UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	AWA Docket No. 09-0175
	)	
Bodie S. Knapp, an individual, d/b/a The Wild Side,	)	
	)	
	)	**Order Denying Amended**
Respondent	)	**Petition for Reconsideration**

PROCEDURAL HISTORY

On June 20, 2013, Bodie S. Knapp filed a "Petition for Reconsideration of the Judicial Officer's Ruling - Motion for Extension of Time for Filing Same" requesting reconsideration of *In re Bodie S. Knapp*, __ Agric. Dec. ___ (June 3, 2013), and requesting an extension of time to August 23, 2013, to file an amended petition for reconsideration. I granted Mr. Knapp's request for an extension of time and extended to August 23, 2013, the time for filing an amended petition for reconsideration.[1] On August 21, 2013, Mr. Knapp filed an "Amended Petition for Reconsideration of the Judicial Officer's Ruling" [hereinafter Amended Petition for Reconsideration] again requesting reconsideration of *In re Bodie S. Knapp*, __ Agric. Dec. ___ (June 3, 2013).[2] On September 12, 2013, Kevin

[1]"Order Extending Time for Filing Mr. Knapp's Petition to Reconsider" filed June 21, 2013.

[2]I conclude Mr. Knapp's Amended Petition for Reconsideration is the only operative

Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed "Complainant's Response to Respondent Bodie S. Knapp's Petition for Reconsideration," and on September 17, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, Mr. Knapp's Amended Petition for Reconsideration.

DISCUSSION

Mr. Knapp's Request for Oral Argument

Mr. Knapp requests oral argument in connection with his Amended Petition for Reconsideration (Amended Pet. for Recons. at 1, 21). Mr. Knapp's request for oral argument is denied because the issues in this proceeding are not complex and have been fully briefed by the parties.

Summary of Denial of Mr. Knapp's Amended Petition for Reconsideration

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petition for reconsideration in this proceeding as it entirely supercedes Mr. Knapp's Petition for Reconsideration of the Judicial Officer's Ruling filed June 20, 2013.

The rules of practice applicable to this proceeding[3] provide that a party to a proceeding may file a petition for reconsideration of the decision of the Judicial Officer, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite*. . . .
>
> . . . .
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> (3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer*. A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

[3]The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

7 C.F.R. § 1.146(a)(3). The purpose of a petition for reconsideration is to seek correction of manifest errors of law or fact. A petition for reconsideration is not to be used as a vehicle merely for registering disagreement with the Judicial Officer's decision. A petition for reconsideration is only granted, absent highly unusual circumstances, if the Judicial Officer has committed error or if there is an intervening change in the controlling law. Based upon my review of the record, in light of the issues raised by Mr. Knapp in the Amended Petition for Reconsideration, I find no error of law or fact necessitating modification of *In re Bodie S. Knapp*, __ Agric. Dec. ___ (June 3, 2013). Moreover, Mr. Knapp does not assert an intervening change in controlling law, and I find no highly unusual circumstances necessitating modification of *In re Bodie S. Knapp*, __ Agric. Dec. ___ (June 3, 2013). Therefore, I deny Mr. Knapp's Amended Petition for Reconsideration. I note the Rules of Practice do not require a petition for reconsideration in order to exhaust administrative remedies. Therefore, review by the appropriate judicial forum is available without a party seeking reconsideration by the Judicial Officer. (7 C.F.R. § 1.145(i).)

Issues Raised by Mr. Knapp in the Amended Petition for Reconsideration

Mr. Knapp raises 16 issues in the Amended Petition for Reconsideration. First, Mr. Knapp contends I failed to articulate the basis for my rejection of Chief Administrative Law Judge Peter M. Davenport's [hereinafter the Chief ALJ] conclusion that Mr. Knapp committed eight violations of the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159 [hereinafter the Animal Welfare Act], and the regulations and standards

issued pursuant to the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations] (Amended Pet. for Recons. at 2 ¶ 1).

I articulated the basis for my concluding that Mr. Knapp committed 235 violations of the Animal Welfare Act and the Regulations and my rejection of the Chief ALJ's conclusion that Mr. Knapp committed eight violations of the Animal Welfare Act and the Regulations, as follows:

> The Chief ALJ found that Mr. Knapp committed eight violations of the Animal Welfare Act and the Regulations. The Chief ALJ concluded that each of the eight transactions which he found to be in violation of the Animal Welfare Act and the Regulations constituted a violation of the Animal Welfare Act and the Regulations. However, when determining the number of violations committed by a person who purchases and sells animals without a required Animal Welfare Act license, each animal purchased or sold constitutes a separate violation of the Animal Welfare Act and the Regulations. Therefore, I reject the Chief ALJ's conclusion that Mr. Knapp committed eight violations of the Animal Welfare Act and the Regulations. Instead, I find that Mr. Knapp purchased and sold 235 animals in violation of the Animal Welfare Act and the Regulations; thus, Mr. Knapp committed 235 violations of the Animal Welfare Act and the Regulations.

In re Bodie S. Knapp, __ Agric. Dec. ___, slip op. at 17 (June 3, 2013) (footnotes omitted). Therefore, I reject Mr. Knapp's contention that I failed to articulate the basis for my rejection of the Chief ALJ's conclusion that Mr. Knapp committed eight violations of the Animal Welfare Act and the Regulations.

