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UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Docket Nos. 15-0058 & 15-0059
16-0037 & 16-0038

In re:

DOUGLAS KEITH TERRANOVA, an individual; and
TERRANOVA ENTERPRISES, INC., a Texas corporation,

Respondents.

Appearances:

Colleen A. Carroll, Esq., and Samuel D. Jockel, Esq., for Complainant

William J. Cook, Esq., for Respondents

DECISION AND ORDER

I. INTRODUCTION

The above captioned matters involve administrative enforcement proceedings initiated by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), an agency of the United States Department of Agriculture ("USDA" or "Complainant"), against Douglas Terranova and Terranova Enterprises, Inc. ("Respondents"). Complainant alleges that Respondents violated the Animal Welfare Act ("Act" or "AWA"), as amended (7 U.S.C. §§ 2131- 2159); the regulations ("regulations") issued under the Act (9 C.F.R. §§ 1.1-3.142); and the standards ("standards") found at part 3 of the regulations (9 C.F.R. §§ 3.1-3.142).

A prior proceeding between these parties resulted in a December 20, 2011, decision finding a number of violations of the Act and imposing a cease and desist order, civil penalty, and license renewal conditions. *In re Terranova Enterprises, Inc., a Texas corporation doing business as Animal Encounters, Inc; Douglas Keith Terranova, an individual; et al.*, AWA

Docket No. 09-0155; *In re Terranova Enterprises, Inc., a Texas corporation doing business as Animal Encounters, Inc.; Douglas Keith Terranova, an individual; et al.*, AWA Docket No. 10-0418 (Decision and Order as to Terranova Enterprises, Inc. d/b/a Animal Encounters Inc. and Douglas Keith Terranova) (referred to herein as "Terranova 2009/2010 Cases").

Respondent Douglas Terranova, who started working with animals at age eleven when he volunteered at a zoo, owns Respondent Terranova Enterprises, Inc., which provides animals for movies, circuses, television shows, live performances, and commercials. Tr. 374, 394.[1] These cases primarily focus on the escape of a tiger at a April 20, 2013, circus performance but also allege over twenty violations of the regulations and standards both at the Terranova property in Texas and while travelling with his animals. As discussed more fully below, three willful violations are found: August 2, 2010, unable to access facility; April 20, 2013, animal escape; and November 14-19, 2015, itinerary not filed.

A. Issues Presented

This proceeding raises the issues of whether Complainant has demonstrated that the Respondents violated the Animal Welfare Act, and if so, what sanctions, if any, should be imposed because of the violations.

The Respondents did not specifically allege selective enforcement or bias. However, they imply that they were unfairly targeted. Claims of selective enforcement or bias would not be successful under these facts. Given the timing of some of the inspections and circumstances of the violations, however, it is understandable that Respondents feel unfairly targeted. As explained during the hearing, this decision is limited to addressing the violations of the Animal

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[1] In this decision, exhibits are identified as follows: Complainant's as "CX #" and Respondents' as "RX #." References to the transcript of the hearing are identified as "Tr. [page #]."

Welfare Act alleged in the complaint and whether the Complainant produced evidence to establish those allegations.

B. Procedural History

In a complaint filed on January 16, 2015, Complainant alleged that the Respondents willfully violated the Act and the regulations on multiple occasions between August 2010 and September 2013. *In re Douglas Keith Terranova and Terranova Enterprises, Inc.*, AWA Dockets 15-0058 and 15-0059 (the 2015 cases). On February 19, 2015, Respondents filed an answer denying the material allegations of the 2015 complaint.

On January 29, 2016, Complainant filed a second complaint against Respondents alleging additional violations in 2015. *In re Douglas Keith Terranova and Terranova Enterprises, Inc.*, AWA Dockets 16-0037 and 16-0038 (the 2016 cases). On February 22, 2016, Respondents filed an answer denying the material allegations of the 2016 complaint.

On February 5, 2016, an order was issued consolidating the two proceedings and scheduling the oral hearing.

Due to an issue with the availability of a witness, the hearing was held in two parts. The events involving allegations that occurred away from the Terranova Respondents' property in Texas were addressed in a hearing that commenced on March 21, 2016, through March 23, 2016, held in person in Washington, D.C. Events involving allegations occurring on the Terranova Respondents' property were addressed when the hearing resumed on April 18, 2016, and April 19, 2016, in Riverdale, Maryland, through audio-visual equipment located in Dallas, Texas, and Palmetto, Florida.

Complainant is represented by Colleen A. Carroll, Esq., and Samuel D. Jockel, Esq., Office of the General Counsel, Washington, D.C. Respondents are represented by William J. Cook, Esq., of Tampa, Florida.

On June 13, 2016, Complainant submitted Complainant's proposed corrections to the transcript of the oral hearing. Respondents did not object to the proposed corrections. The transcript corrections proposed by Complainant on June 13, 2016, are hereby adopted.

On June 10, 2016, Complainant filed its proposed findings of fact, conclusions of law, and order, and brief in support thereof ("Complainant's Brief"). On July 15, 2016, Respondents filed their posthearing brief and proposed findings of fact and conclusions of law (Respondents' Opposition Brief"). On July 29, 2016, Complainant filed its reply brief ("Complainant's Reply Brief").

C. Evidence

Under the Administrative Procedures Act ("APA"), an Administrative Law Judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 102 (1981). This decision is based upon consideration of the record evidence; the pleadings, arguments, and explanations of the parties; and controlling law.

This decision addresses only material issues of fact and law. Proposed findings of fact not included in this decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the complaints or the defenses thereto. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact,

law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959). To the extent individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

This decision provides a discussion of the law and regulations and analysis of each allegation; specific findings of fact and conclusions of law; and the Order.

II. DISCUSSION

A. Law and Regulations

The purpose of the Animal Welfare Act as it relates to exhibited animals is to ensure that they are provided humane care and treatment. 7 U.S.C. § 2131. The Secretary of Agriculture is specifically authorized to promulgate regulations to govern the humane handling and transportation of animals. 7 U.S.C. §§ 2143(a), 2151. The Act requires exhibitors to be licensed. 7 U.S.C. §§ 2133, 2134. Exhibitors must also allow inspection by APHIS inspectors to assure that the provisions of the Act and the regulations are being followed. 7 U.S.C. §§ 2143, 2143(a)(1) and (2), 2146(a).

Violations of the Act by licensees may result in the assessment of civil penalties and the suspension or revocation of licensees. 7 U.S.C. § 2149. The maximum civil penalty that may be assessed for each violation is $10,000. 7 U.S.C. § 2149(b).

Regulations promulgated to implement the Act provide requirements for licensing, record keeping, and veterinary care, as well as specifications for the humane handling, care, treatment, and transportation of covered animals. 9 C.F.R. Chapter 1, Subchapter A, Parts 1 through 4. The standards set forth specific instructions regarding the size and environmental specifications of facilities where animals are housed or kept; the need for adequate barriers; the feeding and

watering of animals; sanitation requirements; and the size of enclosures and manner used to transport animals. 9 C.F.R. Chapter 1, Subchapter A, Part 3, Subpart F. The regulations make it clear that exhibited animals must be handled in a manner that assures not only their safety but also the safety of the public, with sufficient distance or barriers between animals and people.

To prevail in a proceeding brought to enforce the Act, a complainant has the burden of proving by a preponderance of the evidence that the respondents violated the Act. 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); *In re John Davenport, d/b/a King Royal Circus*, 57 Agri. Dec. 189 (1998). "[W]hen the evidence is evenly balanced, the [party with the burden of persuasion] must lose." *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

For a revocation of license to be authorized, only one of the violations need be willful. *Cox v. U.S. Dept. of Agriculture*, 925 F.2d 1102, 1105 (8th Cir. 1991); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 1107 (1996); *In re Cecil Browning, d/b/a Alligatorland Safari Zoo, Inc.*, 52 Agric. Dec. 129 (1993). The Administrative Procedures Act provides in relevant part:

> Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefore, the licensee has been given –
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

5 U.S.C. § 558(c). Willfulness under the Act has been defined as "'an act done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.'" *Lancelot Kollman Ramos v. U.S. Dept. of Agriculture*, 322 Fed. Appx. 814, 823 (11th Cir. 2009) quoting *Coosemans Specialties, Inc. v. U.S. Dept. of*

Agriculture, 482 F.3d 560, 567 (D.C. Cir. 2007); *Potato Sales Co., Inc. v. U.S. Dept. of Agriculture*, 92 F.3d 800, 805 (9th Cir. 1996). Willfulness is not required for a cease and desist order or for a monetary fine.

B. Analysis

The Respondents are charged with violations of the Act that fall within several general categories: access to facilities; handling and supervision; maintaining sufficient barriers; handling and care of animals; providing a veterinary plan of care; providing itineraries; and maintenance of facilities based on inspections or attempted inspections of Respondents' facility, records, and animals on seven dates: August 2, 2010; March 10, 2011; September 28, 2012; September 25, 2013; January 8, 2015; May 13, 2015; and November 19, 2015. The allegations and evidence are summarized below in the roughly chronological order alleged in the complaint.

1. Access to Facilities

The 2015 complaint alleges that on August 2, 2010, and September 28, 2012, Respondents willfully violated the Act and regulations by failing to have a responsible person available to provide access to APHIS officials to inspect its facilities, animals, and records during normal business hours. 2015 Complaint at 5, ¶6.

The Act provides that the Secretary "shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale." 7 U.S.C. § 2146(a). The regulations provide:

> (a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:
>
> (1) To enter its place of business;
>
> (2) To examine records required to be kept by the Act and the regulations in this part;
>
> (3) To make copies of the records;

(4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and

(5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.

9 C.F.R. § 2.126(a).

Complainant alleges that Respondents willfully violated the access requirements on August 2, 2010, and September 28, 2012. Complainant's Brief at 2-5. The Respondents do not contest that the inspectors were not able to see the property, stating:

> On August 2, 2010, APHIS inspector Donnovan Fox attempted to conduct an inspection. Respondent Douglas Terranova was in court at the time on a personal matter. Tr. 695. On September 28, 2012, Terranova had designated Carlos Quinones as a responsible person to be present for the inspection but apparently the gate had been closed inadvertently when Fox arrived for the inspection. Tr. 696-698. Terranova arranged for Fox to return and inspect within the month. Tr. 698. Given the number of successful inspections, these incidents are isolated and non-willful violations. CX 14.

