Agriculture Insurance Company ("ProAg") to insure its peppers, tomatoes, corn, cabbage, and cherries against loss of revenue. Dkt. 1 at ¶¶ 7, 9, 11, Ex. 1 (Dkt. 24, Administrative Record ("AR") 178-224). Non-party ProAg is an AIP. *Id.* at ¶ 2. The WFRP Policy is reinsured by Defendant FCIC under the provisions of the FCA. *Id.* at ¶ 6, Ex. 1 (AR 178-224). After paying the premiums, M&T Farms claimed the full amount of insurance, or $1,991,876.00. *Id.* at ¶ 10. On January 2, 2019, ProAg cancelled the 2017 WFRP Policy on the grounds that M&T Farms was not a "qualifying person" under § 3(a)(4) of the WFRP Policy. *Id.* at ¶ 11. Section 3(a)(4) of the WFRP Policy provides:

> 3. Qualifying Person Criteria and Insurance Eligibility
> (a) To be considered a qualifying person, you must:
> (4) The Schedule F, or Substitute Schedule F, must cover 100 percent of your farm operation. (A tax entity which reports a fractional share of farming activity conducted by a partnership, corporation or any other "joint venture" does not qualify for WFRP coverage on the fractional share of farming activity).

AR 189. In its letter, ProAg explained that it was cancelling the WFRP Policy because M&T Farms' business structure disqualified it from coverage under the policy. Dkt. 25-2 (McFarland Decl.), Ex. 1. M&T Farms is, itself, a general partner with a 65% interest in another general partnership, B&T Farms. Dkt. 1 ¶ 31. Mr. Tognetti is the other general partner, with a 35% ownership interest in B&T Farms. *Id.* ProAg interpreted M&T Farms' earlier presentation of the facts as indicating that M&T was reporting a fractional interest in B&T's farming activities. *See* McFarland Decl., Ex. 1.

A. The Arbitration and Requests for Interpretation

In April 2019, M&T Farms timely filed for arbitration to challenge ProAg's cancellation of the WFRP Policy. Dkt. 1 at ¶ 13. The arbitrator authorized both ProAg and M&T Farms to seek an interpretation of the WFRP Policy from the RMA in accordance with federal regulations. Dkt. 1 at ¶¶ 15-16; AR 228-33, 234-41; 7 U.S.C. § 1506(r); *see Davis*, 762 F.3d at 1285 ("The FCIC provides, as necessary, interpretations of the statute and regulations to interested parties."). Final agency determinations from the FCIC are "[m]atters of general applicability regarding FCIC's interpretation of the [FCIA] or any regulation codified in the Code of Federal Regulations,

including certain policy provisions[.]" 7 C.F.R. § 400.765. Similarly, an FCIC interpretation is "an interpretation of a policy provision not codified in the Code of Federal Regulations or any procedure used in the administration of the Federal crop insurance program." *Id.* "FCIC will not provide a final agency determination or FCIC interpretation for any request regarding, or that contains, specific factual information to situations or cases, such as acts or failures to act of any participant under the terms of a policy, procedure, or any reinsurance agreement." 7 C.F.R. § 400.768(a). Accordingly, litigants must frame their questions more generally or as hypotheticals.

On December 13, 2019, M&T Farms requested FCIC's interpretation of Sections 3(a)(4) and 3(e) of the WFRP Policy and Paragraph 21(1)(d) of the WFRP Pilot Handbook (the "Handbook) (AR 1-176). AR 228-33. M&T Farms framed the issue as follows:

> May a partnership who is an originating entity that files tax forms reporting a fractional share of the farming activity conducted by a partnership obtain WFRP coverage on the partner's fractional share of the partnership's farming activity for which the partnership has a financial risk of loss?

AR 230. ProAg, instead, framed the question as follows: "May a partner who files tax forms reporting a fractional share of the farming activity conducted by a partnership obtain WFRP coverage on the partner's fractional share of the partnership's farming activity?" AR 237. On March 11, 2020, the RMA responded to both requests for interpretation, indicating that it agreed with ProAg's interpretation and disagreed with M&T Farms' interpretation. AR 256-57, 259-60. The RMA emphasized particularly that "[c]overage is only available to a tax filing entity that reports 100 percent of the farming activity to the IRS, including a farming activity conducted by a partnership." AR 256. On July 15, 2020, M&T Farms submitted a further request for interpretation to the RMA, and ProAg did the same on August 4, 2020. AR 344-62, 451-72. This time, M&T Farms framed the question as follows:

> May a partnership that is an originating pass-through entity that files tax forms reporting the revenue and expenses from its percentage share of the commodities it physically produced qualify for WFRP coverage for its percentage share of the revenue from its percentage share of the commodities?

