

# **AGRICULTURE DECISIONS**

**Volume 65**

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Part Two (P & S)  
Pages 1231 - 1273



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

## AGRICULTURE DECISIONS

*Agriculture Decisions* is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in adjudicatory administrative proceedings conducted for the Department under various statutes and regulations. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the *Federal Register* and, therefore, they are not included in *Agriculture Decisions*.

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The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in *Agriculture Decisions*.

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Beginning in Volume 60, each part of *Agriculture Decisions* has all the parties for that volume, including consent decisions, listed alphabetically in a supplemental List of Decisions Reported. The Alphabetical List of Decisions Reported and the Subject Matter Index (from the beginning of the annual Volume) are included in a separate volume, entitled Part Four.

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**PACKERS AND STOCKYARDS ACT**

**DEPARTMENTAL DECISIONS**

**In re: DON LATHAM, AND POPLAR PLAINS LIVESTOCK,  
INC.**

**P & S Docket No. D-06-0011.**

**Decision and Order by Reason of Admissions**

**Filed August 24, 2006.**

**PS – Admission – Willful – Insufficient funds – Payment, late.**

Ruben Rudolph for Complainant.

Glenn Harris, Jr. for Respondent.

*Decision and Order by Administrative Law Judge Jill S. Clifton.*

**Decision Summary**

[1] This case can be decided based on the admissions within the Answer, without a hearing. The Respondents, during 2002, did violate the Packers and Stockyards Act, 1921, 7 U.S.C. § 181 *et seq.* (frequently herein, “the Act”). The Respondents’ violations were “willful”: violations of the Act require no evil intent, no intentional wrongdoing, but merely the intent to act, such as intentionally writing checks to pay for livestock - - without sufficient funds in the account to pay such checks; or intentionally making livestock purchases - - that were paid late, or never paid at all. *In re Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co., James L. Breeding, and Byron E. Thoreson*, 59 Agric. Dec. 299 (2000).

**Parties and Counsel**

[2] The Complainant is the Administrator, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture (frequently herein “GIPSA” or “the Complainant”).

[3] Rubén D. Rudolph Jr., Esq., with the Office of the General Counsel, Trade Practices Division, United States Department of Agriculture, Washington, D.C. 20250, represents the Complainant (GIPSA).

[4] The two Respondents are Respondent Don Latham (frequently herein “Respondent Latham” or “the individual Respondent”), and Respondent Poplar Plains Livestock, Inc., a Kentucky corporation (frequently herein “Respondent Poplar” or “the corporate Respondent”). “The Respondents” refers to both Respondents (the individual Respondent and the corporate Respondent), collectively.

[5] Glennis R. Harris, Jr., Esq., 244-A East Water Street, Flemingsburg, Kentucky 41041, represents both Respondents.

#### **Procedural History**

[6] The Complaint, filed on February 22, 2006, alleged that the Respondents wilfully violated the Packers and Stockyards Act, 1921, 7 U.S.C. § 181 *et seq.* The Complaint alleged that Respondent Poplar, under the management, direction and control of Respondent Latham, failed to pay, when due, the full purchase prices of livestock, totaling \$188,544.76. The Complaint alleged that, of the \$188,544.76 Respondents failed to pay when due, \$132,293.84 remained unpaid as of the date of the issuance of the Complaint.

[7] The Complaint alleged that Respondent Poplar, under the management, direction and control of Respondent Latham, issued two checks in payment for livestock purchases which were returned unpaid by the bank upon which they were drawn, because Respondent Poplar did not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay such checks when presented.

[8] The Respondents filed an Answer and requested an oral hearing and the opportunity to review and present evidence as well as provide testimony and cross-examine witnesses.

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[9] The Answer, filed on March 20, 2006 (via facsimile initially), asserted that delayed payments and non-payments to Respondent Poplar by subsequent purchasers of livestock from Respondent Poplar were factors in Respondent Poplar's failures to pay as required. The Answer denied the amount of paid or unpaid balance, the Respondents being without sufficient knowledge to express an opinion. The Answer admitted the two returned unpaid checks and asserted that the checks were thereafter paid.

[10] The Answer vigorously opposes the *alter ego* allegations. Based merely on the admissions in the Answer, I cannot determine that issue. Whether Respondent Poplar is the *alter ego* of Respondent Latham (or *vice versa*) need not be determined for purposes of this Decision.

[11] The Respondents did not file a response to GIPSA's Motion for Decision without Hearing by Reason of Admissions, with proposed Decision and Order, filed April 21, 2006.

**Findings of Fact**

[12] Poplar Plains Livestock, Inc., is a corporation organized and existing under the laws of the Commonwealth of Kentucky, with a mailing address of Rte 1, P.O. Box 66, Flemingsburg, Kentucky 41041.

[13] Respondent Poplar, the corporate Respondent, was, at all times material herein, engaged in the business of buying and selling livestock in commerce for its own account and as a market agency to buy livestock in commerce on a commission basis, and registered with the Secretary of Agriculture as a dealer to buy and sell livestock and as a market agency to buy livestock in commerce on a commission basis.

[14] Mr. Don Latham is an individual whose business mailing address is Rte 1, P.O. Box 66, Flemingsburg, Kentucky 41041. Respondent Latham, the individual Respondent, is and at all times material herein was president, manager, and one-hundred percent shareholder of the

corporate Respondent, and responsible for the day-to-day management, direction, and control of the corporate Respondent.

[15] The corporate Respondent, under the management, direction and control of the individual Respondent, in 2002 issued two checks in payment for livestock purchases which were returned unpaid by the bank upon which they were drawn. These checks were returned because the corporate Respondent did not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay such checks when presented.

[16] The corporate Respondent, under the management, direction and control of the individual Respondent, in 2002 failed to pay, when due, the full purchase price of livestock, in an amount that clearly was more than *de minimis*.

[17] By virtue of his management, direction and control of the corporate Respondent, the individual Respondent in 2002 acted as a dealer to buy and sell livestock and consequently is subject to the Order entered herein. 7 U.S.C. § 201(d).

### **Conclusions**

[18] The Secretary of Agriculture has jurisdiction.

[19] The Respondents wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a) and 228b(a)) in 2002 by issuing checks in payment for livestock without sufficient funds on deposit and available in the account upon which such checks are drawn to pay such checks when presented, and by failing to pay, when due, the full purchase price of livestock.