Second, Mr. Knapp contends my increasing the $15,000 civil penalty assessed by the Chief ALJ to $395,900 constitutes a deprivation of property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United

States (Amended Pet. for Recons. at 2-3 ¶¶ 3-4).

As an initial matter, the due process clause of the Fourteenth Amendment to the Constitution of the United States, by its terms, is applicable to the states and is not applicable to the United States government. The United States Department of Agriculture is an executive department of the government of the United States;[4] it is not a state. Therefore, as a matter of law, my increasing the civil penalty assessed against Mr. Knapp could not have violated the due process clause of the Fourteenth Amendment to the Constitution of the United States, as Mr. Knapp contends.[5]

[4] 5 U.S.C. §§ 101, 551(1).

[5] *In re Kathy Jo Bauck*, 68 Agric. Dec. 853, 864 (2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); *In re Glenn Mealman* (Order Denying Pet. to Reconsider), 64 Agric. Dec. 1987, 1990 (2005); *In re Bodie S. Knapp*, 64 Agric. Dec. 253, 303-04 (2005).

Moreover, I reject Mr. Knapp's contention that my increasing the $15,000 civil penalty assessed by the Chief ALJ to $395,900 constitutes a deprivation of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States. The fundamental elements of due process are notice and opportunity to be heard.[6] The record reveals that the Second Amended Complaint, which is the operative pleading in this proceeding, fully apprised Mr. Knapp of the issues in controversy and that Mr. Knapp was provided with an opportunity to be heard.

The Second Amended Complaint specifically notifies Mr. Knapp that the Administrator seeks an order assessing civil penalties against Mr. Knapp for his violations of the Animal Welfare Act and Regulations and for his violations of the cease and desist orders issued against Mr. Knapp in previous Animal Welfare Act proceedings, as follows:

> FAILURE TO OBEY TWO ORDERS TO CEASE AND DESIST FROM VIOLATING THE ACT AND THE REGULATIONS
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> 4. On July 5, 2005, the Judicial Officer issued an order requiring respondent Knapp, and his agents, employees, successors and assigns, to "cease and desist from violating the Animal Welfare Act and the Regulations and Standards, directly or indirectly, through any corporate or other device." 64 Agric. Dec. 1668, 1673 (2005). That order became final and effective on September 10, 2005.

[6] *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993); *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84 (1988); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950).

> 5. On August 31, 2006, Administrative Law Judge Victor W. Palmer issued an order requiring respondent Knapp to "cease and desist from violating the Animal Welfare Act and the regulations and standards issued pursuant to the Animal Welfare Act." 65 Agric. Dec. 993. That order became final and effective October 11, 2006.
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> 6. On each of the dates set forth herein, respondent Knapp knowingly failed to obey one or both of the cease and desist orders made by the Secretary under section 2149(b) of the Act (7 U.S.C. § 2149(b)), in the above-cited cases. Therefore, pursuant to section 2149(b) of the Act, said respondent "shall be subject to a civil penalty of [$1,650] for each offense, and each day during which such failure continues shall be deemed a separate offense." 7 U.S.C. § 2149(b); 7 C.F.R. § 3.91.
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> . . . .
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> The Animal and Plant Health Inspection Service requests that unless the respondent fails to file an answer within the time allowed therefor, or files an answer admitting all the material allegations of this second amended complaint, this matter proceed to oral hearing in conformity with the Rules of Practice governing proceedings under the Act; and that such order or orders be issued as are authorized by the Act and warranted under the circumstances, including an order requiring the respondent to cease and desist from violating the Act and the regulations and standards issued thereunder, and assessing civil penalties against the respondent, in accordance with the Act.

Second Amended Compl. at 3-4, 10. Moreover, Mr. Knapp has fully participated in this proceeding, including the oral, in-person hearing conducted by the Chief ALJ on June 21, 2011, in Corpus Christi, Texas.

Third, Mr. Knapp contends, as I did not hear the case and observe the demeanor of the witnesses, I should not have substituted my judgment for the judgment of the Chief ALJ, especially on issues of fact (Amended Pet. for Recons. at 3, 18-19 ¶¶ 5, 16).

The Administrative Procedure Act provides, on appeal from an administrative law judge's initial decision, the agency has all the powers it would have in making an initial

decision, as follows:

> **§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record**
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> . . . .
>
> (b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b).

Moreover, the Attorney General's Manual on the Administrative Procedure Act describes the authority of the agency on review of an initial or recommended decision, as follows:

> *Appeals and review.* . . .
>
> In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board v. Elkland Leather Co.*, 114 F.2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705.

Attorney General's Manual on the Administrative Procedure Act 83 (1947).

Thus, as the final deciding officer for the United States Department of Agriculture in this proceeding,[7] I may substitute my judgment regarding issues of fact for the judgment of the Chief ALJ. However, the consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law judges, since they have the opportunity to see and hear witnesses testify.[8] I carefully

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[7] 7 C.F.R. § 2.35(a)(2).