AR 345. Additionally, M&T Farms provided the following example:

> Entity A is a general partnership made up of Entity B (a partnership) and individual C.
>
> Entity A is not a "farm operation" because it reports no farming activity to the IRS in the form or [sic] revenues or expenses. Moreover, Entity A is not an "originating entity" because it physically produces no commodities. Instead, Entity A is a store-front that holds the business name and goodwill for Entity B and individual C.
>
> Entity B is a "single farm operation" because it reports 100 percent of its farm activity to the IRS in the form of revenue and expenses on its tax forms under a single taxpayer number. Entity B is also an "originating entity" because it actually physically produces its percentage share of the commodities grown nominally under the name of Entity A.
>
> Individual C is likewise a "single farm operation" because it reports 100 percent of its farm activity to the IRS in the form or [sic] revenue and expenses on its tax forms under a single taxpayer number. Individual C also actually physically produces its percentage share of the commodities grown nominally under the name of Entity A.

AR 347-48. ProAg presented the following question for the RMA's interpretation: "May a partner who files taxes on a fractional share of farming activity conducted by the partnership insure that fractional share under a WFRP policy **if** the partner is an originating pass-through entity for its share of commodities produced through the partnership?" AR 294 (emphasis in original).

On September 15, 2020, the RMA responded with its interpretations, once again siding with ProAg. AR 560-65. In rejecting M&T Farms' proffered interpretation, the RMA explained:

> A farm operation must meet eligibility requirements of both sections 3(a)(4) and 3(e) for coverage under WFRP. A farm operation may meet the requirements of an originating pass-through entity within itself. However, if that same entity also reports a fractional share of another entity (farming activity), the entity is not eligible for coverage under WFRP. Using the example from the requestor's interpretation, Entity A is a partnership that includes Entity B and individual C. Entity A, holding the business name and good will of Entity B and individual C (i.e., marketing and selling the commodities produced) is the pass-through entity. Although Entity B may be considered an originating pass-through entity with regards to itself, it reports a fractional share of the general partnership (Entity A). Therefore, Entity B and individual C do not meet the requirements of eligibility within section 3(a)(4) under WFRP.

AR 562. Following receipt of the RMA's interpretations, M&T Farms timely appealed to the National Appeals Division ("NAD"), a division of the U.S. Department of Agriculture. AR 581-91. On March 4, 2021, the NAD found that the FCIC's September 15, 2020 interpretations were "not appealable because they are matters of general applicability." AR 577-79. The

arbitrator subsequently granted ProAg's motion for summary disposition. Dkt. 1 at ¶ 29.

B. Federal Court Litigation

M&T Farms initiated this action against Defendants FCIC and RMA on December 10, 2021. Dkt. 1. Defendants lodged the Administrative Record on September 12, 2022. Plaintiff moved for summary judgment on September 22, 2022. Dkt. 25. Defendants filed their opposition and cross-motion to summary judgment on October 31, 2022. Dkt. 28. Plaintiff replied in support of its motion and in opposition to Defendants' cross-motion for summary judgment, and Defendants filed their surreply in support of their cross-motion. Dkts. 29, 31. The Parties appeared before the undersigned for a hearing on January 24, 2022. Following oral argument, the Court asked the Parties to file supplemental briefs addressing whether the action could be remanded to the RMA. Dkt. 33. The Court has considered the arguments raised in the Parties' supplemental briefing and declines to pursue that avenue. Plaintiff's motion for summary judgment and Defendants' cross-motion for summary judgment are fully briefed and ripe for disposition.

III. STANDARD OF REVIEW

In cases involving review of a final agency determination under the APA, a district court's role is not fact-finding. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994). "[T]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Occidental Eng'g Co. v. I.N.S.*, 753 F.2d 766, 769 (9th Cir. 1985). The reviewing court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Review under the arbitrary and capricious standard is deferential." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007). Under this standard, the reviewing court "must determine whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Friends of Animals v. U.S. Fish & Wildlife Serv.*, 28 F.4th 19, 28 (9th Cir. 2022) (quoting *Ranchers Cattlemen Action Legal Fund v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1115 (9th Cir. 2007)). A reviewing court should not

vacate an agency's decision unless the agency has "relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Nat'l Ass'n of Home Builders*, 551 U.S. at 2529-30 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The APA does not permit a court to overturn an agency decision because it disagrees with the decision or with the agency's conclusions. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 555 (1978). In other words, the court "may not substitute its judgment for that of the agency concerning the wisdom or prudence of [the agency's] action." *Or. Env'tl Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987).