### **Order**

[20] The Respondents, their agents and employees, directly or through any corporate or other device, in connection with their activities subject

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to the Packers and Stockyards Act, shall cease and desist from:

- A. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account on which the checks are drawn to pay the checks when presented;
- B. Failing to pay, when due, the full purchase price of livestock; and
- C. Failing to pay the full purchase price of livestock.

[21] The Respondents are hereby suspended as a registrant under the Act for a period of five (5) years; provided, however, that upon application to Packers and Stockyards Programs, a supplemental order may be issued terminating the suspension of the Respondents at any time after one (1) year upon demonstration by the Respondents that they are in full compliance with the Act; and provided further, that this Order may be modified upon application to Packers and Stockyards Programs to permit the individual Respondent's salaried employment by another registrant or a packer after the expiration of one (1) year of suspension upon demonstration of circumstances warranting modification of this Order.

[22] The provisions of this Order shall become effective on the sixth (6th) day after this Decision and Order becomes final. (*See next paragraph.*)

**Finality**

[23] This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties.

\* \* \*

**APPENDIX A****7 C.F.R.:****TITLE 7—AGRICULTURE****SUBTITLE A—OFFICE OF THE SECRETARY OF  
AGRICULTURE****PART 1—ADMINISTRATIVE REGULATIONS**

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**SUBPART H—RULES OF PRACTICE GOVERNING  
FORMAL****ADJUDICATORY PROCEEDINGS INSTITUTED BY THE  
SECRETARY UNDER****VARIOUS STATUTES**

...

**§ 1.145 Appeal to Judicial Officer.**

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in

§ 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by

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a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145

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**In re: NICHOLAS MEAT PACKING AND EUGENE A. NICHOLAS.**

**P. & S. Docket No. D-06-0017.**

**Decision and Order by Reason of Admissions.**

**Filed December 29, 2006.**

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AND EUGENE A NICHOLAS  
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**PS – Willful – Failure to pay when due – Penalty, inability to pay.**

Jonathan Gordy for Complainant.

William Knecht for Respondent.

*Decision and Order by Administrative Law Judge Jill S. Clifton.*

The Complaint and Notice of Hearing (“Complaint”), filed on April 27, 2006, alleged that the Respondents willfully violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229) (“the Act”).

**Parties and Counsel**

The Complainant is the Administrator, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture (“Complainant” or “GIPSA”). Jonathan D. Gordy, Esq., with the Office of the General Counsel, Trade Practices Division, United States Department of Agriculture, South Building Room 2309, 1400 Independence Avenue, SW, Washington, D.C. 20250-1413, represents the Complainant.

The two Respondents are Respondent Nicholas Meat Packing, also known as Nicholas Meat Packing Co. (“Respondent Nicholas Co.”) and Respondent Eugene A. Nicholas (“Respondent Nicholas”), referred to collectively as “the Respondents.” William L. Knecht, Esq., with the McCormick Law Firm, 835 W. Fourth Street, P.O. Box 577, Williamsport, Pennsylvania 17703, represents the Respondents.

**Procedural History**

The Complainant filed a “Motion for Decision Without Hearing,” which was accompanied by a proposed “Decision Without Hearing Based on Admissions,” on November 16, 2006. The Respondents did not respond to the Complainant’s Motion. Upon careful consideration of the Complaint and Answer, I conclude that this case can be decided without further proceeding or hearing, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) (Rules of Practice Governing

Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes, 7 C.F.R. §§ 1.130-1.151).

The Complaint alleged, among other things, that during the period December 9, 2003 through January 8, 2004, Respondents failed to pay the full purchase price, when due, for livestock that Respondents purchased in interstate commerce from twelve sellers in nineteen transactions. (*See* Complaint ¶ II.)

The Respondents' Answer, timely filed June 1, 2006, admitted the Complaint ¶ II. and the jurisdictional allegations of the Complaint. (*See* Answer ¶¶ I, II.) The Respondents' Answer requested that the Complaint be dismissed, and if not, that the Respondents be provided with a hearing on the merits of the Complaint. The Respondents' Answer denied that Respondent Nicholas was the alter ego of Respondent Nicholas Co. as alleged in the Complaint ¶ III. (Answer ¶ III.)

The Respondents' Answer also denied that the Respondents had committed willful violations of the Act:

Denied. It is specifically denied that based upon the facts alleged in paragraph II of this Complaint, that the Respondents willfully violated Sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b. To the contrary, the dates of payments with respect to the respective transactions were within the ordinary course of business dealings and verbal agreements between the Respondents and the various sellers identified in Paragraph II of Plaintiff's Complaint.

By way of further Answer, and in the alternative, it is averred that any delays in payment, if any, that were not in the ordinary course of business, were not as a result of a willful intention to violate the subject Act recited in Paragraph III of Plaintiff's Complaint, but rather would have been due to circumstances beyond Respondents' reasonable control.

By way of further Answer, it is averred that all of the sellers identified in paragraph II of Plaintiff's Complaint were in fact paid in full and are not now currently owed any money by Respondents.

By way of further Answer, on July 10, 2005, the Respondents' place of business was destroyed by a devastating fire resulting in

the Respondents going out of business.

As a result of the fire, the Respondents were required to and in fact did surrender their license to operate under the Packers and Stockyards Act of 1921 and also at the request of the USDA, the Respondents' bond was surrendered and cancelled.

(Answer ¶ III.)

The foregoing reference to Respondents' license is unclear.<sup>1</sup> The Respondents' Answer asserts further, with supporting detail, that "To assess a fine or penalty under the circumstances set forth above would be inequitable, unfair, inappropriate and not warranted since the Respondent, Nicholas Meat Packing Co ceased operations on July 10, 2005 as a result of the fire and has no financial ability or intention to resume business operations and all sellers were paid in full."

The detail in Respondents' Answer includes the assertion that Respondent Nicholas Co. "has absolutely no resources from which to pay any fines or penalties if any should be assessed . . ." and the assertion that Respondent Nicholas "suffered a severe financial loss as a result of the aforesaid fire of July 10, 2005 because of the inadequacy of insurance proceeds and the personal guarantees of business debt which he has had to honor. The assessment of any further fine or penalty arising out of the facts alleged in this Complaint would cause the Respondent, Eugene A. Nicholas, additional significant financial hardship."