[8] *In re Craig A. Perry* (Decision as to Craig A. Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. ___, slip op. at 15 (Sept. 6, 2013); *In re KOAM Produce, Inc.* (Order Denying Pet. to Reconsider), 65 Agric. Dec. 1470, 1476 (2006); *In re Jewel Bond* (Order Denying Pet. to Reconsider), 65 Agric. Dec. 1175, 1183 (2006); *In re G&T Terminal Packing Co.*, 64 Agric. Dec. 1839, 1852 (2005), *aff'd*, 468 F.3d 86 (2d Cir. 2006), *cert. denied*, 552 U.S. 814 (2007); *In re Southern Minnesota Beet Sugar Cooperative*, 64 Agric. Dec. 580, 608 (2005); *In re Excel Corp.*, 62 Agric. Dec. 196, 244-46 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 210 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004); *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. 527, 561-62 (2001), *appeal dismissed sub nom. Graves v. United States Dep't of Agric.*, No. 01-3956 (6th Cir. Nov. 28, 2001); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 602 (1999); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1055-56 (1998); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1510 (1997), *aff'd*, 99 F. Supp. 2d 1308 (D. Kan. 1998), *aff'd*, 12 F. App'x 718 (10th Cir.), *cert. denied*, 534 U.S. 1440 (2001); *In re Saulsbury Enterprises* (Order Denying Pet. for Recons.), 56 Agric. Dec. 82, 89 (1997); *In re Andershock's Fruitland, Inc.*, 55 Agric. Dec. 1204, 1229 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 279 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Mr. & Mrs. Richard L. Thornton* (Remand Order), 38 Agric. Dec. 1425, 1426 (1979); *In re Unionville Sales Co.* (Remand Order), 38 Agric. Dec. 1207, 1208-09 (1979); *In re Steve Beech*, 37 Agric. Dec. 869, 871-72 (1978); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979); *In re Edward Whaley*, 35 Agric. Dec. 1519, 1521 (1976); *In re Dr. Joe Davis*, 35 Agric. Dec. 538, 539 (1976); *In re American*

examined the record prior to substituting my judgment for that of the Chief ALJ and found ample basis to reverse some of the Chief ALJ's findings of fact, as discussed in *In re Bodie S. Knapp*, __ Agric. Dec. ___ (June 3, 2013).

Fourth, Mr. Knapp, citing *In re Bodie S. Knapp,* __ Agric. Dec. ___, slip op. at 16 (June 3, 2013), contends I erroneously found his purchases of animals, as alleged in paragraphs 7b, 7c, 7f, 7j, 7m, 7n, 7p, 7r, 7t, 7v, 7x, 7z, 7bb, and 7dd of the Second Amended Complaint, were not for his own use or enjoyment; thus, I erroneously concluded Mr. Knapp violated 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a)(1) and 2.10(c) when, without an Animal Welfare Act license, he purchased these animals (Amended Pet. for Recons. at 3-5 ¶ 6).

The Regulations require any person operating or intending to operate as a dealer to have an Animal Welfare Act license, but exempt from the licensing requirement any person who buys animals solely for his or her own use or enjoyment if that person does not also sell or exhibit animals, as follows:

> **§ 2.1 Requirements and application.**
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> (a)(1) Any person operating or intending to operate as a dealer, . . . except persons who are exempted from the licensing requirements under paragraph (a)(3) of this section, must have a valid license.
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> . . . .
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> (3) The following persons are exempt from the licensing

Commodity Brokers, Inc., 32 Agric. Dec. 1765, 1772 (1973); *In re Cardwell Dishmon*, 31 Agric. Dec. 1002, 1004 (1972); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 497-98 (1972); *In re Louis Romoff*, 31 Agric. Dec. 158, 172 (1972).

> requirements under section 2 or section 3 of the Act:
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> . . . .
>
> (viii) Any person who buys animals solely for his or her own use or enjoyment and does not sell or exhibit animals, or is not otherwise required to obtain a license[.]

9 C.F.R. § 2.1(a)(1), (a)(3)(viii). After a careful review of *In re Bodie S. Knapp*, __ Agric. Dec. ___ (June 3, 2013), I cannot locate any language that supports Mr. Knapp's contention that I concluded Mr. Knapp's purchases of animals alleged in paragraphs 7b, 7c, 7f, 7j, 7m, 7n, 7p, 7r, 7t, 7v, 7x, 7z, 7bb, and 7dd of the Second Amended Complaint were not for his own use or enjoyment. Instead, I stated the evidence establishes that Mr. Knapp sold animals for regulated purposes; therefore, Mr. Knapp's purchases of animals (even if the purchases were for his own use or enjoyment), without an Animal Welfare Act license, violated 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c).[9]

Fifth, Mr. Knapp contends I found the exemption for limited sales of hoofstock in the Animal Care Resource Guide published by the Animal and Plant Health Inspection Service [hereinafter APHIS] (RX 2) binding on APHIS (Amended Pet. for Recons. at 5-6 ¶ 7).

[9] *In re Bodie S. Knapp*, __ Agric. Dec. ___, slip op. at 16 (June 3, 2013).

After a careful review of *In re Bodie S. Knapp*, __ Agric. Dec. ___ (June 3, 2013), I cannot locate any language that supports Mr. Knapp's contention that I found the Animal Care Resource Guide published by APHIS (RX 2) binding on APHIS. Instead, I merely declined to assess Mr. Knapp a civil penalty for his sales of hoofstock, as alleged in paragraphs 7d, 7g, 7q, 7s, 7y, and 7aa of the Second Amended Complaint, without an Animal Welfare Act license, in violation of 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a) and 2.10(c), because APHIS' Animal Care Resource Guide (RX 2) unambiguously exempts limited sales of hoofstock made for regulated purposes.[10]

Sixth, Mr. Knapp contends I erroneously concluded Mr. Knapp violated 7 U.S.C. § 2134 and 9 C.F.R. §§ 2.1(a)(1) and 2.10(c) when, without an Animal Welfare Act license, he sold animals at Lolli Brothers Livestock Market, Inc., where the intended use of the animals sold is unknown (Amended Pet. for Recons. at 6-8 ¶ 8).

