

AGRICULTURE DECISIONS

Volume 73

Book Two

Part Two (P & S)

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THIS IS A COMPILATION OF DECISIONS ISSUED BY THE
SECRETARY OF AGRICULTURE AND THE COURTS
PERTAINING TO STATUTES ADMINISTERED BY THE
UNITED STATES DEPARTMENT OF AGRICULTURE

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COURT DECISION

UNITED STATES v. CUESTA.
No. 8:14-cv-995-T-33TGW.
Court Order.
Filed November 24, 2014.

[Cite as: 69 F. Supp. 3d 1296 (D.M.D. Fla. 2014)].

P&S – Dealer.

**United States District Court,
M.D. Florida,
Tampa Division.**

Court denied Defendant's Motion to Dismiss Complaint, finding that USDA was correct in its allegation that Defendant was subject to the Packers and Stockyards Act. The Court rejected Defendant's assertion that he did not satisfy the statutory definitions of a person covered by the Act and held that Defendant's buying and selling of livestock at stockyards was an activity covered by the Act.

OPINION OF THE COURT

VIRGINIA M. HERNANDEZ COVINGTON, U.S. District Judge,
delivered the opinion of the Court.

This cause [sic] is before the Court pursuant to Defendant Abe Cuesta's Motion to Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. P. 12(b)(1), filed on November 5, 2014. (Doc. # 39). Plaintiff United States of America filed a response in opposition thereto on November 18, 2014. (Doc. # 42). For the foregoing reasons, the Court denies the Motion.

I. Background

The United States, on behalf of the Secretary of Agriculture, initiated this action on April 25, 2014, alleging violations of the Packers and Stockyard Act of 1921 (the Act), as amended, 7 U.S.C. §§ 181 *et seq.*

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(Doc. # 1). In particular, the United States asserts that Cuesta violated the Act by failing to timely file his 2009 Annual Report of Dealer or Market Agency (Count I), 7 U.S.C. § 222 and 9 C.F.R. § 201.97, and for continuing to operate as a dealer with an expired registration (Count II), 7 U.S.C. § 203. On November 5, 2014, Cuesta filed the present Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1)¹ (Doc. # 39), which is now ripe for the Court's review.

II. Legal Standard

Federal courts are courts of limited jurisdiction. “[B]ecause a federal court is powerless to act beyond its statutory grant of subject matter jurisdiction, a court must zealously insure that jurisdiction exists over a case, and should itself raise the question of subject matter jurisdiction at any point in the litigation where a doubt about jurisdiction arises.” *Smith v. GTE Corp.*, 236 F.3d 1292, 1299 (11th Cir. 2001).

Motions to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) may attack jurisdiction facially or factually. *Morrison v. Amway Corp.*, 323 F.3d 920, 924 n.5 (11th Cir. 2003). When the jurisdictional attack is factual, the Court may look outside the four corners of the complaint to determine if jurisdiction exists. *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 732 (11th Cir. 1982). In a factual attack, the presumption of truthfulness afforded to a plaintiff under Fed. R. Civ. P. 12(b)(6) does not attach. *Scarfo v. Ginsberg*, 175 F.3d 957, 960 (11th Cir. 1999) (citing *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990)). Because the very power of the Court to hear the case is at issue in a Rule 12(b)(1) motion, the Court is free to weigh evidence outside the complaint. *Eaton*, 692 F.2d at 732.

III. Analysis

The Packers and Stockyard Act regulates the conduct of packers, swine dealers, live poultry dealers, stockyard owners, market agencies, and dealers, imposing certain affirmative requirements on these entities

¹ The Court notes that Cuesta filed the present Motion pursuant to Fed. R. Civ. P. 12(b)(1). Accordingly, the Court limits its analysis to this issue and declines to construe Cuesta's Motion as asserting issues that pertain to Fed. R. Civ. P. 12(b)(6).

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and proscribing certain conduct by them. *See* 7 U.S.C. §§ 181 *et seq.* The Grain Inspection, Packers and Stockyards Administration of the United States Department of Agriculture (USDA) is responsible for administering and enforcing the Act, and investigating unfair and anti-competitive practices in these markets.

By way of the present Motion, Cuesta argues that “Plaintiff fails to establish that [he] falls within the jurisdiction of the Act, making any violations of the Act inapplicable and therefore moot.” (Doc. # 39 at 6). Specifically, Cuesta contends that: (1) “he does not act in the stream of commerce” and (2) he “does not meet any of the statutory definitions of a person or entity covered by the Act.” (*Id.* at 6–7). Cuesta supports his Motion with an affidavit explaining that he “did not know [he] was required to obtain a bond because [he is] a subsistence farmer and not a commercial farmer.” (Doc. 39–1 at 2).

In response, the United States points out that, in his most recent submission to the USDA in 2009, Cuesta indicated that he purchased over \$50,000 of livestock “on a dealer basis.” (Doc. # 42 at 8; Doc. # 42–1). On January 26, 2007, the agency registered Cuesta as a dealer and assigned him a registration number. (*Id.*). The United States avers that Cuesta has provided no evidence to suggest that his activities have changed. (*Id.*). Further, irrespective of his economic activity, Cuesta's buying and selling of livestock at stockyards constitutes activity subject to regulation under the Act. (*Id.* at 10–11).