IV. DISCUSSION

Plaintiff asserts that Defendants erred in concluding that, under the hypothetical Plaintiff offered, a general partnership may be deemed to have engaged in farming activity where products are sold nominally under the partnership's name and the partnership holds the goodwill and business name of its constituent partners. Defendants maintain that the RMA reasonably concluded that such activities constitute farming activity and that, to the extent Plaintiff required additional clarity, Plaintiff should have asked the RMA to define the term "farming activity" as it is used in the WFRP Policy.

Before resolving the above dispute, the Court must first clarify its role under the APA. Plaintiff's motion for summary judgment and reply in support thereof repeatedly conflate the example in its Request for Interpretation, AR 344-50, with the actual facts before the arbitrator. *See* Dkts. 25-1, 29. However, Defendants did not engage in factfinding; Defendants simply interpreted their own policy. *See* AR 560-65; 7 C.F.R. § 400.768(a). The arbitrator made factual findings based on Defendants' policy interpretations, and those findings are not the subject of this suit. The Court's review under the APA is confined to determining whether Defendants' interpretations of the WFRP Policy and Handbook were arbitrary and capricious. *See, e.g.*, *Struss v. U.S. Dep't of Agriculture*, No. 18-cv-2184, 2019 WL 2490721, at *2 (D. Kan. June 14, 2019).

Second, the Court must clarify the scope of the present dispute. The Parties agree that to be a "qualifying person," under the WFRP Policy, an individual must satisfy the criteria set forth in Sections 3(a) and 3(e) and that the RMA's interpretation of Section 3(e) is not in dispute. Dkt. 29 at 5; Dkt. 28 at 15-17. Therefore, the Court will not consider Section 3(e) in the below analysis. Second, although Plaintiff purports to challenge the RMA's March 2020 and September 2020 interpretations, Plaintiff's briefing seeks relief exclusively as to the RMA's September 2020 decisions. Dkt. 25-1 at 9; Dkt. 29 at 2. Accordingly, the Court confines its review to the RMA's September 2020 decisions.

The Parties have narrowed their dispute to the following passage from the RMA's September 2020 decision rejecting Plaintiff's proffered interpretations of Section 3(a)(4) of the WFRP Policy and Paragraph 21(1)(d) of the Handbook:

> A farm operation may meet the requirements of an originating pass-through entity within itself. However, if that same entity also reports a *fractional share of another entity (farming activity), the entity is not eligible for coverage under WFRP*. Using the example from the requestor's interpretation, Entity A is a partnership that includes Entity B and individual C. *Entity A, holding the business name and good will of Entity B and individual C (i.e., marketing and selling the commodities produced)* is the pass-through entity. Although Entity B may be considered an originating pass-through entity with regards to itself, *it reports a fractional share of the general partnership (Entity A)*. Therefore, Entity B and individual C do not meet the requirements of eligibility within section 3(a)(4) under WFRP.

AR 562 (emphasis added). Here, the RMA holds that Entity A's acts of (1) holding the business name and good will of Entity B and Individual C and (2) marketing and selling the commodities produced by Entity B and Individual C, together mean that Entity A is engaged in "farming activity." *See id.* As demonstrated at oral argument, the central dispute for the Court to resolve is whether the RMA's interpretation of the term "farming activity," as used in the WFRP Policy and Handbook, was arbitrary and capricious.