Respondents' Opposition Brief at 2.

There is no dispute that ACI Fox attempted to inspect Respondents' facility during normal business hours on two occasions and was unable to do so. On August 2, 2010, Mr. Terranova was in court on a personal matter and he does not contest this allegation. Tr. 696-697. ACI Fox documented his attempt to inspect in an inspection report. CX 3. Respondents were aware that they are required to have an adult present and available to permit access to facilities, as they were found in violation of this section in the prior case. Terranova 2009/2010 Cases at 23-24. Complainant established that this violation occurred and that it was willful.

On September 28, 2012, Mr. Terranova had designated Carlos "Niche" Quinones as a responsible person to be present for the inspection but apparently the gate had been closed inadvertently before ACI Fox arrived for the inspection. Tr. 697-699. Mr. Terranova arranged

for ACI Fox to return and inspect within the month. Tr. 699. Mr. Terranova's testimony is credited, particularly as he was forthcoming about the 2010 violation. Respondents do not contest that ACI Fox was unable to inspect the facility on this date. Accordingly, the evidence establishes that on September 28, 2012, a violation occurred but the violation was not willful and no additional penalty is imposed from this violation.

2. Handling and Supervision (Tiger Escape)

The 2015 complaint alleges that on April 20, 2013, Respondents willfully violated the regulations (1) "by failing to handle an animal as carefully as possible in a manner that would not cause physical harm or unnecessary discomfort," (2) "by failing, during public exhibition, to handle an animal with sufficient distance and/or barriers between the animal and the public," and (3) "by failing, during public exhibition, to have a dangerous animal under the direct control and supervision of a knowledgeable and experienced animal handler." 2015 Complaint at 5, ¶7. Specifically, the complaint alleges that Respondents "exhibited a tiger (Leah) in a circus in Salina, Kansas, and upon the conclusion of the performance, the tiger was not secured in an enclosure, but was loose and out of the Respondents' control and supervision in the performance area, and thereafter entered the women's restroom in the public concourse area." 2015 Complaint at 5, ¶7.

The tiger escape is alleged to violate three sections of the regulations. The regulations provide (1) "[h]andling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort;" (2) "[d]uring public exhibition, any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of animals

and the public;" and (3) "[d]uring public exhibition, dangerous animals such as lions, tigers, wolves, bears, or elephants must be under the direct control and supervision of a knowledgeable and experienced animal handler." 9 C.F.R. §§ 2.131(b)(1); 2.131(c)(1); 2.131(d)(3).

Complainant asserts that Mr. Terranova worked with Mr. Quinones, the tiger trainer and presenter; Richard Curtis, the prop boss and ringmaster; Jesse Plunkett, part of the crew; and, Cody Ives, a performer from a motorcycle act who voluntarily assisted with transferring the tigers. Complainant's Brief at 16; Tr. 308, 310. Complainant contends that "Mr. Ives, who transferred Respondents' tigers during at least two shows, was untrained, inexperienced, and lacked handling knowledge;" Respondent Terranova's assertion that he was unaware of Mr. Ives's presence is "not credible;" and Respondents are "responsible for complying with the handling Regulations, and for ensuring that their animals are handled carefully, that there are sufficient barriers, and that they employ a sufficient number of qualified personnel." Complainant's Brief at 16-17. Complainant argues that Respondents' handling methods, actions, and omissions constitute serious violations of the handling regulations. Complainant's Reply Brief at 4.

Respondents assert that Complainant failed to prove a violation; Respondents were not understaffed; Respondents had a USDA-approved protocol in place in the event of an escape which was reviewed with the crew before the show; the tiger remained separated from the crowd; the tiger suffered no trauma; the tiger did not escape due to inadequate staffing or training; and "after the tiger escaped, Respondents professionally handled the tiger to keep it and the public separated and from harm. If anything, the evidence shows that Respondents should be commended for how expertly they handled the tiger in response to a human error." Respondents' Opposition Brief at 12-13.

The evidence shows that on April 20, 2013, at the 7 p.m. performance, Respondents exhibited their tigers to the public as part of the Tarzan Zerbini Circus at the Salina Bicentennial Center in Salina, Kansas. CX 8; CX 11. Upon the conclusion of the performance, one of the tigers (Leah) was not placed in an enclosure, but escaped and ran out into the arena's concourse. CX 8; CX 10; CX 11; CX 12; CX 13. The tiger was loose from approximately 7:25 p.m. to 7:32 p.m. and was secured in the women's restroom for part of that time. CX 11 at 1.

Before the shows, Mr. Terranova went over the process with the crew supplied by Labor Ready to push the tiger cages. Tr. 317-318, 439. It was the same process he used with the tigers without incident for 35 years. Tr. 439, 443, 445. Mr. Plunkett, part of the crew supplied by the circus, had worked the tiger cages for Mr. Terranova before and had opened and closed the tiger cage doors many times. Tr. 438-439.

In accordance with Respondents' usual procedure, that night Mr. Terranova worked the performance cage door and Jesse Plunkett opened and closed the cage doors. Tr. 443. Mr. Plunkett's job was to shut the doors and say "clear" or "go" once the tiger was secured in the cage. Tr. 443. Nobody was supposed to pull a pin and separate a cage from the train of cages attached to the arena until Mr. Plunkett said the door was locked. Tr. 443.

Mr. Terranova's role was to watch Mr. Quinones and the other tigers during the performance and make sure that Mr. Quinones was okay, watching his back so to speak. Tr. 445. "Tigers come in the door that I open. Mr. Quinones lets them out, tells them to go to the house. I open the door, they run down to the last cage that's wherever the door's closed. It depends on how many have come out. The person back there, in this case Jesse Plunkett, shuts both doors, locks them." Tr. 521. In addition to having a set procedure for transferring the tigers from the arena, Mr. Terranova had a USDA-approved protocol in place in the event of an escape. Tr. 445.

On the night at issue, Mr. Terranova was at the front door listening for Mr. Plunkett. It was dark and everyone was wearing black. Tr. 303, 446. At the end of the act, Mr. Terranova looked at Mr. Quinones in the arena and heard Mr. Plunkett say, "oh no" so he turned and saw the tiger named Leah outside her cage. The tiger actually was trying to get in the cage, but the door had jammed shut. Tr. 447-448. Cody Ives, who was part of the motorcycle act, was assisting Mr. Plunkett. Tr. 448-449, 519. Apparently Mr. Ives had left a cage door open that allowed the tiger to escape, and then he could not open an empty cage door to allow the tiger into the proper cage. Tr. 449-450.

It is not entirely clear why Mr. Ives was helping. According to ringmaster Richard Curtis, Mr. Terranova had hired four laborers to assist with moving the tiger cages, but he had to fire one of them prior to the first show. Tr. 316-317. Investigator Toni Christensen's report conflicts with the recorded conversation and is given little weight. *Compare* CX 14 *with* RX 19 *and* CX 24 at 49-51.

After the tiger escaped, she started following the cage in front of her. Tr. 451. Mr. Terranova screamed to shut the back door to the outside, and to close all of the doors. Tr. 451-452. The building staff moved people away from the concourse and Mr. Curtis, the ringmaster, instructed patrons to stay in their seats and remain calm. CX 11 at 5; Tr. 377-378, 461.

The tiger turned and went back into the arena, first going to the large performance cage where she had been performing. Tr. 452. The tiger then walked around the arena, which was separated from the seating area by elevated walls. Tr. 298, 453-462; CX 8, video 3. Mr. Terranova and the tiger trainer, Mr. Quinones, ran after the tiger and tried to stay between her and the audience as she walked around the perimeter of the arena. Tr. 453-456. Mr. Quinones

was able to observe and talk to the tiger; he could tell that she was listening because she was walking slowly and not growling. Tr. 363-366, 375.

The tiger entered the concourse area, where food stands and restrooms are located, and entered the women's restroom. CX 8, video 3. The restroom is at an angle with an entrance and exit on opposite sides which are not visible from each other from either inside or outside. CX 9; CX 11; Tr. 247; Tr. 85. Mr. Terranova and Mr. Quinones thought that the restroom was empty. Tr. 368. The building management reported that they "removed patron simultaneously as handler pushed tiger into restroom." CX 11 at 5. Mr. Terranova heard the security guard yell at someone to get back in the women's restroom. Tr. 463-464. Mr. Terranova told two or three women to wait and asked if anyone else was in the women's room. Once the tiger entered the women's room from the entrance, Mr. Terranova entered from the exit. Mr. Terranova yelled "is anybody in there," looked under the stalls, and confirmed that Mr. Quinones was okay. Tr. 466-467.

Mr. Quinones went into the bathroom with the tiger while a cage was moved into place. Tr. 369, 467. Once the cage was in place, he said "Leah, house" and she jumped in the cage. Tr. 370. When the tiger went into the bathroom, Mr. Quinones was right behind her. Mr. Quinones did not see anyone in the bathroom other than Mr. Terranova. Tr. 372, 376-377.

Jenna Krehbiel, who was at the circus that evening with her family, testified that she went into the women's restroom on the south side of the concourse, which has both an entrance and an exit. Tr. 247; Tr. 85; CX 9; CX 10; CX 11. When Ms. Krehbiel attempted to exit, she was instructed by a staff person to go back into the restroom. Tr. 239; CX 10. She testified that she turned around and went back into the restroom (through the exit door) as instructed, and a tiger was inside the restroom walking towards her. Tr. 240; CX 10. She turned around and walked

back out the same exit door and the staff person told her to get out because there was a tiger in the restroom. CX 10; Tr. 240. It is not clear exactly how close Ms. Krehbiel was from the tiger. CX 10; Tr. 251, 246, 471.

The tiger suffered no trauma. Mr. Quinones, who had trained Leah for seven years, sat with the tiger and determined that she was ok. Tr. 372. He did not notice any problems in her next performance. Tr. 378. A veterinarian examined the tiger after the incident and reported that Leah appeared to be "emotionally, neurologically, and physically healthy." Tr. 388; RX 2.

Ms. Krehbiel's testimony at the hearing was credible. The evidence shows that she was initially told to go back into the restroom, while the tiger was in the concourse, and when the tiger entered the restroom she was told to leave due to the tiger in the restroom. It is not clear exactly how far the tiger was from her. She was not injured.