The Chief ALJ rejected Mr. Knapp's argument that his sales of, or offers to sell, one kinkajou on July 12, 2008, one camel on September 27, 2008, one guanaco on April 10, 2009, three camels on April 10, 2010, four guanaco on July 10, 2010, and two camels on September 25, 2010, to or at Lolli Brothers Livestock Market, Inc., were not violations of the Animal Welfare Act and the Regulations because the intended end use of the animals is unknown. I concluded the Chief ALJ correctly inferred, based on the value of the animals and the relative rarity of these animals, that these animals sold or offered for sale by

[10] *In re Bodie S. Knapp*, __ Agric. Dec. ___, slip op. at 14-15 (June 3, 2013).

Mr. Knapp to or at Lolli Brothers Livestock Market, Inc., were used, or intended to be used, for a regulated purpose,[11] and I find nothing in Mr. Knapp's Amended Petition for Reconsideration on which to base an alteration of my conclusion that the Chief ALJ's inference was correct.

[11] *In re Bodie S. Knapp*, __ Agric. Dec. ___, slip op. at 28 (June 3, 2013).

Seventh, Mr. Knapp contends the sanctions which the Secretary of Agriculture is authorized, pursuant to 7 U.S.C. § 2149(b), to impose for violations of the Animal Welfare Act and the Regulations may only be imposed on Animal Welfare Act licensees, and I erroneously assessed Mr. Knapp a civil penalty for his purchases and sales of animals when he was not an Animal Welfare Act licensee (Amended Pet. for Recons. at 8-9 ¶ 9).

The Animal Welfare Act authorizes the Secretary of Agriculture to assess any dealer a civil penalty for violations of the Animal Welfare Act or the Regulations, as follows:

> **§ 2149. Violations by licensees**
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> . . . .
>
> **(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order**
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> Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than $10,000 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation.

7 U.S.C. § 2149(b). The fact that 7 U.S.C. § 2149 is entitled "Violations by licensees" does not mean that the sanctions authorized in 7 U.S.C. § 2149 may only be imposed on a person who holds an Animal Welfare Act license. The plain language of 7 U.S.C. § 2149 refutes that interpretation. Headings and titles are not meant to take the place of the

provisions of the text. As stated in *Brotherhood of R.R. Trainmen v. Baltimore & O.R.R.*, 331 U.S. 519, 528–29 (1947):

> But headings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless. As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text. [Citations omitted.] For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.

The language of 7 U.S.C. § 2149(b) has been consistently interpreted to authorize the Secretary of Agriculture to assess civil penalties and issue cease and desist orders against dealers, exhibitors, research facilities, intermediate handlers, carriers, or operators of auction sales who violate the Animal Welfare Act or the Regulations even if those persons were not Animal Welfare Act licensees at the time they violated the Animal Welfare Act or the Regulations.[12] Therefore, I reject Mr. Knapp's contention that the

[12]See, e.g., *In re Lanzie Carroll Horton, Jr.*, __ Agric. Dec. ___ (Apr. 5, 2013) (ordering the respondent to cease and desist from operating as a dealer without having obtained an Animal Welfare Act license and assessing the respondent a $191,200 civil penalty for operating as a dealer without an Animal Welfare Act license); *In re Karl Mitchell*, __ Agric. Dec. ___ (Dec. 21, 2010) (ordering the respondents to cease and desist from operating as exhibitors without having obtained an Animal Welfare Act license and assessing the respondents a $67,000 civil penalty for violations of the Animal Welfare Act and the Regulations); *In re Sam Mazzola*, 68 Agric. Dec. 822 (2009) (ordering the respondent to cease and desist from operating as a dealer and an exhibitor without having obtained an Animal

sanctions which the Secretary of Agriculture is authorized to impose, pursuant to 7 U.S.C. § 2149(b), for violations of the Animal Welfare Act and the Regulations may only be imposed on Animal Welfare Act licensees, and I reject Mr. Knapp's contention that I erroneously assessed Mr. Knapp a civil penalty pursuant to 7 U.S.C. § 2149(b) for his purchases and sales of animals when he was not an Animal Welfare Act licensee.

Eighth, Mr. Knapp contends, when determining the amount of the civil penalty to be assessed for Mr. Knapp's violations of the Animal Welfare Act and the Regulations, I erroneously failed to consider that Mr. and Mrs. Knapp have nine children and Mr. and Mrs. Knapp are "barely getting by financially" (Amended Pet. for Recons. at 9 ¶ 9).

Welfare Act license and assessing the respondent a $21,000 civil penalty for violations of the Animal Welfare Act and the Regulations), *dismissed*, 2010 WL 2988902 (6th Cir. Oct. 27, 2010).