### **Findings of Fact**

1. Respondent Nicholas Meat Packing, also known as Nicholas Meat Packing Co., was a corporation incorporated and doing business in the Commonwealth of Pennsylvania, with a mailing address of P.O. Box 95, Loganton, Pennsylvania, and was, at all times material to this Decision:

- a. engaged in the business of purchasing livestock in commerce for the purpose of slaughter and of manufacturing or preparing

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<sup>1</sup> The "license" to which Respondents refer to is unclear, because there is no requirement in the Act that packers be licensed or registered.

meats or meat food products for sale or shipment in commerce;  
and

b. a packer within the meaning of and subject to the provisions of the Act.

2. Respondent Eugene A. Nicholas is an individual whose business address is P.O. Box 95, Loganton, Pennsylvania, and who was, at all times material to this Decision:

a. President and owner of 100% of the issued stock of Respondent Nicholas Co., and responsible for the management, direction, and control of Respondent Nicholas; and

b. A packer within the meaning of and subject to the provisions of the Act.

3. During the period December 9, 2003 through January 8, 2004, the Respondents failed to pay the full purchase price, when due, for livestock that Respondents purchased in interstate commerce from twelve sellers in nineteen transactions. *See* Complaint ¶ II.

### Conclusions

1. The Secretary of Agriculture has jurisdiction.

2. The Respondents' violations of the Act were "willful" merely in the sense that the Respondents intended to do their actions (such as making livestock purchases) or their inactions (such as failing to pay when due); no evil intent, no intentional wrongdoing is required to violate the Act. *In re Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co., James L. Breeding, and Byron E. Thoreson*, 59 Agric. Dec. 299 (2000).

3. By reason of Finding of Fact 3, the Respondents willfully violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b).

4. The Complainant asks for a \$5,000.00 civil penalty, which would arise from the Respondents' violations 1-1/2 years prior to the Respondents' losses from the devastating fire. A \$5,000.00 civil penalty is a small amount, compared with what could have been imposed,

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AND EUGENE A NICHOLAS  
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particularly in light of the Secretary's prior cease and desist order.

**Order**

1. Respondent Nicholas Co. and Respondent Nicholas, their officers, directors, agents, employees, successors and assigns, directly or through any corporate or other device, in connection with all their activities subject to the Act, shall cease and desist from failing to pay the full amount of the purchase price for livestock within the time period required by the Act and the regulations promulgated under it.

2. Pursuant to section 203(b) of the Act (7 U.S.C. § 193(b)), the Respondents are jointly and severally assessed a **civil penalty** in the amount of Five Thousand dollars, **(\$5,000.00)**. The civil penalty payment instrument shall be made payable to the order of USDA-GIPSA and sent to:

USDA-GIPSA  
P.O. Box 790335  
St. Louis, Missouri 63179-0335.

Payment shall be made within 30 days from the date this Order is final and effective (see next paragraph).

**Finality**

This Decision and Order shall be final and effective without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties.

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**PACKERS AND STOCKYARDS ACT**

**MISCELLANEOUS ORDERS**

**In re: GFI AMERICA, INC., d/b/a NICOLLET CATTLE TRADING, GARY GOLDBERGER, AND NICOLLET CATTLE COMPANY, INC.**

**P. & S. Docket No. D-06-0016.**

**Order of Dismissal as to Nicollet Cattle Company, Inc.**

**Filed July 12, 2006.**

Eric Paul for Complainant.

Phillip Kunkel, Charles N. Nauen, Reed Rasmussen for Respondents.

*Order of Dismissal by Administrative Law Judge Peter M. Davenport.*

**Order of Dismissal of Notice to Show Cause as to Respondent  
Nicollet Cattle Company, Inc.**

The Complaint and Notice to Show Cause filed in the above-captioned proceeding alleged, *inter alia*, that Nicollet Cattle Company, Inc., was unfit for registration under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*). Respondent Nicollet Cattle Company, Inc., filed an answer denying that it was unfit for registration, but withdrawing its application for registration as a dealer. Accordingly, the Notice to Show Cause part of this proceeding is hereby dismissed. This dismissal is without prejudice, and Complainant may bring another Notice to Show Cause based on the same facts alleged herein in the event that Respondent Nicollet Cattle Company, Inc., files a new application for registration.

Copies of this Order of Dismissal shall be served upon the parties.

GFI AMERICA, INC.,  
d/b/a NICOLLET CATTLE TRADING, ET AL.  
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**DEFAULT DECISIONS**

**In re: GFI AMERICA, INC., d/b/a NICOLLET CATTLE  
TRADING, GARY GOLDBERGER, AND NICOLLET CATTLE  
COMPANY, INC.**

**P. & S. Docket No. D-06-0016.**

**Default Decision.**

**Filed July 12, 2006.**

**P&S – Default.**

Eric Paul for Complainant.  
Phillip Kunkel, Charles N. Nauen, Reed Rasmussen for Respondents.  
*Decision and Order by Administrative Law Judge Peter M. Davenport.*

**DECISION AND ORDER AS TO RESPONDENT GFI  
AMERICA, INC., D/B/A NICOLLET CATTLE TRADING,  
UPON ADMISSION OF FACTS BY REASON OF DEFAULT**

**Preliminary Statement**

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint and notice to show cause filed by the Administrator, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture, charging that the Respondents GFI America, Inc., d/b/a Nicollet Cattle Trading, and Gary Goldberger wilfully violated the Act; and giving Respondent Nicollet Cattle Company, Inc., an opportunity to show cause why its application for registration should not be denied.

Copies of the Complaint and Notice to Show Cause, and the Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act, were served upon Respondents. Respondents Gary Goldberger and Nicollet Cattle Company, Inc. filed an answer, and Respondent Nicollet Cattle Company, Inc., withdrew its application for registration as a dealer under the Act. Service was made on Respondent GFI America,

Inc., d/b/a Nicollet Cattle Trading, by certified mail delivered to its Chapter 11 Trustee, Mr. Phillip Kunkel, on April 24, 2006. During a subsequent telephone call, Complainant's attorney reviewed the terms of the order Complainant seeks against Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading with Mr. Kunkel; and Mr. Kunkel advised Mr. Paul that as the Chapter 11 proceeding was going to be converted into a Chapter 7 proceeding, he did not intend to file an answer on behalf of Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading. By letter dated May 5, 2006, Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading, was notified that it had failed to file an answer with the Hearing Clerk within the allotted time.

Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading, has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading's failure to file an answer, are adopted and set forth herein as findings of fact.