Mr. Terranova and Respondents' witnesses, who care for these tigers on a daily basis, were also credible in their testimony. This was a stressful situation which unfolded quickly. It appears that Ms. Krehbiel was leaving the restroom from the exit as the tiger was entering from the other end and she likely is the patron who building management describes as being removed from the restroom simultaneously as the handler pushed the tiger into the restroom. Given the design of the restroom, it is not possible to see the exit from the entrance from either the inside or the outside. It is credible that Mr. Terranova and Mr. Quinones thought from their vantage points that no one was in the restroom. In addition, given the available options, the restroom was the best way to contain the tiger, protecting both the tiger and the public.

Respondents contend that Cody Ives was not an employee of Respondents and his actions or inactions should not be imputed to Respondents. However, Respondents are responsible for properly staffing and training those working with the tigers.

The evidence does not show that Complainant established that Respondents failed to handle their tigers "as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort." The tiger did not exhibit signs of trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort that were documented in the record. Accordingly, Complainant has not established that Respondents violated 9 C.F.R. § 2.131(b)(1).

The evidence shows that Complainant established that during a public exhibition, the tiger was not "handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of animals and the public." While Mr. Terranova's training and quick thinking prevented direct contact between the tiger and the public and resulted in a safe recapture, there would seem to be little question that having a tiger walking through an arena filled with spectators and out onto a public concourse constitutes a failure to provide sufficient distance and barriers between the animal and the general viewing public. While the tiger moved through the arena and concourse, she was in close proximity to the public and building staff. In this case, a member of the general public was in a restroom, albeit very briefly, with the tiger. Accordingly, under these facts, Complainant has established that Respondents violated regulation 9 C.F.R. § 2.131(c)(1).

In addition, the evidence shows that Complainant established that during a public exhibition, the tiger Leah was not "under the direct control and supervision of a knowledgeable and experienced animal handler." The tiger was not under the control and supervision of a knowledgeable and experienced animal handler when she escaped. Regardless of how Mr. Ives became involved, the evidence is clear that he was not qualified to work with the tigers. While

Mr. Terranova and Mr. Quinones could observe the tiger and followed and talked to her, this does not demonstrate direct control and supervision. Mr. Quinones did not initially know which tiger escaped and called her by the wrong name. Tr. 364; CX 8, video 3. Mr. Terranova had a few ideas about places to contain the tiger which did not work, prior to containing her in the restroom. Tr. 454-456. This demonstrates that while the tiger was being observed, she was not under the direct control and supervision while loose in the arena and on the concourse. Accordingly, under these facts, Complainant has established that regulation 9 C.F.R. § 2.131(d)(3) was violated.

Respondents previously have been found to have insufficient trained personnel available to work with their animals. Terranova 2009/2010 Cases at 57. Respondents knew or should have known who was working with the tigers. The failure to have the tiger Leah under the direct control and supervision of a knowledgeable and experienced animal handler while she was being put into her cage and while she was loose in the arena and concourse without sufficient barriers to protect the public constitutes a violation. This is not, however, an exhibition where the public is invited or authorized to be in direct contact with the tigers or where Respondents planned to not have a sufficient barrier between any of their tigers and the public. Respondents were previously warned about the consequences of not having sufficient trained personnel and willfully proceeded with the exhibition without a sufficient number or sufficiently trained staff. Accordingly, the evidence compels a finding that Complainant has established that this was a willful violation.

3. Tiger Enclosure Height

The 2015 complaint alleges that on March 10, 2011, Respondents willfully violated the regulations "by failing to handle animals as carefully as possible, and by failing, during public

exhibition, to handle animals with sufficient distance and/or barriers between the animals and the public," and specifically alleges that Respondents "exhibited six tigers in a 12-foot high circular wire enclosure in which respondents placed 31-inch high pedestals, which effectively reduced [the] height of the barrier between the tigers and the public, and offered a potential means for a tiger or tigers to exit the enclosure." 2015 Complaint at 5-6, ¶8.

The regulations provide that "[h]andling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort." 9 C.F.R. § 2.131(b)(1). "Handling" means "petting, feeding, watering, cleaning, manipulating, loading, crating, shifting, transferring, immobilizing, restraining, treating, training, working, and moving, or any similar activity with respect to any animal." 9 C.F.R. § 1.1.

The Complainant asserts that on March 10, 2011, ACI Carrie Bongard conducted an unannounced inspection of Respondents' facilities, animals, and records at a traveling circus at the DeltaPlex Arena & Conference Center in Grand Rapids, Michigan. ACI Bongard observed that Respondents exhibited six tigers in a 12-foot high circular wire enclosure, the enclosure had no top, and there were 31-inch high pedestals inside the enclosure adjacent to the sides of the enclosure. Complainant asserts that the "height and location of the pedestals effectively reduced the height of the enclosure itself, and offered the tigers a potential means to exit the enclosure" and that "ACI Bongard's contemporaneous photographs, as well as her declaration and affidavit, corroborate the inspection report." Complainant's Brief at 12.

Respondents reply that prior to and after March 10, 2011, a 12 foot high enclosure was the standard and approved height for a tiger enclosure; "Terranova had been using the cage for years and then suddenly one inspector in consultation with Dr. Gage decided that it was a citable

offense" (Tr. 402; RX 5); Mr. Terranova testified he had never seen a trained tiger climb out of a cage, possibly wild zoo tigers, but not a trained circus tiger (Tr. 414); and Respondents introduced evidence of other tiger acts in which tigers were exhibited in similar arenas with elevated pedestals and one where the tiger walked a tightrope at the top of the arena (RX 4, 5; Tr. 404). Respondents' Opposition at 4-5.

The evidence shows that ACI Carrie Bongard responded to a request from her supervisor to inspect Respondents while they were travelling. CX 6 at 1. This is the only inspection she ever conducted of Respondents. CX 6 at 3. This inspection occurred while the hearing in Respondents' prior case was being conducted and prior to the 2013 tiger escape. Tr. 400. Prior to the inspection, ACI Bongard spoke with Respondents' home inspector, ACI Fox, about a recent escape at a zoo in California and whether Respondents' enclosure was 8, 10, or 12 feet. Tr. 125-126.

On March 10, 2011, ACI Bongard watched the 11 a.m. performance and then went behind the scenes to continue the inspection in Grand Rapids, MI. CX 4; CX 6. ACI Bongard asked the trainer, Mr. Quinones, about the dimensions of the performance cage where he did his act and he responded it was 12' in height. CX 6. ACI Bongard told Mr. Quinones that she would go to her office to write the inspection report and return with it. CX 6 at 1; Tr. 132-133.

After returning to her office, she "called the field specialist for large felids, Dr. Laurie Gage, and discussed the arena height with her. [Dr. Gage] felt confident that it was a citable non-compliance for height." CX 6 at 1, 3; Tr. 400-401. ACI Bongard completed her report after speaking with Dr. Gage.

On March 28, 2011, Mr. Terranova wrote a letter contesting the inspection report, stating:

> I can find no specifications in the AWA that can substantiate her findings. I have either performed in, or owned tiger acts since 1978, and the arena has never been

> taller than 12'. I can't begin to count the number of inspections that have been performed by USDA of these acts and never has this been written as a violation.
>
> If this is a new regulation I would ask that you please point out the statute to me so that I can meet the requirements that are set forth. If this is a recommendation, I will also strive to comply, once I can clearly understand what is being requested.

Tr. 402; CX 5.

The agency responded to Mr. Terranova's letter, stating that neither of the cited standards are new and stating:

> As regards your request for "written guidelines, including dimensions" to modify your tiger exhibit enclosure, please know, first, that the cited provisions are not engineering standards, but are rather performance-based standards. It is the exhibitor's responsibility to ensure that his animals are handled in compliance with all of the applicable regulations. The agency does not provide structural designs (and, in fact, not all deficiencies require design modification).

CX 5 at 5-6. When Mr. Terranova received this response he was confused. "I ask if they've got a new change . . . did you change anything? No. Well, what do you want me to do to fix it? Well we're not going to tell you how to fix it." Tr. 413.

Dr. Gage testified that the agency has, since 2011, produced guidance and letters to licensees regarding the height of fencing that should contain the animals, Tr. 201, although it is not clear whether this new guidance requires tiger cages to be over 12 feet high.

Following the March 10, 2011, inspection, Respondents placed a net over the top of the arena. The agency did not return to re-inspect and circus producers repeatedly complained about the extra work and set up time, particularly as no other tiger acts were using the net. Consequently, after about a year, Respondents stopped using the net. Tr. 415. Since then, Respondents have passed at least five inspections with the same set up cited in 2011. RX 1 at 1; RX 3; Tr. 418-424.

The evidence demonstrates that this inspector was asked to inspect Respondents while their prior case was pending. Even after discussing the cage height with the home inspector prior to the visit, and upon seeing it and being told it was 12', she did not know whether it was citable until speaking with Dr. Gage. If the agency's own inspectors are not sure whether something is a violation, it seems unreasonable to expect that an exhibitor would know. The lack of clear guidance to exhibitors who want to follow the rules and run their businesses without citations fails to provide licensees with sufficient notice of what is prohibited and creates a real challenge for these businesses. And, it is understandable that the Respondents would find the timing of this inspection suspicious. The evidence does not support this violation.

4. Standards for Handling, Care, Treatment, and Transportation

The 2015 complaint alleges that on seven times on two dates, March 10, 2011, and September 25, 2013, APHIS inspectors documented noncompliance by Respondents with the standards. Section 2.100(a) of the regulations provides that each exhibitor "shall comply in all respects with the regulations set forth in part 2 of this subchapter and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, and transportation of animals. 9 C.F.R. § 2.100(a). This regulation applies to all of the alleged noncompliance with the standards promulgated under the Act.

(a) March 10, 2011 (Cables)

The 2015 complaint alleges that on March 10, 2011, Respondents failed to meet the minimum standards with respect to the structural strength, containment, and space requirements for tigers. Specifically, the complaint alleges that Respondents' exhibit and exercise enclosure was in disrepair. 2015 Complaint at 6 ¶9(a).

Section 3.125(a) of the standards provides that the "facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals." 9 C.F.R. § 3.125(a).

Complainant contends that Respondents' performance and exercise arena for tigers was in disrepair (Tr. 103, 106, 112, 114) and ACI Bongard testified that the disrepair potentially allowed for tigers to put a paw or a head through the enclosure, potentially creating a hole for an escape, or injuring the animals (Tr. 114, 117-119, 139). Complainant's Brief at 12-13.