When determining the amount of the civil penalty to be assessed for violations of the Animal Welfare Act and the Regulations, the Secretary of Agriculture is required to give due consideration to four factors: (1) the size of the business of the person involved, (2) the gravity of the violations, (3) the person's good faith, and (4) the history of previous violations.[13] The number of children a violator has and the violator's financial condition are not factors that are required to be considered by the Secretary of Agriculture when determining the amount of the civil penalty.[14] While I sympathize with Mr. Knapp's financial circumstances and I commend Mr. Knapp for raising nine children, I find Mr. Knapp's financial condition and the number of Mr. Knapp's children irrelevant to the determination of the amount of the civil penalty to be assessed for his violations of the Animal Welfare Act and the Regulations.

Ninth, Mr. Knapp contends I erroneously concluded Mr. Knapp's violations of the Animal Welfare Act and the Regulations were willful violations. Mr. Knapp contends his violations were not willful because he relied on the Animal Care Resource Guide published by APHIS (RX 2) as the basis for his determination that he was not required to obtain an Animal Welfare Act license. (Amended Pet. for Recons. at 10-14 ¶¶ 10-11.)

A willful act is an act in which the violator intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless

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[13]7 U.S.C. § 2149(b).

[14]*See In re James J. Everhart*, 56 Agric. Dec. 1400, 1416-17 (1997).

disregard of statutory requirements.[15] Therefore, even if I found the Animal Resource Guide (RX 2) contained erroneous information regarding Animal Welfare Act license requirements and Mr. Knapp relied on that information, I would find Mr. Knapp's violations of the Animal Welfare Act and the Regulations willful.[16]

[15] *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. ___, slip op. at 6 (July 19, 2012); *In re Kathy Jo Bauck*, 68 Agric. Dec. 853, 860-61 (2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); *In re D&H Pet Farms, Inc.*, 68 Agric. Dec. 798, 812-13 (2009); *In re Jewel Bond*, 65 Agric. Dec. 92, 107 (2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); *In re James E. Stephens*, 58 Agric. Dec. 149, 180 (1999); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 306 (1978), *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978).

[16] I agree with Mr. Knapp and the Chief ALJ that the Animal Care Resource Guide (RX 2) unambiguously exempts limited sales of hoofstock made for a regulated purpose. Therefore, I did not assess Mr. Knapp a civil penalty for his sales of hoofstock, even though I found his sales of hoofstock to be in willful violation of the Animal Welfare Act and the Regulations. *In re Bodie S. Knapp*, __ Agric. Dec. ___, slip op. at 14-15 (June 3, 2013).

Tenth, Mr. Knapp contends I erroneously concluded the Animal Welfare Act leaves no room for discretion regarding the assessment of a civil penalty for a knowing failure to obey a cease and desist order (Amended Pet. for Recons. at 14-15 ¶ 12).

The Animal Welfare Act requires the Secretary of Agriculture to assess a specified civil penalty for each violation of a cease and desist order issued under 7 U.S.C. § 2149, as follows:

> **§ 2149. Violations by licensees**
>
> . . . .
>
> **(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order**
>
> . . . . Any person who knowingly fails to obey a cease and desist order made by the Secretary under this section *shall* be subject to a civil penalty of $1,500 for each offense, and each day during which such failure continues shall be deemed a separate offense.

7 U.S.C. § 2149(b) (emphasis added). Effective September 2, 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture increased the civil penalty for a knowing failure to obey a cease and desist order from $1,500 to $1,650.[17] The word "shall" is ordinarily the language of command and leaves no room for discretion.[18] Thus, the Secretary of

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[17] 7 C.F.R. § 3.91(b)(2)(v) (2005); 7 C.F.R. § 3.91(b)(2)(ii) (2006).

[18] *See generally Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (stating the word "shall" normally creates an obligation impervious to judicial

Agriculture is required to assess Mr. Knapp a civil penalty of $1,650 for each of Mr. Knapp's 214 knowing failures to obey the cease and desist orders issued by the Secretary of Agriculture in *In re Bodie S. Knapp* (Order Denying Mot. for Recons.), 64 Agric. Dec. 1668 (2005), and *In re Coastal Bend Zoological Ass'n.*, 65 Agric. Dec. 993 (2006); namely, a total civil penalty of $353,100 for Mr. Knapp's knowing failures to obey the cease and desist orders issued by the Secretary of Agriculture.

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discretion); *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (stating the word "shall" is ordinarily the language of command); *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935) (stating the word "shall" is ordinarily the language of command); *Ex parte Jordan*, 94 U.S. 248, 251 (1876) (indicating the word "shall" means "must"); *In re Lion Raisin, Inc.* (Remand Order), 62 Agric. Dec. 149, 151-52 (2003) (stating the word "shall" is ordinarily the language of command and leaves no room for discretion); *In re PMD Produce Brokerage Corp.* (Order Denying Pet. to Reopen Hearing and Remand Order), 60 Agric. Dec. 364, 369-70 (2001) (stating the word "shall" is ordinarily the language of command and leaves no room for administrative law judge discretion); *In re David Harris*, 50 Agric. Dec. 683, 703 (1991) (stating the word "shall" is ordinarily the language of command); *In re Borden, Inc.*, 46 Agric. Dec. 1315, 1460 (1987) (stating the word "shall" is ordinarily the language of command), *aff'd*, No. H-88-1863 (S.D. Tex. Feb. 13, 1990), *printed in* 50 Agric. Dec. 1135 (1991); *In re Haring Meats and Delicatessen, Inc.*, 44 Agric. Dec. 1886, 1899 (1985) (stating the word "shall" is ordinarily the language of command); *In re Great Western Packing Co.*, 39 Agric. Dec. 1358, 1366 (1980) (stating the word "shall" is the language of command), *aff'd*, No. CV 81-0534 (C.D. Cal. Sept. 30, 1981); *In re Ben Gatz Co.*, 38 Agric. Dec. 1038, 1043 (1979) (stating the word "shall" is ordinarily the language of command).