Under the Act, a “dealer” is “any person ... engaged in the business of buying or selling in commerce livestock, either on his account or as the employee or agent of the vendor or purchaser.” 7 U.S.C. § 201. With regards to the “in commerce” component, the statute sets forth the following:

[A] transaction in respect to any article shall be considered to be in commerce if such an article is part of that current of commerce usual in the livestock and meat-packing industries, whereby livestock ... are sent from one State with the expectation that they will end their transit, after purchase, in another including, in addition to cases within the above general description,

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all cases where purchase or sale is either for shipment to another State, or for slaughter of livestock within the State and the shipment outside the State of the products resulting from such slaughter.

7 U.S.C. § 183.

Upon due consideration, the Court finds that the United States has sufficiently alleged that Cuesta and his actions are subject to regulation under the Act. Therefore, the Court denies Cuesta's Motion as this Court has subject matter jurisdiction over the present action.

Accordingly, it is

ORDERED, ADJUDGED, and DECREED:

- (1) Defendant Abe Cuesta's Motion to Dismiss Plaintiff's Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) (Doc. # 39) is DENIED.
- (2) Cuesta is directed to file an answer to Plaintiff's Complaint on or before December 8, 2014.

DONE and ORDERED.

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DEPARTMENTAL DECISION

**In re: JACOB THOMPSON, d/b/a JACOB THOMPSON CATTLE
CO.**

Docket No. 12-0524.

Decision and Order.

Filed October 30, 2014.

P&S.

Jonathan D. Gordy, Esq. for Complainant.

Bradley L. Drell, Esq. for Respondent.

Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

This disciplinary proceeding was instituted under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*) [“Act”], and the regulations promulgated thereunder (9 C.F.R. § 201 *et seq.*) [“Regulations”] by a Complaint filed on July 12, 2012 by Alan R. Christian, the Deputy Administrator, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration [“GIPSA”], United States Department of Agriculture [“Complainant”]. The Complaint alleges that Jacob Thompson, doing business as Jacob Thompson Cattle Co. [“Respondent”], willfully violated the Act and Regulations.

On July 12, 2012, a copy of the Complaint and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130) [“Rules of Practice”] were sent to Respondent’s business address via certified mail; however, the Complaint was returned as “unclaimed” to the Hearing Clerk’s Office, Office of Administrative Law Judges, Department of Agriculture [“Hearing Clerk’s Office”]. On August 8, 2012, the Complaint was re-mailed to Respondent via regular mail pursuant to Section 1.147(c)(1) of the Rules of Practice. Respondent filed an Answer and Request for Oral Hearing on September 4, 2012.

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On October 23, 2012, I directed the parties to: (1) file witness and exhibit lists with the Hearing Clerk's Office; (2) exchange exhibits intended to be used at trial; (3) consult with each other concerning the expected duration of any hearing on the issues in the action and the preferred location for the hearing; and (4) provide a list of mutually agreeable hearing dates.

Complainant claimed to have not received the Exchange Order, yet filed a Motion for Hearing and Notice of Exhibit Exchange on July 3, 2013. Respondent requested and was thereafter granted an extension of time in which to file his witness and exhibit lists and to exchange exhibits.

On March 13, 2014, after re-examining the case file and being of the opinion that the matter could be resolved on cross-motions for summary judgment, I directed the filing of such cross-motions. On April 17, 2014, the parties filed a Joint Motion for Hearing and Request for Deferral of Order. A teleconference was conducted on April 21, 2014, whereupon my March 13, 2014 Order requiring cross motions for summary judgment was vacated and the matter was set for hearing in Alexandria, Louisiana on May 21, 2014. After discovering that a second action (Docket No. 14-0087) had been brought against Respondent, I consolidated the two cases (Docket No. 12-0524 and Docket No. 14-0087), cancelled the May 21, 2014 hearing, set new exchange deadlines, and indicated that a new hearing date would be scheduled at a later date.

In a demonstration of acedia, Respondent failed either to file an Answer in Docket No. 14-0087 or to effect the directed exchange, and on June 25, 2014, Complainant filed a Motion for Decision Without Hearing by Reason of Default in that action. On August 14, 2014, noting the pending motion by Complainant in Docket No. 14-0087 and the failure of Respondent to file an Answer or comply with the Exchange Order, I again directed that the parties file cross-motions for summary judgment in this action (Docket No. 12-0524). On August 25, 2014, I entered a Default Decision and Order against Respondent in Docket No. 14-0087.

Complainant filed its Motion for Summary Judgment on September 11, 2014. Respondent failed to file a cross-motion or in any other way

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respond to Complainant's motion, and the matter is presently before me for disposition.