Respondents contend that the inspector took no measurements, was unable to say how many areas of the cage were in disrepair, and many of the photographs she took appear to be of the same area of the cage taken from different angles. Tr. 144. The inspector could only say that a tiger could fit its paw through an area of disrepair. She could not opine that a tiger actually could escape. Tr. 146. Dr. Gage could only opine that she had a "concern" and speculate that other cables might break loose in some way. Tr. 179, 182. She expressed no opinion regarding whether a tiger actually could escape. Tr. 183-184 ("Whether it could push it enough to get its head or its leg through, I can't tell from the photograph."). Respondents' Opposition Brief at 5-6.

The evidence is not sufficient to find that the tiger cages were not structurally sound or maintained in good repair to protect the animals from injury and to contain the animals. The evidence shows that there were a few broken or loose cables that were fixed. CX 24 at 108-109; Tr. 427. Mr. Terranova's testimony is credited that the cage is constructed of inch and a half square metal tubing with cables strung vertically and horizontally and that the tubing is the strength of the cage frame with the wiring like a net to contain the animals. Tr. 425. Mr.

Terranova does not like the wires tight because loose wires would be more difficult for a tiger to climb. Tr. 425-426. The broken wires were not in a place that was going to allow a tiger to get loose and it was not possible to determine how many of the wires were loose. Tr. 426, 428-432. There is no evidence that this exhibition permitted audience members to be close enough to the cages that a paw could reach them. In a cage that is being used regularly, there may be cables that become loose or break. The evidence does not show that Respondents were unwilling or unable to repair the cage, nor that the loose or broken cables impacted the structural integrity. The evidence did not show that loose wires would injure a tiger and no such injuries of the tigers were reported. Tr. 430. Accordingly, there is not sufficient evidence to find this violation.

(b) March 10, 2011 (Transport enclosures)

The 2015 complaint alleges that on March 20, 2011, Respondents "utilized transport enclosures as primary enclosures for six tigers, and the enclosures did not offer the tigers sufficient space to make normal postural and social adjustments." 2015 Complaint at 6, ¶9(b).

Section 3.128 of the standards provides that enclosures "shall be constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Inadequate space may be indicated by evidence of malnutrition, poor condition, debility, stress, or abnormal behavior patterns." 9 C.F.R. § 3.128.

Complainant asserts that Respondents used "transport" enclosures as primary enclosures for their tigers and the enclosures were too small to allow proper space for normal postural and social adjustments. Complainant's Brief at 22-23.

Respondents contend that the transport cages had been used for many years, some of them from when Mr. Terranova originally had joined the circus; they provided more than

sufficient space for the tigers to turn around and make normal postural adjustments; the tigers did not contort their bodies; there were no health issues such as back or hip problems or wear marks that might be evidence of contorting; the tigers were exercised daily outside of the transport cages; and the same cages subsequently passed inspection with four different inspectors (Tr. 433-434; *see* RX 1). Respondents' Opposition Brief at 6-7.

The agency cited Respondents for violating the rule governing space requirements for facilities, which requires that enclosures allow animals to "make normal postural and social adjustments with adequate freedom of movement." 9 C.F.R. § 3.128. These were transport cages, however, and the applicable rule governing transport cages states that animals must have enough space merely "to turn about freely and to make normal postural adjustments." 9 C.F.R. § 3.137(c).

The evidence does not establish that the transport cages were too small for the tigers to turn freely and to make normal postural adjustments or to make normal postural and social adjustments with adequate freedom of movement. There was no evidence of contorting such as wear marks or health issues. The tigers were exercised outside of the transport cages every day and the transport cages were used for transport to shows. Respondents could reasonably have thought the size of the transport cages was acceptable given the length of time the cages had been used and the number of inspectors who had not objected to them. Accordingly, there is not sufficient evidence to find this violation.

(c) September 25, 2013 (Lighting)

The 2015 complaint alleges that on September 25, 2013, Respondents "failed to provide areas housing nonhuman primates with a regular diurnal lighting cycle." Complaint at 6, ¶9(c).

Section 3.76(c) of the standards provides:

> Indoor housing facilities must be lighted well enough to permit routine inspection and cleaning of the facility, and observation of the nonhuman primates. Animal areas must be provided a regular diurnal lighting cycle of either natural or artificial light. Lighting must be uniformly diffused throughout animal facilities and provide sufficient illumination to aid in maintaining good housekeeping practices, adequate cleaning, adequate inspection of animals, and for the well-being of the animals. Primary enclosures must be placed in the housing facility so as to protect the nonhuman primates from excessive light.

9 C.F.R. § 3.76(c).

Complainant asserts that on September 25, 2013, Respondents housed two nonhuman primates (spider monkeys) in a barn that had inadequate lighting, specifically diurnal lighting. Complainant's Brief at 24. Complainant contends that diurnal lighting provides for the well-being of these non-human primates and makes the assessment of the health and well-being of the animals and inspection and husbandry practices easier. Complainant's Brief at 24-25.

Respondents contend that Mr. Terranova had followed his inspector's earlier instructions to install lighting, but had not understood that the inspector wanted the lights to be off at night and on in the day; he thought the lights were needed for cleaning; the monkeys did receive natural light through two 14' x 20' barn doors; and Respondents changed the lighting well before the inspector's November 25 deadline and built an outside enclosure connected by a tunnel. Respondents' Opposition Brief at 13-14.

Respondents' spider monkey housing facility was lighted well enough to permit routine inspection and cleaning of the facility and observation of the nonhuman primates and there is no allegation that the lighting failed to provide sufficient illumination to aid in maintaining good housekeeping practices, adequate cleaning, and adequate inspection of animals. Mr. Terranova installed lights as requested by the inspector, and once he understood the need for diurnal lighting, put the lights on a timer and also built an outside enclosure connected by a tunnel.

Tr. 719-721. The spider monkeys had access to natural light from the two barn doors. Accordingly, the evidence is not sufficient to find a violation.

(d) September 25, 2013 (Roof panels)

The 2015 complaint alleges that on September 25, 2013, roof panels on the top of the covered portion of the tiger exercise yard had become unfastened from the top rails of the enclosure. 2015 Complaint 6-7, ¶9(d).

Section 3.125(a) of the standards requires that animal facilities be constructed of such material and of such strength as appropriate for the animals involved. 9 C.F.R. § 3.125(a).

Complainant contends that Respondents' tiger exercise yard and enclosures were in disrepair and structurally compromised. Specifically, the roof panels on the top of the covered portion of the tiger exercise yard had become unfastened from the top rails of the enclosure. In his inspection report, ACI Fox wrote that there were areas along the top where "the heavy gauge panels attached to the top rails of the enclosure had become unfastened. These roof panels need to be re-fastened along the top rail to make this structure structurally sound and to keep it in good repair as well as make certain the animals are contained." CX 16 at 1; Tr. 561.

Respondents assert that Mr. Terranova was in the process of welding the roof panels in the tiger enclosure and ACI Fox admitted that the panels on the tiger structure were not in danger of imminent collapse, "it simply presented itself as a possibility." Respondents' Opposition Brief at 14 (quoting Tr. 638).

There is no evidence that the sections of panels which were loose posed any danger to the animals nor that any animals were injured by them. In addition, the panels were in the process of being repaired. Accordingly, this violation is not established.

(e) September 25, 2013 (Unused building materials)

The 2015 complaint alleges that on September 25, 2013, Respondents "failed to remove from an area adjacent to the tiger facility an accumulation of unused building materials." 2015 Complaint at 7, ¶9(e).

Section 3.131(c) of the standards provides that "[p]remises (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in this subpart. Accumulations of trash shall be placed in designated areas and cleared as necessary to protect the health of the animals." 9 C.F.R. § 3.131(c).

Complainant asserts that although the standard specifically refers to trash, the Secretary has found noncompliance based on accumulations of other items; that ACI Fox observed an accumulation of unused building materials, including livestock panels and old lumber, and other miscellaneous items not used for animal husbandry adjacent to the tiger enclosures. Complainant's Brief at 26.

Respondents assert that the conditions in the barn were no different from ACI Fox's earlier inspections; the supposed accumulation of building materials, old lumber, and other odds and ends was in an unused area that would not interfere with the animals; and the APHIS inspectors did not take photographs of the alleged deficiencies. Respondents' Opposition Brief at 15.

The alleged accumulation of unused building materials, old lumber, and other odds and ends was in an unused area that would not interfere with the animals. Tr. 709. The evidence is not sufficient to find that the condition of the grounds would endanger the animals or husbandry practices. Accordingly, this violation is not established.

(f) September 25, 2013 (Weeds and grass)

The 2015 complaint alleges that on September 25, 2013, there were "weeds and grasses growing in and around the premises and animal areas that offered harborage to rodents and other animals and pests." 2015 Complaint at 7, ¶9(f).

Section 3.131(c) of the standards provides that "[p]remises (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in this subpart. Accumulations of trash shall be placed in designated areas and cleared as necessary to protect the health of the animals." 9 C.F.R. § 3.131(c).

Complainant asserts that there were weeds and grass that have grown up and need to be cut down to a manageable height so that rodents, pests, and snakes which could cause health and disease risks to these animals are not afforded an area to hide and make a home for themselves. Complainant's Brief at 27.

Respondents contend that inspectors had no problems with grass inside the tiger enclosure, as the high grass is considered enrichment, or tall grass and weeds on the adjacent property, but he still wanted it mowed outside the enclosures. Respondents' Opposition Brief at 14-15.

It is not clear the height of the grass or weeds or whether there was any evidence of rodents or pests. Mr. Terranova had the grass in the front and sides cut before returning but planned to get to the back, an unused area on the backside of the facility, when they returned home. Tr. 706. The evidence is not sufficient to find that weeds and grass were sufficient to find that the facility was not in good repair sufficient to protect the animals from injury and to

facilitate the prescribed husbandry practices. Accordingly, there is not sufficient evidence to find a violation.

(g) September 25, 2013 (Unused chain link pens)

The 2015 complaint alleges that on September 25, 2013, Respondents "maintained unused chain link pens containing wooden structures that were in disrepair, and had weeds growing inside of them that could provide harborage for pests." 2015 Complaint at 7, ¶9(g).

Section 3.131(c) of the standards provides that "[p]remises (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in this subpart. Accumulations of trash shall be placed in designated areas and cleared as necessary to protect the health of the animals." 9 C.F.R. § 3.131(c).