Eleventh, Mr. Knapp asserts the Secretary of Agriculture is authorized, but not required, to assess a civil penalty for violations of the Animal Welfare Act and the Regulations (Amended Pet. for Recons. at 15-16 ¶ 13).

I agree with Mr. Knapp. Unlike the civil penalty which the Secretary of Agriculture is required to assess for a knowing failure to obey a cease and desist order, the Animal Welfare Act authorizes the Secretary of Agriculture to assess not more than $10,000 for each violation of the Animal Welfare Act or the Regulations.[19]

[19] 7 U.S.C. § 2149(b).

Prior to June 18, 2008, the Animal Welfare Act authorized the Secretary of Agriculture to assess a civil penalty of not more than $2,500 for each violation of the Animal Welfare Act and the Regulations (7 U.S.C. § 2149(b) (2006)). However, the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), provides that the head of each agency shall, by regulation, adjust each civil monetary penalty provided by law within the jurisdiction of the agency by increasing the maximum civil penalty for each civil monetary penalty by a cost-of-living adjustment. Effective June 23, 2005, the Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed under 7 U.S.C. § 2149(b) for each violation of the Animal Welfare Act and the Regulations by increasing the maximum civil penalty from $2,500 to $3,750 (7 C.F.R. § 3.91(b)(2)(ii) (2006)). On June 18, 2008, Congress amended 7 U.S.C. § 2149(b) to provide that the Secretary of Agriculture may assess a civil penalty of not more than $10,000 for each violation of the Animal Welfare Act and the Regulations (Pub. L. No. 110-246 § 14214, 122 Stat. 1664, 2228 (2008)). Thus, the Secretary of Agriculture is authorized to assess Mr. Knapp a maximum civil penalty of $1,902,500 for his 214 violations of the Animal Welfare Act and the Regulations.[20] For the reasons articulated in *In re Bodie S. Knapp*, __ Agric. Dec. ___, slip op. at 18-22 (June 3, 2013), I assessed Mr. Knapp a $42,800 civil penalty for his 214 violations of the Animal Welfare

[20]Mr. Knapp may be assessed a civil penalty of not more than $3,750 for each of the 38 violations of the Animal Welfare Act and the Regulations that Mr. Knapp committed before June 18, 2008, and a civil penalty of not more that $10,000 for each of the 176 violations of the Animal Welfare Act and the Regulations that Mr. Knapp committed after June 18, 2008.

Act and the Regulations.

Twelfth, Mr. Knapp asserts none of the "creatures" he is alleged to have purchased or sold are "animals," as that term is defined in the Animal Welfare Act; therefore, my failure to dismiss the Second Amended Complaint, is error. Mr. Knapp argues, as he is a breeder only, he did not purchase or sell "animals," as that term is defined in the Animal Welfare Act, because the definition of the term "animal" exempts "creatures" that the seller has bred that are not intended for research, testing, experimentation, or exhibition. Mr. Knapp's argument relies upon the language at the end of the definition of the term "animal" which is specific to dogs: "With respect to a dog, the term means all dogs including those used for hunting, security, or breeding purposes" (7 U.S.C. § 2132(g)). Mr. Knapp argues, since dogs used for breeding are specifically included in the definition of the term "animal" and other animals used for breeding are not mentioned, animals other than dogs used for breeding must be excluded under the canon of statutory construction: "expressio unius est exclusio alterius." (Amended Pet. for Recons. at 16-18 ¶ 14.)

The maxim "expressio unius est exclusio alterius" is an aid to statutory construction, not a rule of law. This aid to statutory construction can never override clear and contrary evidence of congressional intent.[21] Mr. Knapp's interpretation of the Animal Welfare Act is contrary to the objectives of the Animal Welfare Act and to the longstanding interpretation of the Animal Welfare Act by the Secretary of Agriculture. The stated objectives of the Animal Welfare Act are to insure the humane care and

[21] *Neuberger v. Commissioner*, 311 U.S. 83, 88 (1940); *Springer v. Philippine Islands*, 277 U.S. 189, 206 (1928); *United States v. Barnes*, 222 U.S. 513, 518-19 (1912).

treatment of animals and to protect owners of animals from theft of their animals (7 U.S.C. § 2131). To achieve these objectives, all warm-blooded animals are encompassed within the definition of the term "animal," with certain species-specific exclusions and use-specific exclusions (7 U.S.C. § 2132(g)). The definition of the term "animal" does not exclude warm-blooded animals used for breeding and the fact that the definition of the term "animal" specifically provides that the term "animal" means all dogs, including dogs used for hunting, security, and breeding, does not mean that other warm-blooded animals used for hunting, security, and breeding are not "animals," as that term is defined in the Animal Welfare Act.

Moreover, the Animal Welfare Act specifically authorizes the Secretary of Agriculture to issue Animal Welfare Act licenses to breeders of animals other than dogs[22] and the Regulations specifically provide for the issuance of Class "A" Animal Welfare Act licenses to animal breeders.[23] Finally, the Secretary of Agriculture has long interpreted the Animal Welfare Act as authorizing the licensing of breeders of animals other than dogs.