A. Is the Agency's Decision Entitled to Deference?

Before reviewing Defendants' interpretation of the WFRP Policy and Handbook provisions, we must determine the level of deference owed to the RMA's construction of those provisions. *See* 7 C.F.R. 400.765. While the FCIA and pertinent regulations apply to the WFRP

Policy, the policy is not codified in the Code of Federal Regulations and does not carry the force of law. AR 11. Nevertheless, courts have treated FCIC interpretations substantially the same as regulations for purposes of determining the level of deference owed. *See, e.g.*, *Bottoms Farm P'ship v. Perdue*, 895 F.3d 1070, 1074 (8th Cir. 2018) ("Given the Act's broad grant of authority to the Corporation, and the specific authority over the provisions of insurance and insurance contracts found in 5 U.S.C. §§ 1505 and 1506, we conclude that we must give substantial deference to the FCIC's interpretation of the special provision."); *Rain & Hail Ins. Serv. Inc. v. Fed. Crop Ins. Corp.*, 426 F.3d 976, 979 (8th Cir. 2005) ("[W]e think that the reasons for deferring to an agency's interpretation of its regulations apply equally to the AGBCA's interpretation of the Manager's Bulletin[.]"); *United States v. Gonzales & Gonzales Bonds & Ins. Agency, Inc.*, 103 F. Supp. 3d 1121, 1129 (N.D. Cal. 2015) ("[S]everal courts have held that, where an agency's action is being challenged pursuant to the APA, and where the agency has interpreted a contract, that interpretation is entitled to deference and the arbitrary-and-capricious standard applies—at least where the agency's expertise or statutory domain is implicated."). In the absence of guidance from the Ninth Circuit, we, too, shall treat the FCIC interpretations at issue here as regulations in this respect.

1. Is the Policy Genuinely Ambiguous?

Here, the Parties dispute whether the term "farming activity" is ambiguous. Plaintiff maintains that the term is unambiguous and that the Court need only look to the "plain meaning" of the WFRP Policy, while Defendants argue that the term is ambiguous and entitled to substantial deference under *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).[1] The Court finds Section 3(a)(4) of the Policy and Paragraph 21(1)(d) of the Handbook genuinely ambiguous as to what activities constitute "farming activities."

In general, "[w]hen an agency interprets its own regulation, even if through an informal process, its interpretation of an ambiguous regulation is controlling under [*Auer v. Robbins*, 519 U.S. 452 (1997)] unless 'plainly erroneous or inconsistent with the regulation.'" *Bassiri v. Xerox*

[1] During oral argument, Defendants clarified that they are arguing that the term "farming activity" is ambiguous. *Compare* Dkt. 28 at 16 *with* Dkt. 31 at 5.

Corp., 463 F.3d 927, 930 (9th Cir. 2006) (quoting *Auer*, 519 U.S. at 461). Such deference to an agency's construction of its own ambiguous regulation is known as *Auer* deference. *Kisor*, 139 S.Ct. at 2411. However, an agency's interpretation is not entitled to *Auer* deference unless the regulation is genuinely ambiguous. *Amazon.com, Inc. v. Comm'r of Internal Revenue*, 934 F.3d 976, 992 (9th Cir. 2019). "And before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construct." *Kisor*, 139 S. Ct. at 2415 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). This requires a court to "carefully consider []" the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." *Id.* Put more simply, a court "cannot wave the ambiguity flag" until its "legal toolkit is empty and the interpretive question still has no single right answer[.]" *Id.*

When a court concludes that a regulation is genuinely ambiguous, it must still find the agency's reading reasonable before *Auer* deference attaches. *Id.* "In other words, it must come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id.* The inquiry does not end here, however. A court must still make an "independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Id.* To this end, the agency's interpretation "must be one actually made by the agency," meaning that it reflects the agency's official position. *Id.* Further, the agency's interpretation "must in some way implicate its substantive expertise." *Id.* Lastly, the "agency's reading of a rule must reflect 'fair and considered judgment' to receive *Auer* deference." *Id.* (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)). In practice, that means 'that a court should decline to defer to a merely 'convenient litigating position' or 'post hoc rationalization[n] advanced' to 'defend past agency action against attack.'" *Id.* (quoting *Christopher*, 567 U.S. at 155). The new interpretation should not create "unfair surprise" to regulated parties. *Id.* (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007)).

Pursuant to the Supreme Court's guidance in *Kisor*, the Court accordingly addresses the text of the WFRP Policy, the available FCIC interpretations, and the FDA's regulations to the extent relevant. *Kisor*, 139 S. Ct. at 2415. Section 3(a)(4) of the Policy provides:

> 3. Qualifying Person Criteria and Insurance Eligibility
> (a) To be considered a qualifying person, you must:
> (4) The Schedule F, or Substitute Schedule F, must cover 100 percent of your farm operation. (A tax entity which reports a fractional share of farming activity conducted by a partnership, corporation or any other "joint venture" does not qualify for WFRP coverage on the fractional share of farming activity).