#### **Findings of Fact**

1. Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading, is a Minnesota corporation whose official address and registered office is 2815 Blaisdell Avenue South, Minneapolis, MN 55408, and whose business operations are now being conducted during a Chapter 11 bankruptcy proceeding by a Trustee, Phillip L. Kunkel, whose mailing address is Phillip L. Kunkel, Esq., Gray, Plant, Mooty & Bennett, P.A., 1010 West St. Germain, Suite, Suite 600, St. Cloud, MN 56301.

2. Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading, at all times material herein was:

(a) Engaged in the business of a dealer, buying and selling livestock in commerce for its own account.

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce, and as a market agency buying on commission.

3. Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading, on

GFI AMERICA, INC.,  
d/b/a NICOLLET CATTLE TRADING, ET AL.  
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or about the dates and in the transactions set forth below, purchased livestock and failed to pay the full purchase price of such livestock.

| Livestock Seller                                 | Purchase Date      | No. of Head | Livestock Amount             | Invoice Amount after deductions and additions*      | Date Payment Due per § 409(a) | Pro Rata Dealer Bond Distribution in 2006 | Amount Remaining Unpaid              |
|--|--------------------|-------------|------------------------------|---|-------------------------------|---|--------------------------------------|
| Gregory A. Jensen<br>Hamlin, IA                  | 4/18/05            | 34          | \$37,146.15                  | \$37,112.15   | 4/19/05                       | \$2,479.11                                | \$34,633.04<br>(note 1)              |
| Whempner Bros.<br>Wilmont, SD                    | 4/19/05            | 84          | \$92,278.72                  | \$92,194.72   | 4/20/05                       | \$6,158.65                                | \$86,036.07<br>(note 1)              |
| Sisseton Livestock Auction, Inc.<br>Sisseton, SD | 4/21/05<br>4/21/05 | 116<br>320  | \$148,301.52<br>\$373,474.06 | \$148,676.46<br><u>\$390,340.26</u><br>\$539,016.72 | 4/22/05<br>4/22/05            | \$36,007.25                               | (note 2)<br>(note 1)<br>\$503,009.47 |
| Francis Pravacek<br>Scotland, SD                 | 4/26/05            | 76          | \$100,206.82                 | \$100,130.82  | 4/27/05                       | \$6,688.79                                | \$93,442.03<br>(note 1)              |
| Marion Blom<br>Corsica, SD                       | 4/20/05            | 40          | \$46,811.00                  | \$46,811.00   | 4/21/05                       | \$3,127.00                                | \$43,684.00<br>(note 1)              |

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d/b/a NICOLLET CATTLE TRADING, ET AL.  
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|  |         |     |              |              |         |             |                          |
|--|---------|-----|--------------|--------------|---------|-------------|--------------------------|
| Wayne Raymond<br>Zych d/b/a W-<br>Zych Cattle Co.<br>Beardsley, MN | 4/25/05 | 216 | \$237,904.82 | \$237,688.82 | 4/26/05 | \$15,877.73 | \$221,811.09<br>(note 1) |
| Dam's Farm, Inc.<br>Hooper, NE                                     | 4/25/05 | 40  | \$46,185.02  | \$46,145.02  | 4/26/05 | \$3,082.51  | \$43,062.51<br>(note 2)  |
| Roger V. Stotts<br>Appleton, MN                                    | 4/28/05 | 213 | \$232,233.68 | \$232,020.68 | 4/29/05 | \$15,497.72 | \$216,522.96             |
| Michael<br>Currence<br>Sisseton, SD                                | 4/24/05 | 59  | \$72,524.76  | \$72,465.76  | 4/25/05 | \$4,840.75  | \$67,625.01<br>(note 1)  |
| Robert Nienow<br>Farm, Inc.<br>Mapleton, MN                        | 4/17/05 | 115 | \$140,871.75 | \$140,756.75 | 4/18/05 | \$9,410.30  | \$131,346.45             |
| Brandon O.<br>Schweigert<br>Edgely, ND                             | 4/13/05 | 2   | \$2,451.60   | \$2,449.60   | 4/14/05 | \$163.63    | \$2,285.97               |

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## PACKERS AND STOCKYARDS ACT

|   |  |                      |  |   |  |  |                                      |
|---|--|----------------------|--|---|--|--|--------------------------------------|
| South Dakota Livestock Sales Watertown, SD                              | 4/27/05                                  | 79                   | \$96,559.10  | \$100,349.10  | 4/28/05                                  | \$6,704.04                                       | \$93,645.06                          |
| <b>Livestock Seller</b>   | <b>Purchase Date</b>                     | <b>No. of Head</b>   | <b>Livestock Amount</b>                                  | <b>Invoice Amount after deductions and additions*</b>                           | <b>Date Payment Due per § 409(a)</b>     | <b>Pro Rata Dealer Bond Distribution in 2006</b> | <b>Amount Remaining Unpaid</b>       |
| Central Livestock Association, Inc. St. Paul, MN (Central Order Buyers) | 4/20/05<br>4/26/05<br>4/26/05<br>4/27/05 | 14<br>79<br>30<br>30 | \$16,307.71<br>\$88,850.15<br>\$34,838.36<br>\$35,116.37 | \$16,307.71<br>\$88,850.15<br>\$34,838.36<br><u>\$35,164.07</u><br>\$175,160.29 | 4/21/05<br>4/27/05<br>4/27/05<br>4/28/05 | \$11,700.79                                      | \$163,459.50                         |
| Holtzen Farms LTD   | 4/23/05                                  | 30                   | \$29,287.44  | \$29,287.44   | 4/25/05                                  | no bond claim filed                              | \$29,287.44                          |
| Jim & Abe Mach Sturgeon Lake, MN  | 4/24/05                                  | 35                   | \$36,654.36  | \$36,619.36   | 4/25/05                                  | \$2,446.19                                       | \$34,173.17                          |
| Fredin Brothers, Inc. Springfield, MN                                   | 4/25/05<br>4/26/05                       | 80<br>525            | \$ 96,268.22<br>\$638,606.86                             | \$ 96,178.22<br><u>\$638,071.86</u><br>\$734,250.08                             | 4/26/05<br>4/27/05                       | \$49,048.29                                      | (note 1)<br>(note 1)<br>\$685,201.79 |

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d/b/a NICOLLET CATTLE TRADING, ET AL.  
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|  |         |     |                |                |         |              |                         |
|--|---------|-----|----------------|----------------|---------|--------------|-------------------------|
| Keith J. Kvistero<br>Milan, MN   | 4/28/05 | 252 | \$267,878.05   | \$267,626.05   | 4/29/05 | \$17,877.55  | \$249,748.50            |
| Equity<br>Cooperative<br>Livestock Sales<br>Association<br>Baraboo, WI | 4/27/05 | 39  | \$43,596.33    | \$43,586.33    | 4/28/05 | \$2,912.26   | \$40,674.07<br>(note 1) |
| O&S Cattle<br>Company, Inc.<br>South St. Paul,<br>MN                   | 4/27/05 | 77  | \$89,481.97    | \$93,645.55    | 4/28/05 | \$5,977.44   | \$87,668.11<br>(note 1) |
| TOTALS:  |         |     | \$3,003,834.82 | \$3,027,316.24 |         | \$200,000.00 | \$2,827,316.24          |

\* Deductions were made for beef promotion check off, and for the sending of payment checks by Federal Express. Additions were made for buying commission and trucking obligations paid by seller on behalf of buyer and added to invoices.