The Summary Judgment Standard

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [“the Rules” or “Rules of Practice”] set forth at 7 C.F.R., Subpart H, apply to the adjudication of this matter. While the Rules do not specifically provide for the use or exclusion of summary judgment, the Department's Judicial Officer has consistently ruled that hearings are futile and that summary judgment is appropriate where there is no factual dispute of substance. *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987); *Animals of Montana, Inc.*, 68 Agric. Dec. 92, 104 (U.S.D.A. 2009); *Bauck*,¹ 68 Agric. Dec. 853, 858-59 (U.S.D.A. 2009).

While not an exact match, “no factual dispute of substance” may be equated with the “no genuine issue as to any material fact” language found in the Supreme Court's decision construing FED. R. CIV. P. 56 in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). *See also Massey*, 56 Agric. Dec. 1640 (U.S.D.A. 1997). An issue is “genuine” if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way, and an issue of fact is “material” if under the substantive law it is essential to proper disposition of the claim. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment, because the factual dispute must be material. *Schwartz v. Brotherhood of Maintenance Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001). The usual and primary purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

If a moving party supports its motion for summary judgment,² the burden then shifts to the non-moving party, who may not rest on mere allegation or denial in pleadings but must set forth specific facts showing

¹ *See Bauck*, 68 Agric. Dec. 853, 858-59 nn.6 & 7 (U.S.D.A. 2009) (discussing use of summary judgment in a variety of cases).

² *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

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that there is a genuine issue for trial. *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993); *T. W. Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). In providing such facts, the non-moving party must identify the facts by reference to depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials. FED. R. CIV. P. 56(c)(1); *Anderson*, 477 U.S. at 247; *see also Adler*, 144 F.3d at 671. A non-moving party cannot rely upon ignorance of facts or on speculation or suspicions, and the non-moving party may not avoid summary judgment on a hope that some issue may surface at trial. *Conaway v. Smith*, 853 F.2d. 789, 793 (10th Cir. 1988). In ruling on a motion for summary judgment, all evidence must be considered in the light most favorable to the non-moving party with all justifiable inferences to be drawn in the non-movant's favor. *Anderson*, 477 U.S. at 254; *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). In the instant case, after filing an Answer, Respondent failed to file any response whatsoever to Complainant's Motion for Summary Judgment, leaving Complainant's *prima facie* case untouched and un rebutted.

As discussed in *Anderson*, the judge's function is not to himself weigh and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 250. The standard to be used mirrors that for a directed verdict under FED. R. CIV. P. 50(a): "[T]he trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson*, 477 U.S. at 250; *see also Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 624 (1944). If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed. *Anderson*, 477 U.S. at 250-52; *Wilkerson v. McCarthy*, 336 U.S. 53, 62 (1949).

Previously it was held that if there existed what was "called a 'scintilla of evidence' in support of a case" a judge was obligated to leave that determination to a jury; however, "recent decisions of high authority have established a more reasonable rule," which establishes that in every case the question for the judge is "not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." *Improvement Co. v. Munson*, 14 Wall.

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442, 448 (1872) (footnotes omitted). While administrative proceedings typically do not have juries, the rule's application remains appropriate for a judge sitting as a fact-finder performing the same function.

Official Notice

The doctrine of judicial notice, also referred to in administrative proceedings as "official notice,"³ has some application to adjudication of the present matter as the Default Decision and Order that I entered in corresponding Docket No. 14-0087 precludes any material dispute of fact concerning jurisdiction in this action. "Section 1.141(g)(6) of the Rules of Practice (7 CFR § 1.141(g)(6)) provides that official notice shall be taken of such matters as are judicially noticed by federal courts." *W F Produce Co.*, 54 Agric. Dec. 693, 1995 WL 122034 at *5 (U.S.D.A. 1995). Federal courts take judicial notice of official court records, including bankruptcy proceedings and other cases⁴ involving "the same subject matter or questions of a related nature between the same parties." *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (citing *Fletcher v. Evening Star Newspaper Co.*, 133 F.2d 395, 395 (D.C. Cir. 1942), *cert. denied*, 319 U.S. 755 (1943)); *see also Magnolia Fruit & Produce Co., Inc. v. U.S. Dep't of Agric.*, 50 Agric. Dec. 854, 860 (U.S.D.A. 1991) ("The law appears to be settled that a court may take judicial notice of other cases including the same subject matter or questions of a related nature.") (internal citations omitted). Moreover, "[j]udicially noticed facts often consist of matters of public record, *such as prior court proceedings*; administrative materials; city ordinances; or other court documents." *Lion Raisins, Inc. v. U.S. Dep't of Agric.*, 67 Agric. Dec. 1212, 1218 (U.S.D.A. 2008) (emphasis added). Plainly, it is appropriate for an administrative law judge within the Department to take official notice of the facts found in a related case that involved the same parties, subject matter, and any issues as the case before him.

³ *S W F Produce Co.*, 54 Agric. Dec. 693, 1995 WL 122034 at *5, n.1 (U.S.D.A. 1995).