AR 189. Paragraph 21(1)(d) of the Handbook states:

> 21 Eligibility
> (1) To be considered eligible for a WFRP policy, the insured must:
> (d) have a Schedule F that covers 100 percent of their farm operation. A tax entity which reports a fractional share of farming activity conducted by a partnership, corporation, or any other "joint venture" does not qualify for WFRP coverage on the fractional share of farming activity. However, a tax entity may still qualify for WFRP coverage on a fractional share of a commodity in which they have an insurable interest.

AR 20. The Parties agree that neither the FCIA, the regulations implementing the FCIA, the WFRP Policy nor the Handbook expressly defines the term "farming activity." *See, e.g.*, 7 U.S.C. § 1501 and 7 CFR §§ 400.402, 400.765. Nor have the Parties, or the Court, identified any prior or subsequent version of the WFRP Policy or Handbook that offers such a definition.[2] Given the absence of a definition, the Parties turn to the other defined terms in the WFRP Policy for guidance. Dkt. 29 at 5-6; Dkt. 31 at 8-10. The Court agrees that any analysis must begin with the WFRP Policy's other definitions and provisions.

Here, only one definition in the WFRP Policy and Handbook uses the term "farming activity:"

> Farm operation – All of the *farming activities* for which revenue and expenses are reported to the IRS under a single taxpayer identification number will be considered a single farm operation for WFRP purposes (e.g., a partnership filing a U.S. tax return for partnership income that includes revenue and expenses from separate row crop, perennial crop and livestock farms is a single farm operation because it files one tax return).

[2] Nor does it appear that the RMA previously has taken up this issue. *See* https://www.rma.usda.gov/en/Policy-and-Procedure/Insurance-Plans/Whole-Farm-Revenue-Protection (collecting previous WFRP Interpretations of Procedure).

AR 102, 183 (emphasis added). Taking the example provided in the definition of "farm operation," Plaintiff argues that the partnership filing a U.S. tax return for partnership income that includes revenue and expenses from farming separate row crops qualifies as a single farm operation because "as the definition holds, it reports the revenue and expenses from the production of the commodities from its farming activities to the IRS, under a single taxpayer identification number." Dkt. 29 at 6. Thus, "farming activities" must be understood in relation to the term "farm operation" and the stated purpose of the WFRP Policy—to protect against loss of revenue from commodities produced by the farm operation. *Id.* (citing AR 178). Stated more concisely, Plaintiff's argument is that the definition of "farm operation" clearly links "farming activities" to revenue and expenses reported to the IRS, which means that to be engaged in "farming activities," an entity must be generating revenue and expenses from the commodities it produces. *See id.* In support of this conclusion, Plaintiff points to the WFRP Policy's definitions of "allowable expenses" and "allowable revenue:"

> Allowable expenses – Farm expenses, specified by the policy and adjusted as applicable, that are incurred in the production of commodities on your farm and reported to the IRS on farm tax records.
>
> Allowable revenue – Allowable revenue is farm revenue, specified by this policy and including applicable adjustments, from the production of commodities produced by your farm operation, or purchased for further growth and development by your farm operation, that the IRS requires you to report on farm tax records.

AR 180.[3] Because the Policy defines expenses in terms of costs incurred in the production of commodities on the insured's farm and likewise defines revenue in terms of the monies earned from the production of commodities produced by the insured's farm operation, Plaintiff reasons that the term "farming activities" necessarily refers to "those things from which revenue and expenses are reported in connection with the actual production of commodities." Dkt. 29 at 6. Ergo, the absence of revenue and expenses related to the production of commodities would indicate that an entity is not engaged in farming activities. *See id.*; Dkt. 25-1 at 8.

[3] Although not discussed in the briefing, neither the WFRP Policy nor the Handbook defines the term "revenue" or "expenses" specifically and instead defines the terms "allowable revenue," "allowable expenses," "approved expenses," and "approved revenue." AR 180.