Complainant contends that "Respondents maintained unused chain link pens containing wooden structures that were in disrepair and also had weeds growing inside of them that could provide harborage for pests." Complainant's Brief at 27.

Respondents assert that this was a simple maintenance issue that would not interfere with the animals. Respondents' Opposition Brief at 14-15.

There is no evidence of any rodents or pests in these unused pens. Tr. 710. The evidence is not sufficient to find that unused chain link pens or other debris were sufficient to find that the facility was not in good repair sufficient to protect the animals from injury and to facilitate the prescribed husbandry practices. Accordingly, this violation is not established.

5. Veterinary Care Regulations (2015)

The 2016 complaint alleges that between February 11, 2015, and May 13, 2015, Respondents "willfully violated the Regulations by failing to employ an attending veterinarian

under formal arrangements that included a written program of veterinary care" and specifically that Respondents' "written program of veterinary care was incomplete with respect to vaccinations of Respondents' animals." 2016 Complaint at 5, ¶7.

The regulations provide:

> Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section.
>
> (1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor.

9 C.F.R. § 2.40(a).

Complainant asserts that during a compliance inspection on May 13, 2015, Respondents produced a program of veterinary care ("PVC") that "did not set forth a vaccination schedule for dogs in Respondents' custody" and Respondents were "unable to locate an original or complete PVC." Complainant's Brief at 9.

Respondents contend that Complainant has spent "an inordinate amount of time and effort trying to overcome the obtuseness of the APHIS inspectors and prove that a simple photocopying error amounts to a violation of the veterinary care regulations;" Respondents at all times had a program of veterinary care; and it is undisputed that the dogs had been vaccinated. Respondents' Opposition Brief at 3.

The evidence shows that on May 13, 2015, Respondents' agent, Michelle Wallace, provided ACI Fox and VMO DiGesualdo a form dated 2/11/15, and identified it as Respondents' current PVC. Section II.A. of the PVC form contains a space for the schedule and frequency of vaccinations for dogs and cats. VMO DiGesualdo took a photograph of the PVC provided by Ms. Wallace. CX 20. It appears that the document provided to the inspectors was a photocopy

that did not contain the entirety of Section II.A. In his inspection report, ACI Fox wrote that the "PVC was updated on 2/11/15 but the vaccination section was left blank." CX 19. Actually, the form had hash marks on each portion of the vaccination section and was not blank. RX 7. This is a standard form and it should have been immediately obvious that this was a photocopying error which could have been resolved on-site if the inspectors had inquired further. *Compare* RX 7 *with* CX 20. VMO DiGesualdo did not ask about whether the dogs actually had been vaccinated. Tr. 685. Ms. Wallace provided an entire folder on each dog that had all of their vaccinations in there. Tr. 826. Respondents at all times had a program of veterinary care, and it is undisputed that their dogs had been vaccinated. Tr. 735-739, 825-826; RX 7.

This photocopying error is nothing like the violations found in *In re Tri-State Zoological Park of Western Maryland, Inc.,* AWA Docket No. 11-0222, 2013 WL 8214620 (2013) (refusal to keep records on-site) or *In re Lorenza Pearson, d/b/a L & L Exotic Animal Farm,* 68 Agric. Dec. 685, 698 (2009) (program of veterinary care did not include multiple animals). The evidence shows that Respondents had a complete written program of veterinary care on-site. Accordingly, Complainant has not established this violation.

6. Itinerary Requirements

The 2016 complaint alleges that on May 13, 2015, and between November 14-19, 2015, Respondents "willfully violated the Regulations by exhibiting animals at a location other than Respondents' facility, and housing those animals overnight at that location, without having timely submitted a complete and accurate itinerary to APHIS." 2016 Complaint at 5, ¶¶8, 9.

The regulations provide:

> (c) Any person who is subject to the Animal Welfare regulations and who intends to exhibit any animal at any location other than the person's approved site (including, but not limited to, circuses, traveling educational exhibits, animal acts, and petting zoos), except for travel that does not extend overnight, shall submit a

> written itinerary to the AC Regional Director. The itinerary shall be received by the AC Regional Director no fewer than 2 days in advance of any travel and shall contain complete and accurate information concerning the whereabouts of any animal intended for exhibition at any location other than the person's approved site. If the exhibitor accepts an engagement for which travel will begin with less than 48 hours' notice, the exhibitor shall immediately contact the AC Regional Director in writing with the required information. APHIS expects such situations to occur infrequently, and exhibitors who repeatedly provide less than 48 hours' notice will, after notice by APHIS, be subject to increased scrutiny under the Act.

9 C.F.R. § 2.126(c)

Complainant alleges that on or about May 13, 2015, and November 14-19, 2015, Respondents willfully violated the itinerary regulations by failing to submit to APHIS a timely, complete, and accurate itinerary in advance of overnight travel to a location other than Respondents' facility for the purpose of exhibition. Complainant's Brief at 6-7.

On May 13, 2015, Complainant alleges that inspectors noted that two groups of animals were not present, and determined that they were performing in traveling exhibits even though the itinerary represented that all animals would be at Respondents' facility and that although Respondents insisted that they had submitted an itinerary, they produced no documentary evidence to support that claim other than "Terranova's vague and self-serving testimony." Complainant's Brief at 6-7.

On November 19, 2015, Complainant contends that inspectors found that five tigers were off site at a travelling location and that Respondents deliberately decided to not advise APHIS of their traveling status or exhibition locations. Complainant's Brief at 7-8.

Respondents contend that Mr. Terranova submitted an itinerary prior to May 13, 2015, via e-mail but he could not find a copy, Tr. 738-739; RX 1; CX 23. Respondents' Opposition Brief at 2. Respondents additionally assert:

> Terranova did not submit an itinerary for his traveling tigers at the time of the November 2015 inspection. In May, the inspectors came when he was not home

> and cited him for eight violations, which Terranova believed to be outright lies, and were verbally abusive to his employee. In subsequent discussions with Fox, Terranova got the strong impression that they were waiting until he was gone before they conducted another inspection. Tr. 492-493. He therefore did not fill out another itinerary in hopes that the inspectors would catch him at home so [] he could do the inspection. Tr. 493. As it happened, Terranova was correct. He left on the 18th for San Antonio and the inspectors showed up on the 19th. Tr. 493.

Respondents' Opposition Brief at 2-3 (footnote omitted).

Respondents' argument that the agency must have had the itinerary, because it conducted a road inspection on May 14, 2015, is not persuasive as the agency does not rely solely on itineraries to inspect on-the-road licensees, and so the lack of an itinerary does not prevent the agency from inspecting. *See* Tr. 650.

Although Mr. Terranova could not produce a copy of the itinerary he provided regarding the May 13, 2015, travel, his testimony is credited, particularly in light of his admission that he did not provide an itinerary in November. Accordingly, the May 13, 2015, itinerary violation is not established.

Mr. Terranova admitted he did not provide the itinerary as required from November 14 to 19, 2015. Accordingly, this violation, which was a willful violation, is established by the evidence.

7. Minimum Standards (2016 Complaint)

(a) January 8, 2015 (Tiger shelter)

The 2016 complaint alleges that on January 8, 2015, Respondents' enclosures for five[2] tigers lacked adequate shelter from inclement weather. 2016 Complaint at 6, ¶10(a).

Section 3.127(b) of the standards provides that "[n]atural or artificial shelter appropriate to the local climatic conditions for the species concerned shall be provided for all animals kept

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[2] At the hearing, Complainant amended the allegation from six to five tigers. Tr. 22.

outdoors to afford them protection and to prevent discomfort to such animals." 9 C.F.R. § 3.127(b).

Complainant contends that Respondents' enclosures contained a single shelter for five tigers. In his inspection report, ACI Fox wrote:

> At time of inspection the enclosures housing the 5 tiger cubs at the facility had only one housing structure which was completed and allowed protection and comfort from the elements. We are currently experiencing temperatures and wind chills into the high teens and 20 degree range with the chance for a winter mix being possible. There is construction that has been started on additional housing structures that once completed will provide the tigers protection and will help to prevent discomfort to the animals during periods of inclement weather.

CX 18 at 1; Tr. 569.

Respondents contend that most of the tigers were about 40 pounds, ACI Fox was not aware that there was a door between each enclosure that would allow the tigers to roam freely among the enclosures, the tigers had access to all of the houses, and there was hay in the two houses that could have sheltered the tigers. Respondents' Opposition Brief at 15-16.

The evidence shows that there are several enclosures next to each other and that ACI Fox was not aware that there were doors between the enclosures. Tr. 642-643; Tr. 731. There was hay in the two houses that could have sheltered the tigers. Tr. 731. ACI Fox also testified that he was not able to observe all of the tigers within the housing structure to determine if they actually could fit comfortably inside, nor did he see whether one "low man on the totem pole" tiger had been excluded due to lack of room. Tr. 643-644. Accordingly, the evidence is not sufficient to find a violation.

(b) May 13, 2015 (Clutter in spider monkey area)

The 2016 complaint alleges that on May 13, 2015, Respondents housed nonhuman primates in housing facilities that were not kept free of clutter. 2016 Complaint at 6, ¶10(b).

Section 3.75(b) of the standards provides that animal areas "inside of housing facilities must be kept neat and free of clutter, including equipment, furniture, or stored material, but may contain materials actually used and necessary for cleaning the area, and fixtures and equipment for proper husbandry practices." 9 C.F.R. § 3.75(b).

Complainant contends that Respondents' housing facilities for nonhuman primates were not kept neat and free of clutter, with items such as a tractor, hay, pipe, 55 gallon barrel, horse equipment, etc. as documented in the inspection report written by ACI Fox (CX 19 at 2); ACI Fox testified that this led to "the inability to take and perform the proper husbandry required of that building" (Tr. at 583); photographs taken on the date of the inspection corroborate ACI Fox's inspection report, further showing additional items including hay, a freezer unit, an old cage on top of the primate enclosure, plywood, and other various items (CX 20 at 13); the accumulation of materials in the building served to limit the ability to perform the proper husbandry required of that building, as well as to allow for "various types of rodents, reptiles, insect…that could come into the proximity of the non-human primates," and potentially threaten their health and well-being (Tr. at 585). Complainant's Brief at 29-30.