⁴ Federal courts also "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *Lion Raisins, Inc. v. U.S. Dep't of Agric.*, 67 Agric. Dec. 1212, 1218 (U.S.D.A. 2008) (citing *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (quoting *St. Louis Baptiste Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979)).

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Discussion

Respondent's Answer admitted Paragraph I(a), which related to Respondent's identity as an individual and his business address. Without identifying specific transactions, Respondent denied the allegations of Paragraph I(b) as written, indicating that during some of the times mentioned in the Complaint he was working for his father and not buying for his own account. *See* Answer ¶ I(b). Paradoxically, in answering the allegations of Paragraph I(c), he admitted the significant portion of the allegations of Paragraph I(b) of being registered, asserting that he had filed his annual report with the Denver Office of the Packers and Stockyards Program and denying that his registration had expired. *See* Answer ¶ I(c). The uncontested documentary evidence reflects applications for registration dated May 27, 2003 (CX-1 at 1 & 2) and April 9, 2010 (CX-1 at 2- 4). The record further indicates that although Respondent eventually filed an annual report for the year ending December 31, 2008, his filing for that year was not timely (CX-3).

Paragraph II of the Complaint alleges that during the period February 24, 2010 through June 28, 2010: (1) Respondent issued 40 checks,⁵ in a total amount of over \$1,300,000.00,⁶ to Southeast Mississippi Livestock of Hattiesburg, Mississippi and to Livestock Producers Association of Tylertown, Mississippi in purported payment of livestock purchases, which were returned unpaid by the bank upon which they were drawn by reason of insufficient funds in the account; (2) Respondent made an additional purchase from Livestock Producers Association on June 29, 2010, and failed to pay when due the full purchase price of livestock in an amount of over \$750,000.00 (CX-23); and (3) as of October 26, 2010, Respondent had failed to make full payment for two of his purchases in a total amount of over \$50,000.00. With some variances that are not truly material to the ultimate findings as to whether violations were committed, Complainant has established each of these allegations. As to the first allegation, copies of 19 NSF checks (rather than the 40 alleged) totaling \$1,393,706.30 (rather than "over \$1,300,000") are contained in

⁵ Complainant's exhibits relied upon in support of its motion for summary judgment contain 19 NSF checks for the period March 1, 2010 through June 28, 2010 (CX 5-22).

⁶ The total of the above checks amounts to \$1,393,706.30.

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Complainant's exhibits as Exhibits CX-5 through 22.⁷ Details of Respondent's purchase of livestock on June 29, 2010 in the amount of \$73,125.49 (plus commission of \$1,000.00) from Livestock Producers Association is found in CX-23. Payment for that lot of cattle was posted on July 2, 2014; however, the check tendered in payment was returned by Respondent's bank on July 8, 2010. After considering the evidence, I will find that the purchase of livestock made on June 29, 2010 in the amount of \$74,125.49 (rather than the \$750,000.00 alleged) was not paid in full when due (CX-23). That same exhibit reflects a still unpaid balance of \$17,673.88 (*Id.*). Respondent's Answer admits unpaid invoices for the purchase of cattle totaling approximately \$47,000.00.

In his Answer, Respondent indicates without further specificity that during some of the times alleged in the Complaint that he was not buying livestock on his own account, but rather was working for his father. He also asserts that the NSF checks (all of which were for purchases made by Respondent and paid from accounts bearing his name) were "markers" and that he had a credit agreement with Southeast Mississippi Livestock of Hattiesburg, Mississippi. The record does contain an agreement with that market dated December 31, 2008 which provided for payment to be made within seven days from delivery of the livestock. [R-6]. The agreement purports to be signed by Joe Johnson, the Manager of Southeast Mississippi Livestock of Hattiesburg, Mississippi and was to remain in effect until cancelled in writing (*Id.*) The record contains an affidavit from Joe Johnson that without denying the existence of the document advanced by Respondent or producing evidence of its being cancelled in writing denied the existence of any credit agreement "in force" and considered Jacob Thompson to be a cash customer (Aff. of Joe Johnson at 2). Given the fact that so many of Respondent's checks were presented for payment and were not honored, I am inclined to accept Johnson's affidavit as accurate and am disinclined to believe that any agreement would continue to remain in force given Respondent's record of chronic non-payment and issuance of NSF checks.

Paragraph III of the Complaint alleges that: (1) Respondent was notified by letter dated July 27, 2010 that he was operating subject to the

⁷ Additional NSF checks are contained in Respondent's Exhibits filed with the Hearing Clerk on September 27, 2013 as well as multiple NSF Notices from his bank during the period alleged (R-8 through R-11).

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Packers and Stockyards Act but did not have a sufficient bond or bond equivalent in the amount of \$65,000.00;⁸ and (2) Respondent continued to purchase and sell livestock for his own account or on the account of others after the effective date of this notice, and, specifically, purchased 138 head of livestock for \$52,801.72 on December 1, 2012⁹ from Red River Livestock, LLC of Coushatta, LA and selling 5 head of livestock on December 3, 2010 and 17 head of livestock on December 6, 2010 to San Angelo Packing Co. of Pitkin, LA for a total of \$7,338.70. The letter notifying the Respondent of the need for the required bond is found as CX-2 and his continued regulated activity without the bond is established in CX-28.

