

**UNITED STATES DEPARTMENT OF AGRICULTURE**  
**BEFORE THE SECRETARY OF AGRICULTURE**

In re:	)	AWA Docket No. 06-0009
	)	
DAVID McCAULEY, an individual	)	
doing business as DAVE’S ANIMAL	)	
FARM	)	
	)	
Respondents	)	

**Decision**

In this decision I find that Respondent David McCauley violated the Animal Welfare Act by acting as a dealer of regulated animals with respect to at least one transaction even though his license had been revoked in a prior decision. I find that Complainant did not show by a preponderance of the evidence that Respondent acted as a dealer with respect to two wallabies he transported to Germany. I impose a civil penalty of \$2,000 against Respondent.

**Procedural Background**

A Complaint was filed by Kevin Shea, Administrator, Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture, on January 27, 2006, alleging that Respondent David McCauley had committed a number of violations of the Animal Welfare Act (“the Act”) and regulations thereunder between May 4, 2005 and December 15, 2005. In particular the Complaint alleged that Respondent operated as a “dealer” under the Act, even though his license had previously been revoked, and

that he offered animals for sale and exhibition, and sold and transported animals to Guatemala and Germany, during the violative period.

Respondent filed a timely Answer denying that he had violated the Act. He stated that he had been told by USDA personnel that it was not unlawful to ship animals from the U.S. to another country without a dealer's license, and that, in any event, the Complainant's allegations concerning the nature of his business in Germany were incorrect. He further contended that he had not acted as a dealer of regulated animals once his license was revoked.

On March 9, 2006, Complainant moved that a date be set for a hearing. I conducted a conference call on July 28, 2006 at which Complainant was represented by Colleen A. Carroll, Esq. and Respondent represented himself. At the conference call the parties agreed to a hearing date of December 12, 2006. Complainant agreed to deliver to Respondent, to be received no later than September 15, 2006, a list of anticipated witnesses, a brief summary of anticipated witness testimony, and copies of exhibits intended to be introduced at the hearing. Similarly, Respondent agreed to deliver his list, summaries and copies by October 20, 2006. On November 15, 2006, Brian T. Hill, Esq., submitted a Notice of Appearance on behalf of Complainant, replacing Ms. Carroll.

I conducted a hearing on this matter in San Antonio, Texas on December 12, 2006. At the outset of the hearing, Respondent notified me that he had never received the initial exchange from Complainant, nor had he submitted his exchange to Complainant. Mr. Hill, who had not been involved in the case until two months after Complainant's submission was due, could not document that Complainant had mailed its exchange to

Respondent, nor was he able to reach Ms. Carroll<sup>1</sup>. Respondent indicated that he was thus unable to fully prepare for the hearing. Tr. 16. I stated that I would go on with the hearing, and would “reserve the right to continue the hearing” if Respondent needed additional time to prepare his cross-examination of witnesses. Tr. 20.

At the hearing Complainant called five witnesses and introduced 25 exhibits. Respondent testified on his own behalf, and introduced no exhibits. At the conclusion of the hearing, the parties and I agreed that there was no need to continue the hearing, as Respondent had “put on all his evidence and said everything he wanted to say.” Tr. 206. Both parties submitted briefs in early February, 2007.

### **Statutory and Regulatory Background**

The Animal Welfare Act, 7 U.S.C. § 2131 et seq., broadly regulates “animals and activities . . . in interstate or foreign commerce or [which] substantially affect such commerce or the free flow thereof . . . in order—(1) to insure that animals intended for . . . exhibition purposes or for use as pets are provided humane care and treatment.” The Act authorizes the Secretary of Agriculture to issue licenses to dealers, 7 U.S.C. § 2133, and forbids any dealer from selling or offering to sell regulated animals without a license, 7 U.S.C. § 2134. The Act defines “dealer” as “any person who, in commerce, for compensation or profit, deliver for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of” any animal. 7 U.S.C. § 2132 (f).

The Secretary has promulgated regulations pursuant to the Act. The regulations define “commerce” as “trade, traffic, transportation, or other commerce: (1) Between a place in a State and any place outside of such State, including any foreign country, or

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<sup>1</sup> The exchange is normally not filed with the Hearing Clerk, so there was no evidence in the file indicating that my order regarding the exchange was complied with.

between points within the same State but through any place outside thereof, or within any territory, possession, or the District of Columbia; or (2) Which affects the commerce described in this part.” 9 C.F.R. § 1.1. The regulations also provide that a person whose license has been revoked “shall not be licensed in his or her own name or in any other manner,” 9 C.F.R. § 2.10(b), and that any person whose license has been revoked “shall not buy, sell, transport, exhibit, or deliver for transportation” any animal. 9 C.F.R. § 2.10(c).