Respondents assert that the monkeys were kept in a barn that was used as such, and things had been stored there for years. The tractor had been there for sixteen years, and ACI Fox had seen the barn on multiple prior inspections. Tr. 740, 749. ACI Fox had inspected Mr. Terranova's facility about twenty times. Tr. 545. Included in the "clutter" was a non-working freezer used to store feed that ACI Fox himself had recommended. Tr. 745. Mr. Terranova had never seen ACI Fox have a problem moving around the barn. Tr. 749-750. In addition, two days prior to the inspection, there had been a tornado and bad flooding and the wind had "blown a lot of stuff around." Tr. 741. Respondents were cleaning it up. Tr. 747. For example, there was a

piece of plywood that had blown onto the top of the walkway next to the monkey cage. It had been there a day and was not obscuring the view of the monkeys. Tr. 743, 829; CX 20 at 14. Respondents' Opposition Brief at 17.

There is no evidence of illness or injury to the spider monkeys. There is no evidence of rodents or other pests. The barn where the spider monkeys were housed was also used as a storage area. There had been recent weather issues and routine maintenance was required, although, the evidence does not establish that the clutter rises to the level of a violation. Accordingly, this violation is not established.

(c) May 13, 2015 (Spider monkey cage rust)

The 2016 complaint alleges that on May 13, 2015, Respondents housed nonhuman primates in enclosures that were not free of excessive rust. 2016 Complaint at 6, ¶10(c).

The standards provide:

> General requirements. The surfaces of housing facilities—including perches, shelves, swings, boxes, houses, dens, and other furniture-type fixtures or objects within the facility—must be constructed in a manner and made of materials that allow them to be readily cleaned and sanitized, or removed or replaced when worn or soiled. Furniture-type fixtures or objects must be sturdily constructed and must be strong enough to provide for the safe activity and welfare of nonhuman primates. Floors may be made of dirt, absorbent bedding, sand, gravel, grass, or other similar material that can be readily cleaned, or can be removed or replaced whenever cleaning does not eliminate odors, diseases, pests, insects, or vermin. Any surfaces that come in contact with nonhuman primates must:
>
> (i) Be free of excessive rust that prevents the required cleaning and sanitization, or that affects the structural strength of the surface.

9 C.F.R. § 3.75(c)(1)(i).

Complainant contends that ACI Fox's inspection report, photographs, and testimony show that on May 13, 2015, Respondents housed nonhuman primates in enclosures that were not free of excessive rust, and could not be cleaned and sanitized as required, as alleged in the

complaint. Specifically, Complainant asserts that the nonhuman primates' cages, which housed two animals, had many areas where the metal had become rusted, and photographs taken on the day of the inspection show an enclosure with a badly rusted door, which ACI Fox testified was flaking off and coming into contact with the animals. Complainant's Brief at 30-31.

Respondents contend that there was about eight inches of rust on a monkey cage which was not affecting the integrity of the structure. Respondents' Opposition Brief at 17.

There is some surface rust visible on the photos. CX 20 at 15. The rust does not affect the integrity of the structure. CX 20; Tr. 742. The evidence does not support a finding that the rust was excessive or that it prevented the required cleaning and sanitation or that it affected the structural strength of the surface. Accordingly, this violation is not established.

(d) May 13, 2015 (Spider monkey area lighting)

The 2016 complaint alleges that on May 13, 2015, Respondents failed to provide sheltered areas housing nonhuman primates with adequate lighting to permit inspection and cleaning." 2016 Complaint at 6, ¶10(d).

Section 3.77(c) of the standards provides that:

> The sheltered part of sheltered housing facilities must be lighted well enough to permit routine inspection and cleaning of the facility, and observation of the nonhuman primates. Animal areas must be provided a regular diurnal lighting cycle of either natural or artificial light. Lighting must be uniformly diffused throughout animal facilities and provide sufficient illumination to aid in maintaining good housekeeping practices, adequate cleaning, adequate inspection of animals, and for the well-being of the animals. Primary enclosures must be placed in the housing facility so as to protect the nonhuman primates from excessive light.

9 C.F.R. § 3.77(c).

Complainant asserts that lighting of the indoor area of the sheltered housing facility for the nonhuman primates failed to provide enough light to permit routine inspection and cleaning

of the facility, as well as observation of the non-human primates. In his testimony, ACI Fox noted that the lighting was the same issue as discovered in the September 2013 inspection; that the lighting was inadequate; materials in the barn blocked natural light; and there was an inability to assess the overall health and well-being of the primates as well as to assess the husbandry practices within the enclosure. Complainant's Brief at 31.

Respondents contend that not only were the inspectors able to see the monkeys, they spoke with them; the barn had so much light that Michelle Wallace did not believe that ACI Fox used a flash to take photographs of the interior; and, the inspectors photographed the monkeys while they were outside, in more than sufficient light for inspection and their well-being. Respondents' Opposition Brief at 17.

Both the natural light and the lighting fixture over the cage are clearly visible in the photos. CX 20 at 14, 20. ACI Fox's testimony that it was so dark that he could not see the monkeys and conduct a proper inspection is not credible. The inspectors were able to see the monkeys and speak with them. Tr. 827. The inspectors photographed the monkeys while they were outside, in more than sufficient light for inspection and their well-being. CX 20 at 16-17. Accordingly, the evidence does not support a violation.

(e) May 13, 2015 (Enrichment plan)

The 2016 complaint alleges that on May 13, 2015, Respondents failed to make their plan for environmental enrichment for nonhuman primates available for review by APHIS. 2016 Complaint at 6, ¶10(e).

Section 3.81 of the standards provides, in part:

> Dealers, exhibitors, and research facilities must develop, document, and follow an appropriate plan for environment enhancement adequate to promote the psychological well-being of nonhuman primates. The plan must be in accordance with the currently accepted professional standards as cited in appropriate

> professional journals or reference guides, and as directed by the attending veterinarian. This plan must be made available to APHIS upon request, and, in the case of research facilities, to officials of any pertinent funding agency.

9 C.F.R. § 3.81

The Complainant alleges that Respondents failed to make their plan for environmental enrichment for nonhuman primates available for review by APHIS and that despite Respondents' claims that they had a primate enrichment plan, ACI Fox testified that the facility representative did not present the plan to the APHIS inspectors for review and the facility representative did not know where it was kept. Complainant's Brief at 32-33.

Respondents contend that they had an environmental enhancement plan and that the inspectors simply did not look at it because they did not wish to return to the barn where it was located. Respondents' Opposition Brief at 18.

The testimony shows that when the inspectors asked to see the enhancement plan, they were told that it was not in the book that was there but was most likely in the barn and the inspectors did not ask to go see it. Tr. 831. This issue could have been resolved by the inspectors while they were on-site. It is undisputed that the monkeys had enhancement. Tr. 657-659. Accordingly, this violation is not established.

(f) May 13, 2015 (Tiger enclosures roof and floors)

The 2016 complaint alleges that on May 13, 2015, Respondents failed to maintain their housing facilities for tigers in good repair so as to protect the animals from injury, specifically plywood and pallets covering the floors were rotted and in disrepair and the roof of one of the tiger housing facilities was damaged. 2016 Complaint at 6, ¶10(f).

Section 3.125(a) of the standards provides that the "facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor

housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals." 9 C.F.R. § 3.125(a).

Complainant contends that plywood and pallets covering the floors of Respondents' housing facilities for tigers were rotted and in disrepair; multiple tiger units had floors that were rotted to the point that portions of the plywood was missing; the effect of the disrepair of the flooring was a potential for injury to the tigers; and that the wet and decaying hay could potentially cause disease as decaying hay turns into mold, which allows for bacteria organisms to grow. Complainant's Brief at 34. Complainant also claims that the roof of one of Respondents' housing facilities for tigers was damaged and in need of replacement, with material on the roof separating and splintering. Complainant's Brief at 34.

Respondents assert that these enclosures were not in use; that the tiger depicted in one of the photographs of the enclosure had come into the enclosure through a guillotine door that Michelle Wallace, Respondents' agent, had opened at the inspector's request; and the tiger was removed after the inspection. Respondents' Opposition Brief at 18.

The evidence shows that these enclosures were not in use and that they did not pose a risk of injury to or escape of the animals. Accordingly, the evidence does not establish a violation.

(g) May 13, 2015 (Tiger enclosure structures)

The 2016 complaint alleges that on May 13, 2015, Respondents failed to maintain their housing facilities for tigers in good repair so as to contain them, specifically the tiger enclosure was not constructed in a structurally sound manner; contained climbing structures that could provide opportunities for escape; and were rusted, which could reduce structural integrity. 2016 Complaint at 6-7, ¶10(g).

Section 3.125(a) of the standards provides that the "facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals." 9 C.F.R. § 3.125(a).

Complainant asserts that Respondents' tiger enclosure was not constructed in a structurally sound manner, and specifically, the panels on the east side of the roof were not attached to the structure's framework and support pipe. Complainant's Brief at 35. Respondents contend that the panels were not clamped because they had been welded. Respondents' Opposition Brief at 18.

Complainant asserts that the tiger enclosure had various climbing structures which allow for the potential of escape; and all sections of the roof need to be attached properly to all wall sections, roof support pipes, and one panel to the other to minimize the potential for escape from the enclosure. Complainant's Brief at 35-36. Respondents contend that the panels were not clamped because they had been welded and therefore the climbing structures were not an issue. Respondents' Opposition Brief at 18.

Complainant asserts that various metals used in the tiger enclosure were observed to be rusted, and photographs taken on the date of the inspection show rust on the entire door structure and the supports on the sides and top, which could allow for the potential for disease organisms and bacteria to have a foundation to begin, which potentially affects animal health. Complainant's Brief at 36. Respondents contend that the rusted doors depicted in the photographs taken during the inspection had never been painted during their twelve to fourteen year existence; they were made from very thick drill-stem pipe; and the surface rust was not going to affect their integrity. Respondents' Opposition Brief at 18.

The evidence does not support a finding that the tiger enclosure was not structurally sound. The evidence does not show that the roof panels were unsecured or that climbing structures posed a risk of escape. The evidence also does not support a finding that the rust was excessive or that it prevented the required cleaning and sanitation or that it affected the structural strength of the surface. Accordingly, this violation is not established.

(h) May 13, 2015 (Weeds and grass)

The 2016 complaint alleges that on May 13, 2015, there were weeds and grass growing in and around the premises and animal areas that offered harborage to rodents and other animals and pests. 2016 Complaint at 7, ¶10(h).

