

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 12-0123

In re: Tyson Farms, Inc.

Respondent

**Certification of Motion to the Judicial Officer**

This matter is currently before the Administrative Law Judge upon the Motion of Respondent Tyson Farms, Inc. (Tyson) asking that I separate the hearing in this action to consider jurisdictional issues separately from the merits of the Complaint and declare that the Secretary of Agriculture lacks statutory jurisdiction and authority to initiate the action which has been docketed as Docket No. 12-0123. I also had been asked to shorten the time for the Complainant to respond to the Respondent's Motion, but previously declined to do so by Order dated June 1, 2012. The Complainant since responded to the motion to bifurcate the hearing and to determine that jurisdiction is lacking, suggesting that the Motion is in essence a Motion to Dismiss which is not permissible under Section 1.143(b)(1).

Tyson advances three independent reasons for asserting that the adjudicatory proceeding is not in accordance with law:

1. Tyson contends that the Complaint seeks to sanction Tyson for engaging in conduct—the ranking of flocks of birds with different breeds in the same “tournament”—that the Secretary proposed to regulate in a recent proposed rule (amending 9 C.F.R Part 201) which Congress has prohibited any funds from being used to “implement.” Consolidated and Further Continuing Appropriations Act of 2012 (the “Agriculture

Appropriations Bill”), Publ. L. 112-55, 125 Stat.552 (Nov. 18, 2011). If Congress’s prohibition does extend to the instant administrative proceeding, Tyson argues that the Secretary’s action would violate Article I, Sections 8 and 9 of the U.S. Constitution, the Purpose Statute, 31 U.S.C. § 1301, the Antideficiency Act, 31 U.S.C. § 1341, and the Administrative Procedures Act, 5 U.S.C. § 551, *et seq.*

2. Tyson next contends that Congress has not authorized the Secretary of Agriculture to initiate administrative proceedings to adjudicate allegations of unfair and deceptive practices committed by **live poultry dealers** such as Tyson, citing *Jackson v. Swift Eckrich, Inc.*, 53 F. 3d 1452, 1456 (8<sup>th</sup> Cir. 1995) and *London v. Fieldale Farms Corp.*, 410 F. 3d 1295, 1303 (11<sup>th</sup> Cir. 2005).

3. Last, Tyson argues that even were the Secretary vested with jurisdiction to bring an action pursuant to §202 of the Packers and Stockyards Act (Act), 7 U.S.C. § 192, the Complaint in this action is fatally deficient in that it fails to plead an essential allegation that Tyson’s conduct resulted in injury or a likelihood of injury to competition.

As consideration of the question of subject matter jurisdiction appears to be squarely in conflict with the prohibition contained in Section 1.143(b)(1) of the Rules of Practice (7 C.F.R. §1.143(b)(1) precluding consideration of a Motion to Dismiss, I elect pursuant to Section 1.143(e) (7 C.F.R. §1.143(e) to certify and submit the Motion to the Secretary’s Judicial Officer to determine whether the Secretary lacks statutory jurisdiction and authority to proceed with this action on the grounds raised by Tyson.

Copies of this Certification of Motion to the Judicial Officer will be served upon the parties by the Hearing Clerk.

June 19, 2012

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Peter M. Davenport  
Chief Administrative Law Judge

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