### **Facts**

Respondent David McCauley is an individual doing business as Dave’s Animal Farm, whose current mailing address is Post Office Box 358, McQueeney, Texas 78123. Respondent was licensed as a dealer under the Act and was in the business of selling Bennetts wallabies, and other macropods and exotic pets. He is also a published author whose book “Macropods: Their Care, Breeding, and the Rearing of Their Young” is sold through his website.<sup>2</sup> He is an expert in macropod health, and has for years consulted and published in that field.

Respondent’s dealer’s license was revoked by my decision of January 30, 2004, In re: David McCauley, 63 Agric. Dec. 79 (2004), CX 8.<sup>3</sup> That decision became final on March 8, 2004. Respondent has not held a USDA dealer’s license since that time. The

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<sup>2</sup> The USDA library lists this book in its catalog.

<sup>3</sup> At the hearing and again in his brief Respondent continues to urge that this decision be reversed, even though he did not show up at the hearing, did not file a motion to reconsider or for rehearing, and did not timely appeal the decision. While he stated that he did not receive notice of the exact date of the hearing, and the file contains no evidence as to whether he received the exact time and location of the hearing, he knew what day the hearing was scheduled to occur and elected to not show up rather than call my office or the Hearing Clerk’s office to inquire why he had not been notified. Further, he signed a receipt for the decision at his usual place of business on February 11, 2004. CX 8, p. 1. The decision explicitly stated that it would become final within 35 days unless appealed, and the rules of procedure provide that an appeal must be filed within 30 days of receiving service of the decision. It was not until May 13, 2004, two months after the appeal was required to have been filed, that Respondent filed his appeal to the Judicial Officer who denied the late appeal for lack of jurisdiction.

Complaint charges Respondent with two specific transactions that it believes constitutes acting as a dealer without a license, as well as a general violation for advertising sales of regulated animals through his website.

The Guatemala transaction—Complainant presented evidence that Respondent shipped a wallaby to the Guatemalan National Zoo in January 2005. The wallaby was shipped out of San Antonio on Continental Airlines, CX 3, with the requisite health certificates, CX 4, 5. Respondent does not deny this transaction, but consistently has maintained that he was specifically and clearly told, by an unnamed USDA veterinarian, that he was allowed to ship animals outside the United States even though his dealer’s license was revoked. He testified that he called USDA’s regional office, was transferred to a staff veterinarian, and asked him a great many questions so that it was clear that the person knew what Respondent was asking. He stated that he was told “what you do outside of this country is your business.” Tr. 162. Unfortunately, Respondent has no recollection as to the name of the individual who gave him this advice. Even if this advice was actually given, the fact is that the activity complained of did not take place entirely out of the United States or its territories, since Respondent shipped the wallaby from Texas. CX 3.

Respondent also testified that after he received the Complaint in this case, he spoke to his custom broker, who referred him to a Dr. Okino, another USDA veterinarian, who also told him that USDA did not require a license for exporting wallabies outside of the United States. Tr. 163-166. Respondent did not attempt to subpoena Dr. Okino.

Thus, it is undisputed that Respondent sold and shipped a wallaby to the Guatemalan National Zoo in January 2005.

The Germany transaction—Complainant alleges that Respondent acted as a dealer with respect to two joey<sup>4</sup> wallabies he transported to Germany in May 2005. Respondent states that he did not act as a dealer, but rather instead brought the wallabies over to Germany in furtherance of his business as an expert animal consultant, and to participate in the taping of a television program/video on wallabies. Respondent testified that he was paid only his expenses for his trip to Germany, Tr. 181-182, with the hope that the marketing of the video that was produced would net him a profit. Tr. 203. While Complainant proposes a finding of fact that Respondent received two air tickets to Germany, Respondent testified that he received only one such ticket, as part of his expenses, and that he used accumulated airline miles to purchase a ticket for his daughter, who accompanied him on the trip. Tr. 150-151. There is absolutely no testimony to support Complainant’s proposed conclusion of law that the funds advanced by Dagmar Grubnau were used to purchase Respondent’s daughter’s airplane ticket. However, it is undisputed that Respondent received approximately \$1,150 to cover his airline ticket and fees such as the international health certificate and other inspection costs.

Respondent has testified that he did not sell the wallabies to Dagmar Grabnau. He stated that he gave them away because Grabnau’s wife had bonded with them, and because he had had an arduous and messy trip to Germany. Tr. 165-168. However, the health certificate related to the portion of the trip from the United States lists Dagmar Grabnau as the consignee. CX 17. In addition, describing the transaction on his website, Respondent states that he had traveled to Germany and had “delivered a pair of bennetts joeys to a customer for use in a TV documentary” and that the documentary would follow “the joey’s lives until they are parents themselves.” CX 2, p. 1. While there is evidence

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<sup>4</sup> A joey is a juvenile wallaby.

that the price for wallabies can run well over \$1,000 apiece, there is no evidence of any transaction between Respondent and Grabnau that would indicate an actual sale of the two wallabies.