Section 3.131(c) of the standards provides that "[p]remises (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in this subpart. Accumulations of trash shall be placed in designated areas and cleared as necessary to protect the health of the animals." 9 C.F.R. § 3.131(c).

Complainant alleges that grass was growing up through a used pile of bricks in the immediate area of the tiger housing and enclosures. Photographs taken during the date of the inspection show that grass was overgrown inside the tiger compound, and ACI Fox testified that the overgrown grass, "would allow insects, rodents, and reptiles to gain refuge and proximity to the animals and potentially cause injury." Complainant's Brief at 33.

There is no evidence of the height of the weeds and grass and no evidence of rodents or pests. There is no evidence that these items were a danger to the animals or that the property was not being kept up. In fact, the record includes a photo of the finished walkway made from these bricks. Accordingly, there is not sufficient evidence to find a violation.

(i) May 13, 2015 (Trash)

The 2016 complaint alleges that on May 13, 2015, Respondents housed tigers in housing facilities that were not kept clean and free of trash, and specifically, that the tiger facilities contained used bricks, pipes, broken table, roofing material, and a dog house. 2016 Complaint at 7, ¶10(i).

Section 3.131(c) of the standards provides that "[p]remises (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in this subpart. Accumulations of trash shall be placed in designated areas and cleared as necessary to protect the health of the animals." 9 C.F.R. § 3.131(c).

Complainant alleges that Respondents housed tigers in housing facilities that were not kept clean and free of trash, including a pile of used brick, metal roofing material, assorted pipe, a two legged wooden table, an unused dog house, and other miscellaneous items. Complainant's Brief at 33-34. Respondents contend that the metal roofing had blown off from the storm a few days before the inspection and there was no tiger in the vicinity; the bricks had been put down to make a walkway, but the job could not be completed until after the rains subsided; and the table was a pedestal that Respondents used for training. Respondents' Opposition Brief at 19.

This is a working farm and it is reasonable that equipment necessary to complete a project, such as the brick walkway, would be in the area and it is also reasonable that after a storm, some items may be in disarray. There is no evidence that these items were a danger to the animals or that the property was not being kept up. In fact, the record includes a photo of the finished walkway. RX 9. Respondents should not be penalized by their partially completed efforts to improve the property. Accordingly, there is not sufficient evidence to find a violation.

C. Sanctions

1. Arguments of the Parties

Complainant asserts:

> The license held by Respondent Terranova Enterprises (74-C-0199) should be revoked. This is the second administrative enforcement action against this licensee. Notwithstanding the previous findings of violations, the licensee has continued to mishandle dangerous animals, putting both people and animals at risk of harm. The licensee again has failed to apprehend the need for careful planning and preventive measures, adequate husbandry practices, a sufficient number of competent and trained employees, and scrupulous attention to prudent handling procedures. Instead, this licensee has continued to demonstrate carelessness in handling and caring for the animals in his custody and a disregard for the danger that his practices pose to the animals and the public. This licensee has also shown a disregard for the administrative enforcement process and the decisions of the Secretary, having failed to adhere to the orders issued in the licensee's previous enforcement cases.

Complainant's Brief at 37.

Respondents contend:

> As discussed above, none of the violations involved any allegation of harm to an animal or person. Most of the violations involve paperwork and minor maintenance issues that the agency gave ample time to correct. The only potentially grave violation would be the escaped tiger, but as discussed above, Complainant failed to show that the tiger escaped through any negligence on the part of Respondents or that such Respondents willfully failed to exercise due care. Thus, the alleged violations here fall far short of the violations that have resulted in license revocations. *See In Re: Gus White, a/k/a Gustave L. White, III, d/b/a Collins Exotic Animal Orphanage, Respondent*, AWA Docket No. 12-0277, 2014 WL 4311058 (May 13, 2014) (revoking license due to multiple violations including failure to develop and follow a plan for veterinary care that led to multiple deaths of animals); *In Re: Lorenza Pearson, d/b/a L & L Exotic Animal Farm in Re: Lorenza Pearson*, AWA Docket No. 02-0020., 2009 WL 2134028 (July 13, 2009) (revocation warranted for 281 violations and animals kept in "appalling conditions").

Respondents' Opposition Brief at 20-21.

2. License Revocation

The purpose of assessing penalties is not to punish actors, but to deter similar behavior in others. *In re David M. Zimmerman*, 56 Agric. Dec. 433 (1997). The Secretary may revoke or suspend the license of an exhibitor for violations of the Act. 7 U.S.C. § 2149(a). APHIS has recommended that Respondents' license be revoked, relying in large part upon the serious lapses that led to the escape of a tiger.

The recommendation of a sanction by an administrative officer charged with enforcing statutory purposes is entitled to weight, but not controlling weight, and circumstances may support a different outcome. *In re Judie Hansen*, 57 Agric. Dec. 1072 (1998); *In re Marilyn Shephard*, 57 Agric. Dec. 242 (1998). APHIS' recommendation has been given significant weight; however, the majority of the allegations were not proven, which justifies a reduction from the proposed sanction.

The cases cited by Complainant in support of license revocation involve more serious violations than found here. For example, in *ZooCats, Inc. v. U.S. Dept. of Agric.*, 417 F. App'x 378, 382 (5th Cir. 2011), on numerous occasions ZooCats exhibited lions and tigers for photography shoots with children without any barrier between the animals and the public resulting in injury to several members of the public and ZooCats physically abused the animals and failed to provide them with a proper diet. Similarly, in *In re The International Siberian Tiger Foundation, Inc.*, 61 Agric. Dec. 53, 90 (2002), on multiple occasions while their license was suspended, the respondents allowed the public, including children, to have "close encounters" where they touched and pet lions and tigers resulting in numerous injuries to the public. In *Jamie Michelle Palazzo d/b/a Great Cat Adventures; and James Riggs,* 69 Agric. Dec. 173 (2010), juvenile tigers were photographed with members of the public, including small

children, having direct contact with the tigers without distance and/or barriers between the public and the tigers and there were multiple material discrepancies in the records. This record was not considered sufficient to revoke the license and a lengthy suspension was ordered instead.

In contrast, Respondents' exhibition is designed to keep the public at a safe distance from the tigers and to ensure barriers between the public and the animals. While on one occasion Respondents willfully failed to have sufficient trained staff loading the tigers into the cages leading to an escape, they did not intend to place the public in close proximity to the animals, as was done in both *ZooCats* and the *International Siberian Tiger Foundation*. The gravity of this violation is significantly less than the violations in both *ZooCats* and the *International Siberian Tiger Foundation*. License revocation is not appropriate under these facts.

Respondents have, however, previously been found in violation of the Animal Welfare Act. In the prior case, the Judge found that "Mr. Terranova's laissez-faire supervision led to camels being left unattended and the series of poor decisions that led to Kamba's escape and injury in Enid, Oklahoma" and that "[i]t is clear to me that additional trained personnel and more attention to decision making could have averted or mitigated some of the unfortunate events that led to two elephant escapes." Terranova 2009/2010 Cases at 57. While the escape *sub judice* did not result in injury to the tiger and there is no evidence of a laissez-faire attitude, the problem of insufficient supervision and human error again contributed to the escape. The prior decision imposed a fine of $25,000, all or most of which has not been paid by Respondents. Accordingly, a short thirty day suspension of Respondents' AWA license 74-C-0199 is appropriate in this proceeding.

3. Civil Money Penalties

Pursuant to 7 U.S.C. § 2149(b), an exhibitor that violates the AWA, regulations, or standards may be assessed a civil penalty of not more than $10,000 per violation. 7 U.S.C. § 2149(b); 7 C.F.R. § 3.91(b)(2)(ii). The Act requires that the Secretary, in assessing a civil penalty, "give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations." 7 U.S.C. § 2149(b); *In re Lee Roach and Pool Laboratories*, 51 Agric. Dec. 252 (1992).

The record reflects that Respondents operate a moderately-sized animal exhibition business, reporting custody of some twenty animals in 2011 and 2012. Stipulations at 2 ¶ I.C. One of the violations is grave, involving the escape of a tiger in Selina, Kansas. The other violations are all minor, involving access to the facilities and filing an itinerary. While three occurrences of these violations, constituting seven days of violations, are willful, there is no evidence that Respondents acted in bad faith. Respondents have a history of previous violations of the Act.

In consideration of the gravity and number of offenses, the size of the business, the absence of bad faith, and the determination that a brief license suspension is appropriate, APHIS' recommendation of civil money penalties in the amount of $35,000 for 22 violations should be reduced to $10,000 for the three violations (seven days) established. In addition, a penalty of $1,650 for each knowing failure to obey the Secretary's cease and desist order is appropriate (7 U.S.C. § 2149(b); 7 C.F.R. § 3.91(b)(2)(ii)), for a total of $11,550 for seven days of violation of the cease and desist order. Thus, the total penalty is $21,550.00.

4. Cease and Desist

The Secretary may also make an order that such person shall cease and desist from continuing such violation. 7 U.S.C. § 2149(b). Such an order is appropriate in these circumstances to protect the public and the animals.

IV. Findings and Conclusions

A. Findings of Fact

1. Respondent Douglas Keith Terranova is an individual whose mailing address is (b) (6) [redacted] (b) (6) [redacted]. At all times material hereto, Respondent Terranova was (1) operating as an exhibitor, as that term is defined in the Act and the regulations, and/or (2) acting for or employed by an exhibitor or exhibitors (Respondent Terranova Enterprises, Inc.), and any acts, omissions or failures within the scope of his employment or office are, pursuant to section 2139 of the Act (7 U.S.C. § 2139), deemed to be his own acts, omissions, or failures, as well as the acts, omissions, or failures of Respondent Terranova Enterprises, Inc. Answer (2015 Cases) at 2 ¶A.1.; CX 1; Stipulations as to Facts, Witnesses, and Exhibits (Stipulations) at 1 ¶ I.A.

2. Respondent Terranova Enterprises, Inc., is a Texas corporation (0159995901) whose president and registered agent for service of process is Respondent Terranova, 6962 S. FM 148, Kaufman, Texas 75142. Respondents Terranova and Terranova Enterprises, Inc., do business as Terranova Wild Animal Act. At all times material hereto, Terranova Enterprises, Inc., was operating as an exhibitor, as that term is defined in the Act and the regulations, and held AWA license number 74-C-0199. Answer (2015 Cases) at 2 ¶ A.2.; CX 1; Stipulations at 2 ¶ I.B.