Thirteenth, Mr. Knapp asserts he is the victim of selective enforcement; therefore, he has been denied equal protection of the law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States (Amended Pet. for Recons. at 18

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[22]7 U.S.C. § 2133.

[23]9 C.F.R. §§ 1.1 (*Class "A" licensee*); 2.6(b)(1).

¶ 15).

I find nothing in the record to support Mr. Knapp's contention that the Administrator has singled out Mr. Knapp for enforcement of the Animal Welfare Act and the Regulations. Mr. Knapp bears the burden of proving he is the target of selective enforcement. Persons claiming selective enforcement must demonstrate the enforcement policy had a discriminatory effect and the enforcement policy was motivated by a discriminatory purpose.[24] In order to prove his selective enforcement claim, Mr. Knapp must show one of two sets of circumstances. Mr. Knapp must show: (1) membership in a protected group; (2) prosecution; (3) that others in a similar situation, not members of the protected group, would not be prosecuted; and (4) that the prosecution was initiated with discriminatory intent.[25] Mr. Knapp has not shown that he is a member of a protected group; that, in a similar situation, no disciplinary proceeding would be instituted against others that are not members of the protected group; or that this proceeding was initiated with discriminatory intent. In the alternative, Mr. Knapp must show: (1) he exercised a protected right; (2) the Administrator's stake in the exercise of that protected right; (3) the unreasonableness of the Administrator's conduct; and (4) this disciplinary proceeding was

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[24] *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *Wayte v. United States*, 470 U.S. 598, 608 (1985).

[25] *See Futernick v. Sumpter Twp.*, 78 F.3d 1051, 1056 n.7 (6th Cir.), *cert. denied sub nom. Futernick v. Caterino*, 519 U.S. 928 (1996); *United States v. Anderson*, 923 F.2d 450, 453 (6th Cir.), *cert. denied*, 499 U.S. 980 (1991) and *cert. denied sub nom. McNeil v. United States*, 500 U.S. 936 (1991).

initiated with intent to punish Mr. Knapp for exercise of the protected right.[26] Mr. Knapp has not shown any of these circumstances. Therefore, I reject Mr. Knapp's unsupported assertion that the Administrator singled out Mr. Knapp for enforcement of the Animal Welfare Act and the Regulations.

Fourteenth, Mr. Knapp requests that I describe my relationship to the United States Department of Agriculture and contends, if I am an employee of the United States Department of Agriculture, *In re Bodie S. Knapp*, __ Agric. Dec. ___ (June 3, 2013), is tainted by the human influences associated with the employment relationship (Amended Pet. for Recons. at 19 ¶ 16).

[26] *See Futernick v. Sumpter Twp.*, 78 F.3d 1051, 1056 n.7 (6th Cir.), *cert. denied sub nom. Futernick v. Caterino*, 519 U.S. 928 (1996); *United States v. Anderson*, 923 F.2d 450, 453-54 (6th Cir.), *cert. denied*, 499 U.S. 980 (1991) and *cert. denied sub nom. McNeil v. United States*, 500 U.S. 936 (1991).

My relationship to the United States Department of Agriculture has had no affect on my disposition of this proceeding and my relationship to the United States Department of Agriculture is not relevant to this proceeding. Nonetheless, since Mr. Knapp believes my relationship to the United States Department of Agriculture tainted *In re Bodie S. Knapp*, __ Agric. Dec. ___ (June 3, 2013), and he requests full disclosure of my relationship to the United States Department of Agriculture, I briefly address the relationship of the Judicial Officer to the United States Department of Agriculture and, in particular, my relationship to the United States Department of Agriculture.

The Act of April 4, 1940, as amended (7 U.S.C. §§ 450c-450g),[27] authorizes the Secretary of Agriculture to delegate his regulatory functions. Pursuant to this authority, the Secretary of Agriculture established the position of Judicial Officer.[28] The Secretary of Agriculture has delegated authority to the Judicial Officer to act as the final deciding officer in lieu of the Secretary of Agriculture in adjudicatory proceedings identified in 7 C.F.R. § 2.35, including adjudicatory proceedings subject to the Rules of Practice.[29] Since the position was created in 1940, three people have served as the United States Department of Agriculture's Judicial Officer.[30] The Judicial Officer is an employee of the

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[27]The Act of April 4, 1940, is also referred to as the Schwellenbach Act.

[28]The position was called "Assistant to the Secretary" until 1945 when the title became "Judicial Officer" as a result of a United States Department of Agriculture reorganization. 10 Fed. Reg. 13769 (Nov. 9, 1945).

[29]7 C.F.R. § 2.35(a)(2).

[30]Thomas J. Flavin held the position from 1940 to June 1972, and Donald A. Campbell

United States Department of Agriculture.

I have been an employee of the United States Department of Agriculture since July 18, 1976. During the period July 18, 1976, to January 20, 1996, I was employed in the Office of the General Counsel, Regulatory Division, and from January 21, 1996, to the present I have served as the United States Department of Agriculture's Judicial Officer.[31]

Congress has put in place a number of statutory provisions and the United States Department of Agriculture has put in place a number of regulatory provisions and institutional practices designed to ensure that the Judicial Officer renders impartial decisions in administrative proceedings.