Complainant also contends<sup>5</sup> that with respect to securing the possession of a female wallaby to take to Germany, that Respondent acted as a dealer in regards to a complicated three way transaction. In essence, Respondent arranged for Arnold Sorenson to trade a male wallaby to Mike Smith, with the understanding that Mike Smith would give Respondent a female wallaby to take to Germany. Mr. Sorenson understood that Respondent would eventually provide him a male wallaby and \$300 to complete the deal, but apparently that has not happened thusfar.

Complainant also contends that Respondent has acted as a dealer by maintaining a website which until at least early May, 2005, indicated that Respondent was selling wallabies and other macropods, and even posted the price for some wallabies. CX 1, p. 3. Respondent's homepage indicates that he "is available for future consulting and presentations and still owns his large mob of Bennetts wallabies in Texas, which he supplies to zoos, exotic animal breeders, and the bottle-fed joeys to the public as pets." Sometime subsequent to May 2005 and before August, 2005, the price listings were left blank on Respondent's website. Respondent contended at the hearing that he was not in the business of selling wallabies and essentially blamed all his difficulties with the website on his webmaster, Mike Clayton, who he stated was constantly delinquent in complying with his requests to update his website. Tr. 197-202. He stated that he was paying him too much money to switch to someone else. He did not attempt to subpoena Mr. Clayton, even though Clayton's whereabouts is known to Respondent since he is

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<sup>5</sup> Although it is not specifically mentioned in the Complaint.

apparently an assistant professor at a local university. Tr. 197. He also offered no explanation as to why Clayton was able to update his website to include details of his Germany trip, but did not eliminate the page “Pricing for Wallabies” on the website.

### **Discussion**

I find that Respondent has violated the Animal Welfare Act by acting as a dealer without a dealer’s license. However, I am only finding that he violated the Act with regard to the transaction with the Guatemala National Zoo. Although it is a close question, I find that he did not act as a dealer with regard to the transaction involving the shipment of wallabies to Germany. In addition, although I find he was clearly holding himself out as a dealer on his website, and continues to do so, that in itself is not a violation of the Act—there has to be a transaction in order for their to be a violation, and only the Guatemalan transaction was proven by a preponderance of the evidence. Accordingly, I am issuing a cease and desist order and imposing a civil penalty of \$2,000, rather than the \$6,600 requested by Complainant.

At the outset, it is unequivocally clear that “commerce” as used in the Act and regulations, covers the sale and shipment of animals from within the United States to a point outside of the United States. There is no dispute that such a transaction took place with respect to the sale of wallabies to the Guatemalan National Zoo. The principal area of dispute centers on Respondent’s claim that he was told by an unidentified veterinarian that it was permissible for him to ship the wallabies outside the United States without a dealer’s license, and was told after-the-fact by another USDA veterinarian that his shipping of animals outside the country without a dealer’s license was legal. The problem with Respondent’s claim of “justifiable reliance” is that the regulations clearly

define commerce as including transactions between a place in a state and any foreign country. There is nothing ambiguous about this language, and it was easily discernable to Respondent, who had a copy of the regulations. Tr. 137-138. Even if Respondent could produce USDA witnesses who gave him incorrect advice, he still would not prevail on this issue. The clear language of the regulation prevails over the incorrect interpretation of an employee. While clear proof of bad Agency advice might go to the issue of Respondent's good faith on this issue, and have an impact of the penalty, the failure to name the person who allegedly gave him the bad advice before the transaction, and the failure to subpoena the person who allegedly confirmed this bad advice after-the-fact, leads me to reject this defense. Further, the alleged advice does not appear to cover Respondent's transaction anyway, since the undisputed evidence clearly demonstrates that the wallaby was shipped from within the United States.

The German transaction presents a closer question. Bearing in mind that Complainant bears the burden of proof, by the preponderance of the evidence, I must rule in favor of Respondent on this issue. If Respondent had shipped the two wallaby joeys from San Antonio to Germany without accompanying them, there is no question that he would have acted as a dealer. However, the fact that he lost his dealer's license does not require him to abandon all activities involving macropods. The loss of his license does not act as a ban on his utilizing his expertise in other manners, including writing, lecturing, consulting, etc. Lack of a license does not preclude him from taking wallabies with him on a lecture tour, or from making a television or movie documentary about macropods. There is not much in the way of evidence that contradicts Respondent's account of his trip to Germany. He stated he was being paid his expenses for a

documentary on wallabies, and there is no evidence in this record to the contrary. The approximately \$1,100 he states that he was paid for his airline tickets and other expenses does not seem excessive, particularly when the length of the trip—less than two weeks—is factored in. There is no evidence that he was paid any amount that would approach the amount he normally charged for joey wallabies. There is no evidence to support the government contention that the costs of Respondent’s daughter’s ticket to Germany was borne by anyone in Germany, rather than Respondent’s un rebutted statement that he used his accumulated airline miles to finance her ticket, and paid her taxes with his own money. Basically, Respondent’s account—that he took the trip to help create a documentary film/video with the hope that he would receive a share of the profits, if any, as well as an increase in profits from the sales of his book, has not been countered by Complainant. Even though I find Respondent’s account that he decided to donate the wallabies to be less than convincing,<sup>6</sup> Complainant needs more than surmise to meet its burden of proof.