Defendants rejoin that the definition of "farm operation" is "largely directed to the reporting requirements, and it does not substantively restrict the meaning of 'farming activities.'" Dkt. 31 at 4. As proof of this, they note that the term "farm operation report" refers to "[t]he form on which you provide all required information regarding the commodities you expect to earn revenue from during the insurance period" and consists of three parts. AR 183. Defendants further argue that the terms "allowable expenses" and "allowable revenue" are largely based on tax reporting requirements and that such requirements should have no bearing on the definition of "farming activities." Dkt. 31 at 4. While Defendants are correct that the definition of "farm operation" does not go into detail regarding what is and is not "farming activity," the definition does plainly link "farming activity" with revenue and expenses. In other words, though the definition of "farm operation" includes a reporting component, the "farming activity" is the reason revenue and expenses are generated that must be reported to the IRS. The reporting requirements, accordingly, are not constricting the definition of "farming activities;" they are merely a consequence of the revenue and expenses generated by "all of the farming activities" in a farm operation. Moreover, to discount the definitions of "allowable expenses" and "allowable revenue" as based chiefly on tax reporting requirements, as Defendants suggest, ignores the rest of those definitions.

Defendants further argue that even if the term "farming activity" is linked to revenue and expenses, the definitions of "direct marketing" and "direct marketing sales records" evidence that "farming activity" broadly encompasses other aspects of a farm operation beyond the production of commodities. Dkt. 31. The WFRP Policy defines "direct marketing" and "direct marketing sales records" as follows:

> Direct marketing – Marketing commodities directly to consumers without the involvement of a third party (e.g., farmer's markets, u-pick, roadside stands, internet sales, etc.).
>
> Direct marketing sales records – Contemporaneous records that document the sale of commodities through direct marketing. If you sell a commodity through direct marketing, you must provide the contemporaneous records used to determine allowable revenue on the Schedule F farm tax form.

AR 182. "Direct marketing sales records" also refers to "allowable revenue" generated by

the sale of commodities through "direct marketing," as documented in "contemporaneous records." *Id.* "Contemporaneous records" include "written records developed at the time the event occurred, recording information such as planting of a commodity, harvested production, sale of a commodity, daily receipts, etc." AR 181. Thus, even though "direct marketing" does not involve the production of commodities, it still generates "allowable revenue" from the sale of a commodity. It follows that being engaged in "farming activities" does not necessarily require that an entity be engaged in producing commodities because other activities, like direct marketing, still generate revenue that must be reported to the IRS. *See id.*

At oral argument, Plaintiff claimed that Defendants' broad interpretation of the term "farming activities" is inconsistent with the other definitions in the WFRP Policy and the "common understanding" of what farming activity is—i.e., the production of commodities. Dkt. 32. A "farm" is commonly understood to refer to the "land and connected buildings used for agricultural purposes," while the verb "farm" means "to cultivate land; to conduct the business of farming." Farm (n.), Farm (vb.), Black's Law Dictionary (11th ed. 2019); *see also Yith v. Nielsen*, 881 F.3d 1155, 1165 (9th Cir. 2018) (holding, for purpose of statutory interpretation, courts, "[w]hen determining the plain meaning of language, . . . may consult dictionary definitions"). Yet, the dictionary definitions shed no further light on what falls under the umbrella of "farming activities" where the verb "farm" broadly refers to "cultivat[ing] the land" and "conduct[ing] the business of farming." Farm (vb.), Black's Law Dictionary (11th ed. 2019).

The Court is, therefore, unpersuaded that the plain text of the provisions at issue are clear on their face. The WFRP Policy and Handbook each fail to define the term "farming activity." Plaintiff offers a narrow interpretation of the term while Defendants offer a broad interpretation. Both appear plausible, though not compelled by the language of the Policy or Handbook. When considered in relation to the other definitions, the Court finds that the Policy and Handbook are ambiguous as to what constitutes "farming activity" or "activities." *See, e.g., George S. v. Saul*, No. 19-cv-4252, 2020 WL 6149692, at *3 (N.D. Cal. Oct. 20, 2020) (finding that where regulation failed to "squarely address whether an individual receiving retirement benefits is eligible for the PASS program," the omission rendered the regulation ambiguous on that point within the meaning

of *Kisor*); *JPM-RDP, LLC v. U.S. Dep't of Agriculture Risk Mgmt. Agency*, No. 17-cv-85, 2018 WL 1167325, at *10-11 (M.D. Fla. Mar. 6, 2018) (concluding phrase "no effective control measure exists" in 7 C.F.R. § 457.139, ¶ 11(b)(1) was not "plain and unambiguous" and applying *Auer* deference).