The factual allegations regarding Respondent's registration status in the present Complaint differ slightly from those of the subsequent Complaint filed in Docket No. 14-0087.¹⁰ The record in this action contains an Application for Registration dated May 2, 2003 which was accepted by GIPSA on May 27, 2003 and assigned Registration No. 2879093 (CX-1). A subsequent application which appears in the record is dated April 9, 2010 (*Id.*) On that application form, the box indicating that the application is a renewal (which is completed by GIPSA) is not checked and the form then in use no longer contained a Registration Number, but Respondent's Annual Report of Dealer or Market Agency Buying on Commission for the period January 1, 2010 through May 7, 2010 indicates that the report was filed by the same organization type as the previous year and that the business is neither owned nor controlled by another business entity (R-2).

⁸ The only bond that appears in the record is one issued by the Platte River Insurance Company for the Respondent which was in the amount of \$15,000 and which was effective as of February 17, 2012 (R-5).

⁹ Paragraph III (b) of the Complaint alleges that Respondent purchased 138 head of livestock from Red River Livestock, LLC on December 1, 2012. This date appears to be a typographic error as Complainant's Exhibit CX-28 indicates that Respondent purchased 138 head of livestock from Red River Livestock, LLC on December 1, 2010 (CX-28 at 4-28).

¹⁰ In the present case (Docket No. 12-0527), I conclude that Respondent was registered as a dealer with the Packers and Stockyards Program at the time of violations, each of which occurred in 2010; however, in Docket No. 14-0087, Respondent's registration had expired on May 17, 2012 prior to the violations there.

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Findings of Fact

1. Respondent Jacob Thompson, doing business as Jacob Thompson Cattle Co., is an individual whose last known business address is in Carthage, Texas (CX-1 at 1; Answer ¶ I(a)).
2. At all times material herein, Respondent was engaged in the business of buying and selling livestock in commerce for his own account or the account of others and buying livestock in commerce on a commission basis (CX-1, 5-28; R-2).
3. During the period of March 1, 2010 through June 28, 2010, Respondent issued at least 19 checks, in a total amount of \$1,393,706.30, to Southeast Mississippi Livestock of Hattiesburg, Mississippi and Livestock Producers Association of Tylertown, Mississippi (CX-5-22) for cash livestock purchases¹¹ that were returned unpaid by the bank upon which they were drawn to pay them when presented.¹²
4. Respondent made an additional purchase from Livestock Producers Association on June 29, 2010, and failed to pay when due the full purchase price of livestock in an amount of \$74,125.49 (CX-23).
5. As of September 4, 2012, Respondent admitted failing to make full payment for purchases of livestock from those livestock sellers in a total amount of over \$47,000.00 (Answer ¶¶ II(a),(b)).
6. By letter dated July 27, 2010, Respondent was notified by a “Notice of Default Registration/Bonding” that he was operating subject to the Packers and Stockyards Act without having a sufficient bond or bond equivalent in the amount of \$65,000.00 (CX-2).
7. Respondent continued to buy and sell livestock for his own account or the account of others after the effective date of the “Notice of Default Registration/Bonding.”

¹¹ Aff. of Mike Pigott, p. 2; Aff. of Joe Johnson at 2.

¹² The dates alleged in the Complaint cover the period February 24 to June 28, 2010 and the issuance of 40 checks; however, the evidence of record establishes 19 checks issued between the dates of March 1 to June 28, 2010 (CX-5-22).

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8. On December 1, 2010, Respondent purchased 138 head of livestock from Red River Livestock, LLC of Coushatta, LA for \$52,801.72 (CX-28 at 4).
9. On December 3, 2010 and December 6, 2010, Respondent sold 22 head of livestock to San Angelo Packing Co. of Pitkin, LA for a total of \$7,338.70 (CX-28 at 1-3).

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Respondent has willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b) and Sections 201.29, 201.30, and 201.43 of the Regulations. (9 C.F.R. §§ 201.29, 201.30, and 201.43).

ORDER

1. Respondent shall cease and desist from:
 - a. Issuing checks in purported payment of livestock purchases without having and maintaining sufficient funds on deposit and available in the account upon which such checks are drawn to pay when presented; and
 - b. Failing to pay, when due, the full purchase price for livestock.
2. Respondent is prohibited from registering to engage in business subject to the Act for a period of five (5) years, to commence on the effective date of this Order. After the expiration of this five (5) year time period, Respondent may submit an application for registration to the Packers and Stockyards Program along with the required bond or bond equivalent. Pursuant to Section 303 of the Act (7 U.S.C. § 203), Respondent is prohibited from engaging in business subject to the Act in any capacity for which registration is required under the Act without being registered with the Packers and Stockyards Program.
3. This Decision and Order shall become final and effective without

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further proceedings thirty-five (35) days after service upon Respondent, unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).

Copies of this Order will be served upon the parties by the Hearing Clerk.

