

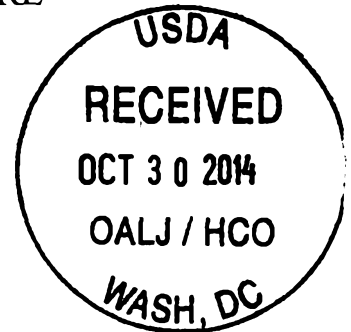
UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 12-0524

In re: Jacob Thompson,
d/b/a Jacob Thompson Cattle Co.

Respondent

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.

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 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); *In re Animals of Montana, Inc.*, 68 Agric. Dec. 92, 104 (U.S.D.A. 2009); *In re 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 *In re Massey*, 56 Agric. Dec. 1640 (U.S.D.A. 1997). An issue is

¹ See *In re 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).

“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 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

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

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. 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.” *In re: S 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)

³ *In re: 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)).

(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.

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, pp. 1 & 2] and April 9, 2010 [CX-1, pp. 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 (b) (4)

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 \$1,393706.30.

(b) (4) ; (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 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)

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].

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, p.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 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

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, pp. 4-28].

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].

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, p.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].

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.

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 purchases¹² that were returned unpaid by the bank upon which they were drawn to pay them when presented.¹³

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".

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, p. 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, pp. 1-3].

¹² Aff. of Mike Pigott, p. 2; Aff. of Joe Johnson, p. 2

¹³ 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].

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 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.

October 30, 2014

Peter M. Davenport

Peter M. Davenport
Chief Administrative Law Judge