2. Is the Agencies' interpretation of "farming activity" reasonable?

Having determined that the term "farming activity" is ambiguous, the Court next must consider whether the Agencies' decision was reasonable. *Kisor*, 139 S. Ct. at 2415-16. "In other words, it must come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id.* at 2416. "[T]he agency's reading must fall 'within the bounds of reasonable interpretation.'" *Id.* (quoting *Arlington v. FCC*, 569 U.S. 290, 296 (2013)). The Court concludes that it does.

In Plaintiff's August 2020 Request for Interpretation, Plaintiff proposed the following example: "Entity A is not a 'farm operation' because it reports no farm activity to the IRS in the form of revenue or expenses. Moreover, Entity A is not an 'originating entity' because it physically produces no commodities. Instead, Entity A is a store-front that holds the business name and goodwill for Entity B and individual C." AR 348. Plaintiff also posited that Entity B's and Individual C's commodities are grown nominally under the name of Entity A. *Id.* From these details, the Agencies concluded, "Entity A, holding the business name and goodwill of Entity B and individual C (i.e., marketing and selling the commodities produced), is the pass-through entity. Although Entity B may be considered an originating pass-through entity with regards to itself, it reports a fractional share of the general partnership (Entity A)." AR 562. Under the WFRP Policy, a "pass-through entity" is an entity that reports to the IRS but does not pay taxes on portions of the revenue, instead passing it to each individual owner who then pays income tax on their portion of the revenue from the business." AR 184.

The Agencies reasonably concluded that Entity A's acts of holding the business name and goodwill of Entity B and Individual C and marketing and selling the commodities they produce qualify as "farming activities." Although Plaintiff stresses that Entity A is a mere "store-front," Dkt. 29-1 at 2, Plaintiff's example states that Entity A is a partnership, not a mere fictitious

business name for Entity B or Individual C, that holds assets and markets and sells the commodities produced by its general partners. *See* AR 347-48. As set forth above, "farming activity" is not defined in the WFRP Policy or the Handbook. In light of the Policy's other definitions, particularly the definitions of "direct marketing" and "direct marketing sales records," the Agencies could reasonably conclude that Entity A is engaged in a form of direct marketing and selling on behalf of Entity B and Individual C and that it passes the profits from the sale of commodities back to Entity B and Individual C. AR 182. Defendants note that the Policy and Handbook contrast the "verifiable records" requirements for transactions with third parties with those for "direct marketing sales records." *See* AR 47-48, 182, 186. "Verifiable records" include "[c]ontemporaneous records provided from a disinterested third party, such as records from a warehouse, processor, packer, broker, input vendor, etc., or by measurement of farm-stored commodities." AR 186. Based on Plaintiff's example, Entity A is not a disinterested third party because it (1) markets and sells commodities produced by its general partners and (2) holds the business name and goodwill for its general partners. *See* AR 347-48. Thus, in the absence of facts to show that a third-party vendor sells commodities for Entity B and Individual C, the Agencies could reasonably find that, in Plaintiff's example, Entity A is engaged in a form of direct marketing, such as marketing and selling through a farmer's market or roadside stand. AR 182, 562. Further, the Agencies could reasonably find that Entity A's acts of marketing and selling commodities on behalf of its general partners, coupled with the fact that Entity A holds the business name and goodwill for those same partners, demonstrate that Entity A is engaged in farming activity, thus precluding Entity B and Individual C from meeting the eligibility requirement set forth in Section 3(a)(4) of the Policy.

In sum, the Court finds that the Agencies' interpretation of the WFRP Policy and Handbook was reasonable and, further, that the Agencies reasonably concluded that Entity A was engaged in "farming activities" under the hypothetical Plaintiff offered at AR 347-48.

3. Is the Agencies' interpretation entitled to controlling weight?

The Court next must "make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Kisor*, 139 S. Ct. at 2416. To this

end, the interpretation must (1) reflect the agency's authoritative or official position, (2) implicate the agency's substantive expertise, and (3) reflect fair and considered judgment. *Id.* at 2416-18. The Court finds these criteria satisfied.

First, Defendants' interpretations reflect the USDA's official position. As set forth above, M&T Farms timely appealed the Agencies' interpretation to the NAD. AR 581-91. On March 4, 2021, the NAD found that the Agencies' September 15, 2020 interpretations were "not appealable because they are matters of general applicability." AR 577-79. Plaintiff does not dispute that it has exhausted its administrative remedies with respect to the Agencies' interpretations and that the interpretations, consequently, reflect the FDA's official position. *See* Dkt. 35 at 4.