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held the position from January 1971 to January 1996, when I was appointed as the Judicial Officer. A fourth person, John J. Franke, Jr., was delegated authority to decide one case as Judicial Officer, but that decision, *In re Utica Packing Co.* (Ruling on Complainant's Motion for Recons. and Decision and Order on Recons.), 43 Agric. Dec. 373 (1984), was held to violate due process of law. *United Packing Co. v. Block*, 781 F.2d 71, 78 (6th Cir. 1986).

[31]My service computation date as a United States government employee predates July 18, 1976, due to my service in the United States Army during the period 1970 through 1972.

The Administrative Procedure Act requires that the functions of the Judicial Officer must be conducted in an impartial manner.[32] Between the institution of a proceeding and the issuance of a final decision, the Judicial Officer is prohibited from discussing ex parte the merits of a proceeding.[33] The Judicial Officer has no responsibility for investigation, prosecution, or advocacy and is not responsible to, supervised by, or directed by any employee or agent engaged in the investigative or prosecuting functions of the United States Department of Agriculture.[34] During the period of my employment as the Judicial Officer, my job performance has never been evaluated; I have never received an award, bonus, certificate of merit, or emolument; and I never been promoted, demoted, penalized, or reprimanded.

In short, the Judicial Officer is required by law to conduct the functions of the Judicial Officer in an impartial manner and the incentives normally present in an employment relationship to conduct functions in other than an impartial manner are not present in the employment relationship between the United States Department of Agriculture and the United States Department of Agriculture's Judicial Officer. Therefore, I reject Mr. Knapp's contention that *In re Bodie S. Knapp*, __ Agric. Dec. ___ (June 3, 2013), is tainted by my employment relationship with the United States Department of Agriculture.

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[32] 5 U.S.C. § 556(b).

[33] 5 U.S.C. § 557(d); 7 C.F.R. § 1.151.

[34] Thomas J. Flavin, *The Functions of the Judicial Officer, United States Department of Agriculture*, 26 Geo. Wash. L. Rev. 277, 284 (1957).

Fifteenth, Mr. Knapp asserts I took nearly 2 years to issue *In re Bodie S. Knapp*, __ Agric. Dec. ___ (June 3, 2013) (Amended Pet. for Recons. at 2, 19 ¶¶ 1, 16).

On April 9, 2012, the Hearing Clerk transmitted the record in this proceeding to the Office of the Judicial Officer for consideration and decision. I did not issue a decision until June 3, 2013, 1 year 1 month 25 days after the Hearing Clerk referred the record to the Office of the Judicial Officer. While I disagree with Mr. Knapp's characterization of 1 year 1 month 25 days as "nearly 2 years," I do agree with Mr. Knapp's general point that the time between referral of the record to the Office of the Judicial Officer and my issuance of *In re Bodie S. Knapp*, __ Agric. Dec. ___ (June 3, 2013), was far too long. However, there is no limitation on the time within which the Judicial Officer must issue a decision in an Animal Welfare Act proceeding, and I do not find that Mr. Knapp was harmed by the lengthy period between referral of the record to the Office of the Judicial Officer and issuance of *In re Bodie S. Knapp*, __ Agric. Dec. ___ (June 3, 2013).

Sixteenth, Mr. Knapp asserts my suggestion that the Administrator consider referring any future knowing violation of the Animal Welfare Act or the Regulations by Mr. Knapp for criminal prosecution is an indication that I harbor personal animosity toward Mr. Knapp (Amended Pet. for Recons. at 19 ¶ 16).

As Mr. Knapp states, I did urge the Administrator to consider referring for criminal prosecution any future knowing violation of the Animal Welfare Act or the Regulations by Mr. Knapp, as follows:

Criminal Prosecution of Mr. Knapp

> This proceeding is the third administrative proceeding brought under the Animal Welfare Act against Mr. Knapp. As evidenced in this proceeding, the orders issued by the Secretary of Agriculture against Mr. Knapp in *In re Bodie S. Knapp* (Order Denying Mot. for Recons.), 64 Agric. Dec. 1668 (2005), and *In re Coastal Bend Zoological Ass'n.*, 65 Agric. Dec. 993 (2006), have not deterred Mr. Knapp from continuing to violate the Animal Welfare Act and the Regulations. If Mr. Knapp knowingly violates the Animal Welfare Act or the Regulations in the future, I would urge the Administrator to consider referring the matter for criminal prosecution in accordance with 7 U.S.C. § 2149(d).

In re Bodie S. Knapp, __ Agric. Dec. ___, slip op. at 41 (June 3, 2013). However, my suggestion to the Administrator was not motivated by personal animosity toward Mr. Knapp. Instead, my suggestion was motivated by the failure to deter Mr. Knapp from violating the Animal Welfare Act and the Regulations through the administrative process.

Lifting of the Automatic Stay

The Rules of Practice provide that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration (7 C.F.R. § 1.146(b)). Mr. Knapp's Amended Petition for Reconsideration was timely filed and automatically stayed *In re Bodie S. Knapp*, __ Agric. Dec. ___ (June 3, 2013). Therefore, since Mr. Knapp's Amended Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in *In re Bodie S. Knapp*, __ Agric. Dec. ___ (June 3, 2013), is reinstated.

For the foregoing reasons, the following Order is issued.

ORDER

Mr. Knapp's Amended Petition for Reconsideration, filed August 21, 2013, is denied.

Done at Washington, DC

November 6, 2013

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William G. Jenson
Judicial Officer