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MISCELLANEOUS ORDERS & DISMISSALS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders & Dismissals] with the sparse case citation but without the body of the order. Miscellaneous Orders & Dismissals (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions/].

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**In re: WEST COAST COMMODITIES, LLC, d/b/a M. PARTLOW CO.; AND MICHAEL PAUL PARTLOW.
Docket No. 12-0475.
Miscellaneous Order.
Filed September 18, 2014.**

P&S – Extension of time – Finality of ALJ decision – Service.

Darlene M. Bolinger, Esq. for Complainant.
Michael Paul Partlow for Respondents.
Initial Decision and Order by Janice K. Bullard, Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER DENYING LATE APPEAL

Procedural History

Alan R. Christian, Deputy Administrator, Packers and Stockyard Program, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on June 15, 2012. The Deputy Administrator instituted the proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b) [hereinafter the Packers and Stockyards Act]; the regulations issued pursuant to the Packers and Stockyards Act (9 C.F.R. pt. 201) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

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The Deputy Administrator alleges, during the period August 9, 2010, through August 4, 2011, West Coast Commodities, LLC, and Michael Paul Partlow willfully violated the Packers and Stockyards Act and the Regulations.¹ On June 22, 2012, the Hearing Clerk served West Coast Commodities, LLC, and Mr. Partlow with the Complaint at their business address, 1720 SW 4th Avenue, Portland, Oregon 97201.² On July 16, 2012, West Coast Commodities, LLC, and Mr. Partlow filed an Answer in which they denied the material allegations of the Complaint.

On December 21, 2012, Mr. Partlow sent an e-mail to Marilyn Kennedy, a legal secretary in the Office of Administrative Law Judges, United States Department of Agriculture, stating all correspondence regarding this proceeding should be sent to:

West Coast Commodities, LLC
Mike Partlow
8150 SW Barnes Rd., E308
Portland, OR 97225

At no time thereafter has Mr. Partlow supplied a different address for either West Coast Commodities, LLC, or himself.

Mr. Partlow's December 21, 2012 e-mail to Ms. Kennedy was filed with the Hearing Clerk on January 24, 2013, and on January 25, 2013, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] issued an Order Setting Time and Place of Hearing stating, as follows:

In addition, the record is hereby corrected to note Respondent's [sic] correct address:

West Coast Commodities, LLC
Mike Partlow
150 SW Barnes Rd., E308
Portland, OR 97225

¹ Compl. ¶¶ III-VII at 3-4.

² (West Coast Commodities, LLC) United States Postal Service Domestic Return Receipt for Article Number 7005 1160 0002 7836 8187; (Mr. Partlow) United States Postal Service Domestic Return Receipt for Article Number 7005 1160 0002 7836 6909.

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On June 13, 2013, the ALJ conducted a hearing by audiovisual connection between Washington, DC, Portland, Oregon, and Denver, Colorado. Mr. Partlow represented himself and West Coast Commodities, LLC. Darlene M. Bolinger, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Deputy Administrator.

On November 4, 2013, after the parties filed post-hearing briefs, the ALJ issued a Decision and Order: (1) concluding West Coast Commodities, LLC, and Mr. Partlow violated the Packers and Stockyards Act and the Regulations; (2) ordering West Coast Commodities, LLC, and Mr. Partlow to cease and desist from violating the Packers and Stockyards Act and the Regulations; (3) assessing West Coast Commodities, LLC, and Mr. Partlow, jointly and severally, a \$14,000 civil penalty; and (4) prohibiting West Coast Commodities, LLC, and Mr. Partlow from being registered and from engaging in any activity for which registration is required under the Packers and Stockyards Act for a period of 30 days.³

On November 6, 2013, the Hearing Clerk sent the ALJ's Decision and Order by certified mail to West Coast Commodities, LLC, 8150 SW Barnes Road, E308, Portland, Oregon 97201. While the Hearing Clerk used the incorrect zip code in West Coast Commodities, LLC's address, the United States Postal Service product and tracking information states the United States Postal Service delivered the mailing to Portland, OR 97225. J. Wannamaker signed the certified return receipt as agent for West Coast Commodities, LLC, on November 8, 2013 at the address supplied by Mr. Partlow.⁴ I find, under these circumstances, that the Hearing Clerk served the ALJ's Decision and Order on West Coast Commodities, LLC, on November 8, 2013.

The Hearing Clerk also attempted to serve Mr. Partlow on November 6, 2013, by sending the ALJ's Decision and Order by certified mail to Mr. Partlow at the first address on record, 1720 SW 4th Avenue, Portland, Oregon 97201. The United States Postal Service reported that

³ ALJ's Decision and Order at 22-25.

⁴ United States Postal Service Domestic Return Receipt for Article Number 7005 1160 0002 7837 4355.