Second, Defendants' interpretations implicate the Agencies' substantive expertise. Congress established the FCIC to administer crop insurance under the FCIA and established the RMA to supervise the FCIC and administer all programs authorized under the FCIC. 7 U.S.C. § 1502; 31 U.S.C. § 9101(3); 7 U.S.C. § 6933(a); 7 U.S.C. § 6933(b)(1)-(3); 7 C.F.R. § 400.701. Congress also vested the FCIC with the authority to issue regulations and interpret the FCIA or any regulations the FCIC might issue. 7 U.S.C. §§ 1506(o), 1506(r). As relevant here, the FCIC has issued regulations providing that it will likewise issue interpretations "of a policy provision not codified in the Code of Federal Regulations or any procedure used in the administration of the Federal crop insurance program." 7 C.F.R. § 400.765. The WFRP Policy at issue in this case is a pilot policy reinsured by the FCIC that is not codified in the Code of Federal Regulations. AR 11, 178. Although the basic issue here—what constitutes "farming activity"—is seemingly prosaic, it nonetheless implicates the Agencies' specific area of expertise in administering the complexities of the WFRP Pilot Policy and the circumstances under which an entity qualifies for coverage under that Policy. *See Kisor*, 139 S.Ct. at 2417; *Bottoms Farm*, 895 F.3d at 1073-74.

Finally, the interpretations reflect Defendants' fair and considered judgment and are not "convenient litigating position[s]" or "post hoc rationalization[ns]." *Kisor*, 139 S.Ct. at 2417 (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)). The interpretations reflect that the FCIC carefully considered M&T Farms' request and worked directly with the "facts" presented in the hypothetical regarding Entities A and B and Individual C.

In sum, the *Kisor* framework being satisfied, the Court finds that *Auer* deference is warranted.

B. The Agencies' Decision Was Not Arbitrary and Capricious.

Having found that Defendants' interpretations of the WFRP Policy and Handbook provisions at issue are entitled to *Auer* deference, the Court must defer to those interpretations "unless 'plainly erroneous or inconsistent with the regulation.'" *Bassiri*, 463 F.3d at 930. As discussed extensively in Section IV above, the Court finds Defendants' interpretations neither plainly erroneous nor inconsistent with the other WFRP Policy and Handbook provisions. Having concluded that Entity A was engaged in "farming activities," Defendants' conclusion that neither Entity B nor Individual C met the eligibility requirements under § 3(a)(4) is not contrary to the WFRP Policy or Handbook. Section 3(a)(4) provides:

> 3. Qualifying Person Criteria and Insurance Eligibility
> (a) To be considered a qualifying person, you must:
> (4) The Schedule F, or Substitute Schedule F, must cover 100 percent of your farm operation. (A tax entity which reports a fractional share of farming activity conducted by a partnership, corporation or any other "joint venture" does not qualify for WFRP coverage on the fractional share of farming activity).

AR 189. In Plaintiff's hypothetical, Entity B and Individual C, Defendants conclude, are reporting a fractional share of partnership Entity A's farming activities and therefore do not qualify for WFRP coverage on the fractional share of farming activity. AR 347-48. This conclusion follows from the plain language of the WFRP Policy and, thus, is not arbitrary.

Further, Defendants did not act arbitrarily or capriciously in interpreting "farming activity" as encompassing the activities of the partnership Entity A contained in Plaintiff's hypothetical—i.e., holding the business name and goodwill of its constituent general partners and marketing and selling their commodities under Entity A's own name. AR 347-48; AR 562. As set forth above, the Court found this interpretation reasonable given the record before the Agencies at the time the interpretations were provided and the structure and other definitions of the WFRP Policy and Handbook.

In sum, the Agencies reasonably determined that "farming activity" includes holding the

business name and goodwill, "i.e., marketing and selling the commodities produced," of a partnership's constituent general partners. This determination was not plainly erroneous or contrary to any other provision of the WFRP Policy, Handbook, or any regulation. Thus, the Court finds that the Agencies' interpretation should not be vacated on this ground.

V. CONCLUSION

For the reasons set forth above, the Court **DENIES** Plaintiff's motion for summary judgment and **GRANTS** Defendants' cross-motion for summary judgment.

SO ORDERED.

Dated: March 9, 2023

SUSAN VAN KEULEN
United States Magistrate Judge