Note 1 This livestock seller has also filed statutory trust and bond claims against National Beef Packing Co., claiming that Nicollet Cattle Trading was buying livestock in this transaction as an agent for National Beef Packing Co., a disclosed principal.

Note 2 This livestock seller has also filed statutory trust and bond claims against Creekstone Farms Premium Beef, LLC, claiming that Nicollet Cattle Trading was buying livestock in this transaction as an agent for Creekstone Farms Premium Beef, LLC., a disclosed principal.

4. Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading, had agreed with the livestock sellers that payment for the above livestock purchases was to come from Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading, although the livestock was almost always shipped directly to packers whose identity had been fully disclosed to the livestock sellers.

In two thirds of these transactions, the packers were billed by Nicollet Cattle invoice for the same livestock purchase amounts plus an itemized buying commission (generally twenty-five cents per hundredweight), and in some instances an additional itemized "clearing expense."

5. Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading, in purported payment for the livestock purchases set forth in paragraph II above, issued checks which were returned unpaid because there were insufficient funds on deposit and available in the account upon which they were drawn when the checks were presented for payment. The information regarding the checks appears below:

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| <b>Livestock Seller<br/>Payee</b>   | <b>Check Date</b> | <b>Check No.</b> | <b>Check Amount</b> | <b>Date Returned</b> | <b>Reason Shown<br/>for Return</b>     |
|-------------------------------------|-------------------|------------------|---------------------|----------------------|--|
| Greg Jensen                         | 4/19/05           | 402485           | \$37,112.15         | 5/04/05              | Insufficient funds                     |
| Whempner Bros                       | 4/20/05           | 402504           | \$92,194.72         | 5/03/05              | Insufficient funds                     |
| Sisseton Livestock<br>Auction, Inc. | 4/22/05           | 402531           | \$148,676.46        | 5/03/05              | Insufficient funds                     |
| Sisseton Livestock<br>Auction, Inc. | 4/22/05           | 402532           | \$390,340.26        | 5/03/05              | Insufficient funds                     |
| Marion Blom                         | 4/22/05           | 402535           | \$46,811.00         | 5/03/05              | Insufficient funds                     |
| Brandon Schweigert                  | 4/22/05           | 402539           | \$2,449.60          | 5/11/05              | Refer to maker                         |
| Mike Currence                       | 4/25/05           | 402544           | \$72,465.76         | 5/03/05              | Insufficient funds                     |
| Jim & Abe Mach                      | 4/25/05           | 402547           | \$36,619.36         | 5/03/05              | Insufficient funds                     |
| W-Zych Cattle Co.                   | 4/25/05           | 402548           | \$237,688.82        | 5/03/05              | Insufficient funds<br>& refer to maker |

## PACKERS AND STOCKYARDS ACT

|                                      |         |        |              |         |                                     |
|--------------------------------------|---------|--------|--------------|---------|-------------------------------------|
| Fredin Bros                          | 4/25/05 | 402549 | \$96,178.22  | 5/03/05 | Insufficient funds                  |
| Fredin Bros                          | 4/27/05 | 402572 | \$638,071.86 | 5/03/05 | Insufficient funds                  |
| Robert Nienow Farm, Inc.             | 4/27/05 | 402574 | \$140,756.75 | 5/05/05 | Insufficient funds & refer to maker |
| Central Livestock Association, Inc.* | 4/27/05 | 402575 | \$88,850.15  | 5/05/05 | Insufficient funds & refer to maker |
| Central Livestock Association, Inc.* | 4/27/05 | 402576 | \$34,838.36  | 5/05/05 | Insufficient funds & refer to maker |
| Central Livestock Association, Inc.* | 4/27/05 | 402586 | \$35,164.07  | 5/05/05 | Insufficient funds & refer to maker |
| Central Livestock Association, Inc.* | 4/29/05 | 402596 | \$16,307.71  | 5/05/05 | Insufficient funds & refer to maker |
| Holtzen Farms LTD                    | 4/27/05 | 402578 | \$29,287.44  | 5/06/05 | Insufficient funds                  |
| Dams Farms, Inc.                     | 4/27/05 | 402580 | \$46,145.02  | 5/04/05 | Insufficient funds                  |
| Francis Pravacek                     | 4/27/05 | 402581 | \$100,130.82 | 5/02/05 | Insufficient funds                  |
| Equity Cooperative Livestock Sales   | 4/28/05 | 402587 | \$43,586.33  | 5/03/05 | Insufficient funds                  |

GFI AMERICA, INC.,  
d/b/a NICOLLET CATTLE TRADING, ET AL.  
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|                                 |         |        |                |         |  |
|---------------------------------|---------|--------|----------------|---------|--|
| O&S Cattle Co.                  | 4/28/05 | 402588 | \$93,645.55    | 5/03/05 | Insufficient funds<br>& refer to maker |
| South Dakota<br>Livestock Sales | 4/28/05 | 402589 | \$100,349.10   | 5/03/05 | Insufficient funds                     |
| Roger Stotts                    | 4/28/05 | 402591 | \$232,020.68   | 5/05/05 | Insufficient funds<br>& refer to maker |
| Keith Kvistero                  | 4/28/05 | 402592 | \$267,626.05   | 5/05/05 | Insufficient funds<br>& refer to maker |
| TOTAL:                          |         |        | \$3,027,316.24 |         |  |

\* named Central Order Buyers on check

6. Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading, knew, at the time the livestock was purchased and the above payment checks were issued, that Respondent had consistently been in default with respect to its secured loan agreement with Wachovia Capital Finance Corporation (Wachovia). Wachovia had given Respondent written notice on April 20, 2005, that Wachovia's forbearance with Respondent's defaults was at an end. Wachovia gave Respondent this notice due to Respondent's admission to Wachovia that approximately \$1,390,151.33 of the Accounts Respondent had reported to secure new advances on the Wachovia loan agreement were in fact the same Accounts previously reported to secure prior loan agreement advances.

7. Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading, knew, or should have known, that Respondent's defaults provided Wachovia with good reason to apply all livestock payments received by Respondent from packers, and deposited to the lockbox account required by Wachovia, to reduce Respondent's secured debt, instead of transferring such funds to the checking account on which Respondent drew checks to pay livestock sellers from whom Respondent had obtained the livestock.

### **Conclusions**

By reason of the facts found in Findings of Fact 3 through 7 above, Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading, has wilfully violated section 312 (a) of the Act (7 U.S.C. §§ 213(a)).

### **Order**

Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading, directly or through any corporate or other device, in connection with its operations subject to the Packers and Stockyards Act, shall cease and desist from:

- 1 Failing to pay the full purchase price of livestock; and
2. Issuing checks in payment for livestock without sufficient funds on

KENNETH E. BARROWS d/b/a  
SCHALLER'S MEATS, ET AL.  
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deposit and available in the account upon which such checks are drawn to pay such checks when presented.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), Respondent GFI America, Inc., d/b/a Nicollet Cattle Trading, is suspended as a registrant for the period of five years.

This decision shall become final and effective without further proceedings 35 days after the date of service upon the Respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this decision shall be served upon the parties.

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**IN RE: KENNETH E. BARROWS d/b/a SCHALLER'S MEATS, OR  
NORTH AMERICAN MEAT PACKERS.**

**P. & S. Docket No. D-06-0018.**

**Default Decision.**

**Filed September 22, 2006.**

**PS – Default.**

Jonathan Gordy for Complainant.

Respondent Pro se.

*Decision and Order by Administrative Law Judge Peter M. Davenport*

## **DECISION WITHOUT HEARING BY REASON OF DEFAULT**

### **Preliminary Statement**

This proceeding was instituted under the Packers and Stockyards Act (7 U.S.C. § 181 *et seq.*) (“Act”), by a Complaint filed on May 1, 2006, by the Administrator, Grain Inspection, Packers and Stockyards Administration (GIPSA), United States Department of Agriculture, alleging that the Respondent willfully violated the Act. The Complaint and a copy of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R.

§ 1.130 *et seq.*) (“Rules of Practice”) were served on Respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint.

Respondent failed to file an answer within the time period required by the Rules of Practice (7 C.F.R. § 1.136), and the material facts alleged in the Complaint, which are admitted by Respondent’s failure to file an answer, are adopted and set forth in this decision and order as findings of fact.

This decision and order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

#### **Findings of Fact**

1. Kenneth E. Barrows, (“Respondent”) d.b.a. Schaller’s Meats, or North American Meat Packers, is an individual whose business address is State Route 8, Bridgewater, NY 13331.
2. Respondent was at all times material to this Decision:
  - (a) engaged in the business of buying livestock in commerce for purposes of slaughter; and
  - (b) a packer within the meaning of and subject to the provisions of the Act
3. Respondent, on or about the dates and in the transactions set forth below, purchased livestock and failed to pay, when due, the full purchase price of the livestock:

KENNETH E. BARROWS d/b/a  
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| Purchase Date | Payee  | Number of Head | Purchase Amount |
|---------------|--|----------------|-----------------|
| 03/07/2005    | Millers Livestock Auction,<br>4008 State Route 40<br>Argyle, NY 12809                    | 10             | \$502.93        |
| 03/10/2005    | Millers Livestock Auction  | 11             | \$620.55        |
| 03/14/2005    | Millers Livestock Auction  | 6              | \$200.44        |
| 06/09/2005    | N.N.Y. Farmers Marketing Co-op.,<br>Inc.<br>P.O. Box. 169<br>Lowville, NY 13367          | 19             | \$1,262.32      |
| 06/13/2005    | N.N.Y. Farmers Marketing Co-op.,<br>Inc.   | 24             | \$1,370.68      |
| 06/16/2005    | N.N.Y. Farmers Marketing Co-op.,<br>Inc.   | 11             | \$628.48        |
| 06/20/2005    | N.N.Y. Farmers Marketing Co-op.,<br>Inc.   | 16             | \$902.22        |
| 06/23/2005    | N.N.Y. Farmers Marketing Co-op.,<br>Inc.   | 10             | \$531.18        |
| 03/10/2005    | Empire Livestock Marketing,<br>Lewis Co.<br>P.O. Box 4844<br>Syracuse, NY 13221-4844     | 5              | \$1,010.80      |
| 03/23/2005    | Tom Przysiecki, d.b.a.<br>Fox Valley Vail Farms<br>247 Zimmer Rd.<br>Schoharie, NY 12157 | 2              | \$1,827.04      |
| Total:        |  | 114            | \$8,856.64      |

4. As of the May 1, 2006, there remained unpaid a total of \$6,422.18 for those livestock purchases.

5. Respondent failed to keep records, as required by section 401 of the Act (7 U.S.C. § 221), that fully and correctly disclosed all transactions involved in his business, in that Respondent failed to keep kill sheets, bank statements, invoices and shipping records.

### **Conclusions**

By reason of the facts found in Findings of Fact 3 and 4, Respondent willfully violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b) by failing to pay, when due, for livestock.

By reason of the facts found in Finding of Fact 5, Respondent has failed to keep records as required by section 401 of the Act (7 U.S.C. § 221) and, therefore, has willfully engaged in an “unfair practice” under section 202(a) of the Act (7 U.S.C. § 192(a)).

Respondent did not file an answer within the time period prescribed by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), which constitutes an admission of all the material allegations in the Complaint. Complainant has moved for the issuance of a Decision Without Hearing by Reason of Default, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Accordingly, this decision and order is entered without hearing or further procedure.

### **Order**

Respondent, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Act, shall cease and desist from failing to pay the full amount of the purchase price for livestock within the time period required by the Act and the regulations promulgated under it.

Respondent and his agents and employees shall keep such accounts, records and memoranda which fully and correctly disclose all transactions conducted subject to the Act, including, but not limited to, kill sheets, bank statements, invoices and shipping records.