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the November 6, 2013 mailing to Mr. Partlow containing the ALJ's Decision and Order was "Undeliverable as Addressed" and returned the mailing to the Hearing Clerk.⁵

On January 30, 2014, the Hearing Clerk sent the ALJ's Decision and Order to Mr. Partlow by certified mail to 8150 SW Barnes Road, E308, Portland, Oregon, 97201.⁶ An unidentified person, who I infer was an employee of the United States Postal Service, corrected the zip code on the envelope containing the January 30, 2014 mailing to read "97225,"⁷ and the United States Postal Service delivered the January 30, 2014 mailing to the address supplied by Mr. Partlow.

On March 12, 2014, the United States Postal Service returned the January 30, 2014, mailing containing the ALJ's Decision and Order to the Hearing Clerk marked "unclaimed."⁸ On March 25, 2014, the Hearing Clerk served the ALJ's Decision and Order on Mr. Partlow by regular mail in accordance with 7 C.F.R. § 1.147(c)(1).⁹

Counsel for the Deputy Administrator was made aware of a different address for Mr. Partlow in May 2014.¹⁰ On May 19, 2014, the Hearing Clerk served the ALJ's Decision and Order on Mr. Partlow at 1717 Southwest Park Avenue, Number 624, Portland, Oregon 97201.¹¹ However, I find that this mailing by the Hearing Clerk was unnecessary as the Hearing Clerk served West Coast Commodities, LLC, with the ALJ's Decision and Order on November 8, 2013¹² and served

⁵ United States Postal Service information regarding United States Postal Service Domestic Return Receipt for Article Number 7005 1160 0002 7837 4317.

⁶ Office of Administrative Law Judges, Hearing Clerk's Office, Document Distribution Form for United States Postal Service Domestic Return Receipt for Article Number 7012 1010 0002 0093 7159.

⁷ See the envelope relating to United States Postal Service Domestic Return Receipt for Article Number 7012 1010 0002 0093 7159.

⁸ Mem. to the File issued by Shawn Williams, Hearing Clerk, on May 6, 2014.

⁹ Mem. to the File issued by Carla M. Andrews, Assistant Hearing Clerk, on March 26, 2014.

¹⁰ E-mails from Amy Blechinger, Grain Inspection, Packers and Stockyards Administration, to Darlene Bolinger, Office of the General Counsel, dated May 12, 2014 and May 13, 2014.

¹¹ United States Postal Service Domestic Return Receipt for Article Number 7003 1010 0001 7366 7109.

¹² See *supra* note 4.

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Mr. Partlow with the ALJ's Decision and Order on March 25, 2014.¹³

On June 18, 2014, West Coast Commodities, LLC, and Mr. Partlow appealed the ALJ's Decision and Order to the Judicial Officer. On July 3, 2014, the Deputy Administrator filed Complainants Response in Opposition to Respondents' Appeal Petition and/or Motion for Reconsideration. On July 8, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Conclusions by the Judicial Officer

The Rules of Practice provide that an administrative law judge's written decision must be appealed to the Judicial Officer by filing an appeal petition with the Hearing Clerk within 30 days after service.¹⁴ The Hearing Clerk served West Coast Commodities, LLC, with the ALJ's Decision and Order on November 8, 2013¹⁵ and served Mr. Partlow with the ALJ's Decision and Order on March 25, 2014;¹⁶ therefore, West Coast Commodities, LLC, was required to file an appeal petition with the Hearing Clerk no later than December 9, 2013,¹⁷ and

¹³ See *supra* note 9.

¹⁴ 7 C.F.R. § 1.145(a).

¹⁵ See *supra* note 4.

¹⁶ See *supra* note 9.

¹⁷ Thirty days after November 8, 2013 was December 8, 2013. However, December 8, 2013 was a Sunday. The Rules of Practice provide that when the time for filing a document or paper expires on a Sunday, the time for filing shall be extended to the next business day, as follows:

§ 1.147 Filing; service; extensions of time; and computation of time.

....

(h) *Computation of time.* Saturdays, Sundays and Federal holidays shall be included in computing the time allowed for the filing of any document or paper: *Provided*, That, when such time expires on a Saturday, Sunday, or Federal holiday, such period shall be extended to include the next following business day.

7 C.F.R. § 1.147(h). The next business day after Sunday, December 8, 2013 was Monday, December 9, 2013. Therefore, West Coast Commodities, LLC, was required to file its appeal petition no later than December 9, 2013.

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Mr. Partlow was required to file an appeal petition with the Hearing Clerk no later than April 24, 2014. Instead, West Coast Commodities, LLC, and Mr. Partlow filed their appeal petition with the Hearing Clerk on June 18, 2014. Therefore, I find West Coast Commodities, LLC, and Mr. Partlow's appeal petition is late-filed.

