UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	AWA Docket No. D-09-0175
	)	
Bodie S. Knapp, an individual doing	)	
business as The Wild Side; and	)	
Kimberly G. Finley, an individual	)	
	)	
Respondents	)	

Denial of Summary Judgment Motion

Respondent, Bodie S. Knapp, has filed a motion for summary judgment in this case stating that there is no substantial issue of fact and that under controlling law this proceeding against him should be dismissed. The motion is herewith denied for the reasons that follow.

Summary judgment is appropriate "…when…based on the pleadings, affidavits, and other forms of evidence relevant to the merits…there is no genuine issue of material fact to be decided, and the movant is entitled to judgment as a matter of law." *See Thomas Massey*, 56 Agric. Dec. 1640, 1641 (1997). Evidence and all inferences must be construed in the light most favorable to the nonmoving party. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F. 2d 626, 630 (9th Cir. 1987). "… evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986). However, "… the nonmoving party may not merely state that it will discredit the moving party's evidence at trial…it must produce at least some significant probative evidence tending to support the complaint." *T.W. Elec.*, 809 F.2d at 630. "At the summary judgment stage, the judge's

function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

In his motion for summary judgment, Respondent, Bodie S. Knapp, contends that the Animal Welfare Act (7 U.S.C. §§ 2131-2159; "the Act") and the Regulations and Standards that implement the Act (9 C.F.R. §§ 1.1-4.11; "the Regulations and Standards") do not apply to his activities. He argues that although his APHIS license was revoked as of September 10, 2005, he has not since engaged in transactions in animals of the type that require a license. He asserts that his activities all pertained to "hoofstock" sold to game ranches and/or private collectors for breeding purposes only, and for that reason did not come within, as Complainant contends, the proscription of 9 C.F.R. §§ 2.10(c) that:

> Any person whose license has been suspended or revoked shall not buy, sell, transport, exhibit, or deliver for transportation, any animal during the period of suspension or revocation.

In support of the complaint's allegations and in response to the motion for summary judgment, Complainant has filed 28 exhibits. They include affidavits from witnesses, copies of completed APHIS forms, cancelled checks, and business records that support the complaint's allegations that Respondent, Bodie S. Knapp, after the effective date of the revocation of his license on September 10, 2005 through 2008, bought and sold various animals, and did not limit himself to the sale of hoofstock to game ranches and breeders. Complainant has provided evidence indicating that Mr. Knapp purchased two warthogs, an eland, a Perte David, and two water buffalo. There is also evidence that Respondent sold a camel to an exhibitor. There is a statement from the Texas Zoo that he transported two lemurs to the zoo in exchange for two zebras.

In that there is evidence that Respondent's transactions were not limited to hoofstock, were not limited to sales, and that his sales were to licensed exhibitors or dealers for regulated purposes, and to individuals for pets, it cannot be found that he was exempt from the requirements of the Act and the Regulations and Standards under the language of APHIS's "Dealer Inspection Guide" that identifies as exempt from licensing a "person who sells wild/exotic hoofstock, such as deer, elk and bison for nonregulated purposes to game ranches and/or private collectors for breeding purposes only…."

Furthermore, the APHIS Dealer Inspection Guide states in its Introduction that it is no more than a reference document to assist an inspector and does not supersede the Act and the Regulations and Standards (Motion for Summary Judgment-Exhibit B). This limitation has been recognized and used to set aside that part of an ALJ decision that relied upon such a document as authoritative. *In Re Jerome Schmidt*, d/b/a Top of the Ozark Auction, 66 Agric. Dec. 159, at 214 (2007).

Respondent, Bodie S. Knapp, further argues that he is a breeder only and, as such, did not transport "animals" within the meaning of the Act and the Regulations and Standards (7 U.S.C. §§ 2132(g); 9 C.F.R. § 1.1) because their definitions of "animal" exempt creatures that the seller has bred that are not intended "for research, testing, experimentation or exhibition". This argument relies upon language at the end of the "animal" definition sections that is specific to dogs:

> With respect to a dog, the term means all dogs, including those used for hunting, security, or breeding purposes.

Since dogs used for breeding are specifically included, and other animals used for breeding are not mentioned, Respondent argues they must therefore be excluded under the maxim of statutory construction: "expressio unius est exclusio alterius". Under that

maxim, the expression of one thing excludes that which has not been expressed. Black's Law Dictionary, Fourth Edition; *People v. One 1941 Ford 8 Stake Truck,* 159 P.2d 641, 642.

This interpretation, however, is contrary to the objectives of the Act and to a long-maintained interpretation by the Secretary of Agriculture of the statutory language at issue.

The Act's stated objectives are to insure humane treatment of animals and to protect their owners from theft of their animals (7 U.S.C. §§ 2131). To achieve these objectives, all warm blooded animals are encompassed within the Act's definition of an animal except those specifically exempted such as birds, mice and rats bred for research, horses not used for research and farm animals. At the time of enactment, the theft of dogs then sold to research laboratories with no questions asked as to how they had been acquired was a matter of public outrage, and it is not surprising that Congress included catch-all language to make it clear that all dogs, however purportedly used, come within the Act's protection.

Moreover, the Secretary has long interpreted the Act's language as authorizing the licensing of breeders of animals other than dogs. *See* 9 C.F.R. § 1.1 (definition of Class "A" licensee (breeder) that refers to dealers with breeding colonies subject to the licensing requirements of 9 C.F.R. §2.6 (b)(1)). *See also, In re: Nat M. Barker*, 40 Agric. Dec. 218 (1981)(rabbit breeder holding ClassA license); *In re James Daulton*, 42 Agric. Dec. 1801(1983)(guinea pig breeder holding Class A license). The fact that this interpretation by the Secretary has never been challenged is persuasive evidence that it is

the one intended by Congress. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846, 106 S.Ct. 3245, 3254, 92 L.Ed.2d 675 (1986).

More importantly, the Supreme Court consistently holds under its seminal decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845, 104 S.Ct. 2778, 81, L.Ed.2d 694 (1984), that to the extent statutory language is ambiguous, deference is to be given to an agency's reasonable interpretation of a statute it is charged with administering. *Barber v. Thomas*, 130 S.Ct. 2499, 2508, 78 USLW 4509(2010); *Cuomo v. Clearing House Ass'n L.L.C.*, 129 S.Ct. 2710, 174 L.Ed.2d 464, 77 USLW 4664 (2009).

Accordingly, Respondent's Motion for Summary Judgment is herewith denied.

Dated: August 16, 2010

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Victor W. Palmer
Administrative Law Judge