PHILLIP O. MATTES, JR. d/b/a  
R OR M CATTLE COMPANY  
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Pursuant to section 203(b) of the Act (7 U.S.C. § 193(b)), Respondent is assessed a civil penalty in the amount of Two Thousand dollars (\$2,000.00).

This decision shall become final and effective without further proceedings thirty-five days (35) after service on Respondent, if it is not appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this order shall be served on the parties.

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**In re: PHILLIP O. MATTES, JR., d/b/a R OR M CATTLE  
COMPANY.**

**P&S Docket No. 06-0021.**

**Default Decision.**

**Filed October 6, 2006.**

**PS – Default.**

Ruben Rudolph for Complainant.

Respondent Pro se.

*Decision and Order by Administrative Law Judge Peter M. Davenport.*

### **Preliminary Statement**

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Deputy Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act.

Copies 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 *et seq.*) governing proceedings under the Act were served on Respondents by regular mail on July 7, 2006, after

service by certified mail, return receipt requested, was returned marked “unclaimed.” Respondent Philip O. Mattes was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by Respondent’s failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Practice (7 C.F.R. § 1.139).

#### **Findings of Fact**

1. Philip O. Mattes Jr. (hereinafter “Respondent Mattes”) is an individual doing business as R or M Cattle Company (hereinafter “R or M Cattle”), whose business mailing address is N13640 Gorman Avenue, Thorp, Wisconsin 54771.

2. Respondent Mattes is and at all times material herein was:

- (A) Manager of R or M Cattle;
- (B) One hundred percent owner of R or M Cattle;
- (C) Responsible for the day-to-day management, direction, and control of R or M Cattle.

3. Respondent Mattes, doing business as R or M Cattle at all times material herein, was:

- (A) Engaged in the business of buying and selling livestock in commerce for his own account as a dealer; and
- (B) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account, and as a market agency buying on commission.

4. On or about the dates and in transactions set forth in paragraph II (a) of the complaint, Respondent Mattes, doing business as R or M Cattle,

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issued checks in payment for livestock purchases which were returned unpaid by the bank upon which they were drawn. These checks were returned because Respondent Mattes did not have and maintain sufficient funds on deposit and available in the account upon which the checks were drawn to pay such checks when presented.

5. On or about the dates and in the transactions listed paragraph II (b) of the complaint, Respondent Mattes, doing business as R or M Cattle, failed to pay the full purchase price of livestock in the amount of \$186,505.61. Of the \$186,505.61 Respondent failed to pay, \$176,505.61 remained unpaid as of the date of the issuance of the complaint in this matter.

#### **Conclusions**

By reason of the facts alleged in paragraph 4 and 5, Respondent Mattes, doing business as R or M Cattle, wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a) and 228b).

#### **Order**

Respondent Mattes, doing business as R or M Cattle, his company's officers, directors, agents and employees, successors and assigns, directly or indirectly, in connection with hsi activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Failing to pay the full purchase price of livestock; and

2. Issuing checks in payment for livestock purchases without maintaining sufficient funds on deposit and available in the account upon which the checks were drawn to pay the checks when presented.

Respondent Mattes, doing business as R or M Cattle, is suspended as a registrant under the Act for a period of five (5) years.

This decision shall become final and effective without further proceedings 35 days after the date of service upon Respondents, unless it

is appealed to the Judicial Officer by a party to the proceeding within 30 days pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

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**In re: AMERICAN FAMILY FARMS, INC., AND TIM DIETZLER.  
P. & S. Docket No. D-06-0015.  
Default Decision only American Family Farms, Inc.  
Filed October 31, 2006.**

**PS – Default.**

Andrew Stanton for Complainant.

Respondent Pro se.

*Decision and Order by Administrative Law Judge Jill S. Clifton.*

#### **Decision**

The Complaint and Notice of Hearing (“Complaint”) filed on March 8, 2006, alleged that the Respondents willfully violated the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*) (“Act”).

#### **Parties and Counsel**

The Complainant is the Administrator, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture (“Complainant”).

Andrew Y. Stanton, Esq., with the Office of the General Counsel, Trade Practices Division, United States Department of Agriculture, 1400 Independence Avenue SW, Washington, D.C. 20250, represents the Complainant.

The two Respondents are Respondent American Family Farms, Inc. (hereinafter sometimes referred to as the “Corporate Respondent”), and Respondent Tim Dietzler. This Decision and Order concerns only the Corporate Respondent; only the Corporate Respondent is in default.

**Procedural History**

The Complaint that was initially sent to the Corporate Respondent by certified mail was returned to the Hearing Clerk, with the Post Office label indicating "RETURN TO SENDER" "MOVED, LEFT NO ADDRESS." On March 28, 2006, the Hearing Clerk sent the Complaint to the Corporate Respondent by certified mail to the address of the Corporate Respondent's registered agent, Tibeck, Inc., addressed to: American Family Farms, Inc., c/o Tibeck, Inc., 102 S. Main Street, Elkader, Iowa 52043, but the Complaint was again returned to the Hearing Clerk, with the Post Office label indicating "RETURN TO SENDER" "MOVED, LEFT NO ADDRESS."

On March 30, 2006, a copy of Hearing Clerk's letter acknowledging receipt of the answer of Respondent Tim Dietzler was mailed to American Family Farms, Inc., c/o Tibeck, Inc., 102 S. Main Street, Elkader, Iowa 52043, but the envelope was returned to the Hearing Clerk with a Post Office label indicating that Tibeck was located at P.O. Box 331, Elkader, Iowa 52043-0331, and that the time for forwarding had expired. After receiving this information about Tibeck's location, the Hearing Clerk, on April 11, 2006, sent the Complaint to the Corporate Respondent by certified mail to the address of the Corporate Respondent's registered agent, Tibeck, Inc., addressed to: American Family Farms, Inc., P.O. Box 331, Elkader, Iowa 52043-0331 (the Hearing Clerk did not include "c/o Tibeck, Inc."). The Complaint was returned to the Hearing Clerk, with the Post Office label indicating "RETURN TO SENDER" "REFUSED." On April 28, 2006, the Hearing Clerk sent the Complaint to the Corporate Respondent by ordinary mail to the address of the Corporate Respondent's registered agent, Tibeck, Inc., as follows: American Family Farms, Inc., P.O. Box 331, Elkader, Iowa 52043-0331 (the Hearing Clerk did not include "c/o Tibeck, Inc.").