Moreover, the Judicial Officer has continuously and consistently held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an administrative law judge's decision becomes final.¹⁸ The ALJ's Decision and Order became final 35 days after the Hearing Clerk served West Coast Commodities, LLC, and Mr. Partlow with the ALJ's Decision and Order.¹⁹ Thus, the ALJ's Decision and Order became final as to West Coast Commodities, LLC,

¹⁸ See, e.g., *Piedmont Livestock, Inc.*, 72 Agric. Dec. 422 (U.S.D.A. 2013) (Order Den. Late Appeal) (dismissing *Piedmont Livestock, Inc.*'s appeal petition filed three days after the chief administrative law judge's decision became final and dismissing *Joseph Ray Jones*'s appeal petition filed one day after the chief administrative law judge's decision became final); *Custom Cuts, Inc.*, 72 Agric. Dec. 484 (U.S.D.A. 2013) (Order Den. Late Appeal) (dismissing the respondents' appeal petition filed one month 27 days after the chief administrative law judge's decision became final); *Self*, 71 Agric. Dec. 1169 (U.S.D.A. 2012) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 18 days after the chief administrative law judge's decision became final); *Mays*, 69 Agric. Dec. 631 (U.S.D.A. 2010) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 1 week after the administrative law judge's decision became final); *Noble*, 68 Agric. Dec. 1060 (U.S.D.A. 2009) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed one day after the administrative law judge's decision became final); *Edwards*, 66 Agric. Dec. 1362 (U.S.D.A. 2007) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed six days after the administrative law judge's decision became final); *Tung Wan Co.*, 66 Agric. Dec. 939 (U.S.D.A. 2007) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 41 days after the chief administrative law judge's decision became final); *Gray*, 64 Agric. Dec. 1699 (U.S.D.A. 2005) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 1 day after the chief administrative law judge's decision became final); *Mokos*, 64 Agric. Dec. 1647 (U.S.D.A. 2005) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 6 days after the chief administrative law judge's decision became final); *Blackstock*, 63 Agric. Dec. 818 (U.S.D.A. 2004) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed two days after the administrative law judge's decision became final); *Gilbert*, 63 Agric. Dec. 807 (U.S.D.A. 2004) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed one day after the administrative law judge's decision became final); *Nunez*, 63 Agric. Dec. 766 (U.S.D.A. 2004) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became final).

¹⁹ See 7 C.F.R. § 1.142(c)(4); ALJ's Decision and Order at 25.

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on December 13, 2013 and became final as to Mr. Partlow on April 29, 2014. West Coast Commodities, LLC, and Mr. Partlow filed their appeal petition on June 18, 2014. Therefore, I have no jurisdiction to hear West Coast Commodities, LLC, and Mr. Partlow's appeal petition.

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing an appeal petition after an administrative law judge's decision has become final. The absence of such a provision in the Rules of Practice emphasizes that jurisdiction has not been granted to the Judicial Officer to extend the time for filing an appeal after an administrative law judge's decision has become final. Therefore, under the Rules of Practice, I cannot extend the time for West Coast Commodities, LLC, and Mr. Partlow's filing an appeal petition after the ALJ's Decision and Order became final. Accordingly, West Coast Commodities, LLC, and Mr. Partlow's appeal petition must be denied.

For the foregoing reasons, the following Order is issued.

ORDER

1. West Coast Commodities, LLC and Mr. Partlow's appeal petition, filed June 18, 2014, is denied.
2. The ALJ's Decision and Order, filed November 4, 2013, is the final decision in this proceeding.

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Default Decisions
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DEFAULT DECISIONS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Decisions and Orders] with the sparse case citation but without the body of the order. Default Decisions and Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions/].

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HATCH AUCTION, INC., d/b/a COW HOUSE AUCTION.

Docket No. 14-0091.

Default Decision and Order.

Filed July 1, 2014.

RAYMOND L. HATCH.

Docket No. 14-0092.

Default Decision and Order.

Filed July 1, 2014.

JACOB THOMPSON, d/b/a JACOB THOMPSON CATTLE CO.

Docket No. 14-0087.

Default Decision and Order.

Filed August 25, 2014.

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CONSENT DECISIONS

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Powell Livestock, Inc.

Docket No. 13-0318.

Filed July 14, 2014.

Hugh B. Powell, Jr.

Docket No. 13-0319.

Filed July 14, 2014.

David Shaw.

Docket No. 14-0155.

Filed July 14, 2014.

Donnie Miller.

Docket No. 14-0156.

Filed July 14, 2014.

T&J Meat Packing, Inc.

Docket No. 14-0080.

Filed July 18, 2014.

Faron Helvey.

Docket No. D-14-0185.

Filed September 8, 2014.

Sun-Jon, Inc., D/B/A Iowa Poultry.

Docket No. 14-0183.

Filed September 19, 2014.

Keosauqua Sales Company, Inc.

Docket No. D-14-0073.

Filed August 12, 2014.

Bill Goehring.

Docket No. D-14-0074.

Filed August 12, 2014.

Consent Decisions
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Becky Goehring.

Docket No. D-14-0075.
Filed August 12, 2014.

Barrow Land and Livestock, LLC.

Docket No. 14-0159.
Filed October 16, 2014.

Linda K. Barrow.

Docket No. 14-0160.
Filed October 16, 2014.

Dean Barrow.

Docket No. 14-0161.
Filed October 16, 2014.

Justin Barrow.

Docket No. 14-0162.
Filed October 16, 2014.

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