Similarly, Respondent’s role in the three-way transaction Respondent participated in to obtain a female joey wallaby to take with him to Germany does not appear to be that of a dealer as defined in the Act. The net impact of the transaction is that Respondent arranged for a trade to allow him to obtain a female joey for his own benefit to take with him to Germany to utilize in the preparation of a documentary on wallabies. That he generated a debt with other dealers as part of this transaction does not make him a dealer.

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<sup>6</sup> His website narrative of the trip, where he indicates that the documentary would follow the joeys “until they are parents themselves,” is flatly inconsistent with his testimony that he had intended to bring them back to the United States. CX 2, p. 1.

I also find that even if Respondent advertised that he had wallabies for sale, that does not make him a dealer. Complainant has consistently proven its unlicensed dealer cases, against Respondent and others, by demonstrating sales of animals at a time when the seller did not have a license. E.g., In re Marilyn Shepherd, 65 Agric. Dec \_\_ (Aug. 31, 2006). Each time a person without a dealer’s license acts as a dealer—generally by buying or selling a regulated animal—that person commits a violation of the Act. Advertising prices for regulated animals does not in itself constitute a violation, as advertising is not listed as one of the regulated acts for which a dealer’s license is required. Complainant’s brief is devoid of case citations on this issue, and I have found nothing to indicate that the mere act of advertising constitutes violative conduct.<sup>7</sup>

I am imposing a penalty of \$2,000 for the violation committed by shipping a wallaby to the Guatemalan National Zoo. Dealing animals without a license is among the most serious violations of the Animal Welfare Act. Respondent was fully aware that his license had been revoked. His refusal to pay the civil penalty assessed in the earlier decision, the fact that he has a history of prior violations, and the unambiguous language in the regulations support a finding that his violation here was willful and that his conduct can be characterized as lacking good faith.

### **Findings of Fact**

1. Respondent David McCauley is an individual doing business as Dave’s Animal Farm and whose current mailing address is Post Office Box 358, McQueeney, Texas 78123.

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<sup>7</sup> This is not to say I give any credibility to Respondent’s rather lame defense that he had been trying to get his webmaster to remove any references to sales, but has been unable to get him to do so.

2. Respondent at one time held Animal Welfare dealer's license # 74-B-0439. This license was revoked (and a civil penalty of \$10,000 was imposed) on January 30, 2004, in In re: David McCauley, 63 Agric. Dec. 79 (2004). The revocation became a final decision of the Secretary of Agriculture on March 8, 2004.

3. On or about January 18, 2005, Respondent sold and transported a wallaby to the Guatemala National Zoo.

4. On or about May 11, 2005, Respondent transported two wallabies to Dagmar Grubnau in Germany. These wallabies were transported in order to allow Respondent to assist in the preparation of a documentary. Respondent received some expenses and a promise of a percentage of profits that would be generated from the documentary. Although the wallabies remained in Germany after Respondent returned to the United States, there is no evidence that the wallabies were sold.

5. From on or about the time Respondent's license was revoked through at least August 22, 2005, Respondent advertised the sale of wallabies on his website.

### **Conclusions of Law**

1. The Secretary has jurisdiction in this matter.
2. Respondent's sale and transportation of a wallaby to the Guatemala Zoo in January 2005, when he did not possess a dealer's license issued pursuant to the Act, was a willful violation of section 2134 of the Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).
3. Respondent's transporting of two wallabies to Germany in conjunction with the preparation of a documentary did not constitute a violation of the Act or the Regulations.

4. The act of advertising wallabies for sale on his website did not in itself constitute a violation of the Act.

5. Upon consideration of the factors enumerated in the Act, I impose a civil penalty of \$2,000 against Respondent.

### **Order**

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Act and regulations without being licensed as required.

2. Respondent is assessed a civil penalty of \$2,000, which shall be paid by a certified check or money order with the notation "AWA Dkt. No. 06-0009" on the front of the check or money order made payable to the Treasurer of United States and shall be sent to:

Brian T. Hill  
Office of the General Counsel  
Room 2343 South Building  
United States Department of Agriculture  
1400 Independence Ave., S.W.  
Washington, D.C. 20250-1417

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.  
this 14th day of May, 2007.

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**MARC R. HILLSON**  
Chief Administrative Law Judge