Section 1.147(c)(1) of the Rules of Practice Governing Formal Adjudicatory Procedures Instituted by the Secretary Covering Various Statutes (7 C.F.R. § 1.147(c)(1)) (hereinafter, "Rules of Practice"), states as follows, with regard to the service of complaints:

Any complaint or other document initially served on a person to make that person a party respondent in a proceeding, proposed

decision and motion for adoption thereof upon failure to file an answer or other admission of all material allegations of fact contained in a complaint, initial decision, final decision, appeal petition filed by the Department, or other document specifically ordered by the Judge to be served by certified or registered mail, shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, *Provided that*, if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.

7 C.F.R. § 1.147(c)(1)

Since the Hearing Clerk's attempt to serve the Complaint on the Corporate Respondent by certified mail on April 11, 2006, at the address of its registered agent, was returned marked "RETURN TO SENDER" "REFUSED," the April 28, 2006, remailing of the Complaint by ordinary mail to the same address satisfied the requirements for service set forth in section 1.147(c)(1) of the Rules of Practice. The Corporate Respondent's answer was due within 20 days after service, according to section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). The Corporate Respondent has failed to file an answer, so the Corporate Respondent is in default, pursuant to section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)).

Further, the Hearing Clerk sent the Complainant's Motion for Decision together with the Complainant's proposed Decision ("Motion for Decision"), to the Corporate Respondent by certified mail on August 7, 2006, to the address of the Corporate Respondent's registered agent, Tibeck, Inc., addressed to: American Family Farms, Inc., P.O. Box 331, Elkader, Iowa 52043-0331 (the Hearing Clerk did not include "c/o Tibeck, Inc."). The Motion for Decision was returned to the Hearing Clerk, with the Post Office label indicating "RETURN TO SENDER" "REFUSED." On August 22, 2006, the Hearing Clerk sent the Motion for Decision to the

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Corporate Respondent by ordinary mail to the address of the Corporate Respondent's registered agent, Tibeck, Inc., addressed to: American Family Farms, Inc., P.O. Box 331, Elkader, Iowa 52043-0331 (the Hearing Clerk did not include "c/o Tibeck, Inc.").

Failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint (7 C.F.R. § 1.136(c)). Failure to file an answer constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the material facts alleged in the Complaint, which are admitted by the Corporate Respondent's default, are adopted and set forth herein as Findings of Fact. This Decision and Order as to American Family Farms, Inc., therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). *See* 7 C.F.R. § 1.130 *et seq.*

**Findings of Fact**

1. Respondent American Family Farms, Inc., is a corporation whose business mailing address is that of its registered agent, Tibeck, Inc., P.O. Box 331, Elkader, Iowa 52043-0331.

2. Respondent American Family Farms, Inc., was, at all times material herein:

- (a) Engaged in the business of buying livestock in commerce for purposes of slaughter;
- (b) Manufacturing or preparing meat and meat food products for sale and shipment in commerce; and
- (c) A packer within the meaning of and subject to the Act.

3. Respondent American Family Farms, Inc., in connection with its operations subject to the Act, purchased livestock for slaughter and failed to pay the full amount of the purchase price for livestock within the time period required by the Act, with \$765,445.72 remaining unpaid.

4. Respondent American Family Farms, Inc. was insolvent as of August 15, 2003, as its current liabilities then exceeded its current assets in the

amount of \$1,141,203.36.

### Conclusions

1. The Secretary of Agriculture has jurisdiction.
2. By reason of Finding of Fact 3 herein, Respondent American Family Farms, Inc. has willfully violated sections 202(a) and 409 of the Act (7 U.S.C. §§ 192(a), 228b).
3. By reason of Finding of Fact 4 herein, Respondent American Family Farms, Inc.'s financial condition does not meet the requirements of the Act (7 U.S.C. § 204).

### Order

1. Respondent American Family Farms, Inc., its officers, directors, agents, employees, successors and assigns, individually or through any corporate or other device, in connection with its operations subject to the Act, shall cease and desist from:

- a. Failing to pay the full amount of the purchase price for livestock within the time period required by the Act; and
- b. Purchasing livestock in commerce while insolvent, i.e., while current liabilities exceed current assets, unless Respondent American Family Farms, Inc. pays the full purchase price of the livestock at the time of purchase in U.S. currency, by cashier's check or wire transfer.

2. Pursuant to section 203(b) of the Act (7 U.S.C. § 193(b)), Respondent American Family Farms, Inc., is assessed a **civil penalty** in the amount of Fifty Thousand Dollars (**\$50,000.00**). The civil penalty payment instrument shall be made payable to the order of **USDA-GIPSA** and sent to: **USDA-GIPSA**

P.O. Box 790335  
St. Louis, Missouri 63179-0335.

Payment shall be made within 30 days from the date this Order is final and

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effective (*see* next paragraph).

### **Finality**

This Decision and Order shall be final and effective without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties. The address for the Corporate Respondent is **American Family Farms, Inc., c/o Tibeck, Inc., P.O. Box 331, Elkader, Iowa 52043-0331**. The remaining Respondent shall also be served, even though this Decision and Order does not decide the case as to him: **Mr. Tim Dietzler, National Fish Hatchery, HC37 Box 8, Willow Beach, AZ 86445**.

\* \* \*

## **APPENDIX A:**

### **TITLE 7—AGRICULTURE**

#### **SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE**

##### **PART 1—ADMINISTRATIVE REGULATIONS**

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##### **SUBPART H—RULES OF PRACTICE GOVERNING FORMAL**

##### **ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER**

##### **VARIOUS STATUTES**

...

**§ 1.145 Appeal to Judicial Officer.**

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in

§ 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument

before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief,

shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for

purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.  
[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145

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**Consent Decisions**

**PACKERS AND STOCKYARDS ACT**

Larry K. Smeal d/b/a Fatted Calf Cattle Farms P&S Docket No. D-06-0002  
7/25/06

Beeville Livestock Commission, Inc. and W. E. Butler P & S Docket No D-  
05-0004 8/02/06

T-Byrd Cattle Company and Jerry T. Byrd P&S Docket No D-06-0012  
8/31/06

Steve.M. Hand P&S Docket No D-06-0013 10/12/06

James T. Harmon d/b/a J.H. Cattle Company Docket No. P & S D-06-0009  
11/7/06

Muenster Livestock Auction Commission, Inc. and Scotty Austin P&S  
Docket D-06-0010 12/12/06 Andrew Pudliner, d/b/a Pudliner Packing P &  
S docket No D-06-0025 12/15/06