3. Respondents exhibit domestic, wild, and exotic animals. Respondents represented to APHIS that they held 21 animals in 2010, 20 animals in 2011, and 20 animals in 2012. Answer (2015 Cases) at 2 ¶ B.3.; CX 1; Stipulations at 2 ¶ I.C.

4. APHIS conducted inspections or attempted inspections of Respondents' facility, records, and animals on seven dates: August 2, 2010; March 10, 2011; September 28, 2012; September 25, 2013; January 8, 2015; May 13, 2015; and November 19, 2015. CX 3; CX 4; CX 7; CX 16; CX 18; CX 19; CX 22.

5. Respondents have a history of previous violations. On December 20, 2011, an Administrative Law Judge (Judge) issued a decision and order in two administrative proceedings finding that on multiple occasions, the Respondents violated the regulations, including the regulations governing the careful handling of tigers and elephants. Terranova 2009/2010 Cases. Respondents did not seek review of the decision and order in those cases, and the decision and order became final and unappealable on January 31, 2012. Terranova 2009/2010 Cases; Stipulations at 2 ¶ I.D.; Answer at B.4.

   a. As of April 15, 2016, neither Respondent had paid any part of the $25,000 civil penalty that the Judge assessed. Answer (2015 Cases) at 2 ¶A.1.; Transcript, 848.

   b. Respondents did not provide APHIS "with an affidavit describing the number of personnel hired for each exhibit, and the training and experience of animal handlers" as required by the prior order. CX 2; Transcript, 70.

<u>Access to facilities – August 2, 2010</u>

6. On August 2, 2010, APHIS Animal Care Inspector (ACI) Donnovan Fox attempted to conduct an inspection of Respondents' premises, animals, and records, but no one was present to accompany him on his inspection. CX 3; CX 14 at 3; Answer at ¶ D.6. Mr.

Terranova was in court at the time on a personal matter. Tr. 696-697. ACI Fox documented his attempt to inspect in an inspection report. CX 3.

Tiger enclosure (height/cables) and transport cages – March 10, 2011

7. ACI Carrie Bongard responded to a request from her supervisor to inspect Respondents while they were travelling. CX 6 at 1. This is the only inspection she ever conducted of Respondents. CX 6 at 3.

8. This inspection occurred while the hearing in Respondents' prior case was being conducted. Tr. 400.

9. Prior to the inspection, ACI Bongard spoke with Respondents' home inspector, ACI Fox, about a recent incident at a zoo in California and whether Respondents' enclosure was 8, 10, or 12 feet. Tr. 125-126.

10. On March 10, 2011, ACI Bongard watched the 11 a.m. performance and then went behind the scenes to continue the inspection in Grand Rapids, MI. CX 4; CX 6.

11. ACI Bongard asked the trainer, Mr. Quinones, about the dimensions of the arena where he did his act in and he responded it was 12' in height. CX 6.

12. ACI Bongard told Mr. Quinones that she would return to her office to write the inspection report and come back with it. CX 6 at 1; Tr. 132-133.

13. After returning to her office, she "called the field specialist for large felids, Dr. Laurie Gage, and discussed the arena height with her. [Dr. Gage] felt confident that it was a citable non-compliance for height." CX 6 at 1, 3; Tr. 400-401.

14. On March 28, 2011, Mr. Terranova wrote a letter contesting the inspection report, stating:

> I can find no specifications in the AWA that can substantiate her findings. I have either performed in, or owned tiger acts since 1978, and the arena has never been taller than 12'. I can't begin to count the number of inspections that have been performed by USDA of these acts and never has this been written as a violation.

> If this is a new regulation I would ask that you please point out the statute to me so that I can meet the requirements that are set forth. If this is a recommendation, I will also strive to comply, once I can clearly understand what is being requested.

Tr. 402; CX 5.

15. The agency responded to Mr. Terranova's letter, stating that neither of the cited standards are new and stating:

> As regards your request for "written guidelines, including dimensions" to modify your tiger exhibit enclosure, please know, first, that the cited provisions are not engineering standards, but are rather performance-based standards. It is the exhibitor's responsibility to ensure that his animals are handled in compliance with all of the applicable regulations. The agency does not provide structural designs (and, in fact, not all deficiencies require design modification).

CX 5 at 5-6.

16. When Mr. Terranova received this response he was confused. "I ask if they've got a new change . . . did you change anything? No. Well, what do you want me to do to fix it? Well we're not going to tell you how to fix it." Tr. 413.

17. Dr. Gage testified that the agency has, since 2011, produced guidance and letters to licensees regarding the height of fencing that should contain the animals. Tr. 201.

18. Following the March 10, 2011, inspection, Respondents placed a net over the top of the arena. The agency did not return to re-inspect and circus producers repeatedly complained about the extra work and set up time, particularly as no other tiger acts were using the net. Consequently, after about a year, Respondents stopped using the net. Tr. 415. Since then, Respondents have passed at least five inspections with the same set up cited in 2011. *See* RX 1 at 1; RX 3; Tr. 418-424.

19. ACI Bongard thought that Respondents' tiger enclosure was in disrepair, with loose or detached wires that left gaps in the sides of the enclosure. CX 4.

20. The inspector could only say that a tiger could fit its paw through an area of disrepair. She could not opine that a tiger actually could escape. Tr. 146. Dr. Gage opined that she had a "concern" and speculated that other cables might break loose in some way. Tr. 171-182. She expressed no opinion on whether a tiger actually could escape. Tr. 176 ("Whether it could push it enough to get its head or its leg through, I can't tell from the photograph.").

21. The cage is constructed of inch and a half square metal tubing with cables strung vertically and horizontally. Tr. 425. The tubing is the strength of the cage frame with the wiring like a net to contain the animals. Tr. 425-426. Mr. Terranova does not like the horizontal wires tight because loose wires would be more difficult for a tiger to climb. Tr. 425-426. The loose wires also would not injure a tiger, as the wires were cable which moved, like a wire rope. Tr. 430-431.

22. During her March 10, 2011, inspection, ACI Bongard also cited Respondents for transport cages that Respondents had been using for many years, some of them from when Mr. Terranova originally had joined the circus, and they had repeatedly passed inspection. CX 4; Tr. 403; Tr. 433.

23. After the March 10, 2011, inspection, the same cages passed inspection with four different inspectors. *See* RX 1 (no non-compliant items at traveling inspections on 4/19/2012, 3/19/2013, 5/14/2015, 8/18/2015).

24. The cages provided sufficient space for the tigers to turn around and make normal postural adjustments. The tigers did not contort their bodies, and there were no health issues such as back or hip problems or wear marks that might be evidence of contorting. Tr. 433-435.

25. Dr. Gage testified that once tigers are no longer being moved, they must have the ability to exercise at least an hour outside their transport cages. Tr. 163-164.

26. Unless the tigers had three shows, Mr. Quinones would put them in the arena and play with them while he had his coffee. After the third show or the second show and playtime, the tigers were pretty tired. Tr. 435-436.

Access to facilities – September 28, 2012

27. On September 28, 2012, ACI Fox attempted to conduct an inspection of Respondents' premises, animals, and records and documented his attempt to inspect in an inspection report. CX 7; CX 14 at 3-4; Answer (2015 Cases) at ¶ D.6

28. On September 28, 2012, Mr. Terranova had designated Mr. Quinones as a responsible person to be present for the inspection but apparently the gate had been closed inadvertently when ACI Fox arrived for the inspection. Tr. 697-699. Mr. Terranova arranged for ACI Fox to return and inspect within the month. Tr. 699.

Tiger escape – April 20, 2013

29. On April 20, 2013, at the 7 p.m. performance, Respondents exhibited their tigers to the public as part of the Tarzan Zerbini Circus at the Salina Bicentennial Center in Salina, Kansas. CX 8; CX 11.

30. Upon the conclusion of the performance, one of the tigers (Leah) was not placed in an enclosure, but escaped and ran out into the arena's concourse. CX 8; CX 10; CX 11; CX 12; CX 13.

31. Before the shows, Mr. Terranova went over the process with the crew supplied by Labor Ready to push the tiger cages. Tr. 317-318,439. It was the same process he used with the tigers without incident for 35 years. Tr. 439, 443, 445.

32. Mr. Plunkett, part of the crew supplied by the circus, had worked the tiger cages for Mr. Terranova before and had opened and closed the doors many times. Tr. 438-439.

33. In accordance with Respondents' usual procedure, that night Mr. Terranova worked the front door and Jesse Plunkett opened and closed the cage doors. Tr. 443

34. Mr. Plunkett's job was to shut the doors and say "clear" or "go" once the tiger was secured in the cage. Tr. 443. Nobody was supposed to pull a pin and separate a cage from the train of cages attached to the arena until Mr. Plunkett said the door was locked. Tr. 443.

35. Mr. Terranova's role was to watch Mr. Quinones and the other tigers during the performance and make sure that Mr. Quinones was ok, watching his back so to speak. Tr. 445.

36. "Tigers come in the door that I open. Mr. Quinones lets them out, tells them to go to the house. I open the door, they run down to the last cage that's wherever the door's closed. It depends on how many have come out. The person back there, in this case Jesse Plunkett, shuts both doors, locks them." Tr. 521.

37. In addition to having a set procedure for transferring the tigers from the arena, Mr. Terranova had a USDA-approved protocol in place in the event of an escape. Tr. 445.

38. On the night of the event, Mr. Terranova was at the front door listening for Mr. Plunkett. It was dark and everyone was wearing black. Tr. 303, 446.

39. At the end of the act, Mr. Terranova looked at Mr. Quinones in the arena and heard Mr. Plunkett say, "oh no" so he turned and saw the tiger named Leah on the floor. The tiger actually was trying to get in the cage, but the door had jammed shut. Tr. 447-448.

40. Cody Ives, who was part of the motorcycle act, was assisting Mr. Plunkett. Tr. 448-449, 519.

41. Apparently Mr. Ives had left a cage door open that allowed the tiger to escape, and then he could not open an empty cage door to allow the tiger into the proper cage. Tr. 449-450.

42. According to Mr. Curtis, Mr. Terranova had hired four laborers to assist with moving the tiger cages, but he had to fire one of them prior to the first show. Tr. 316-317.

43. After the tiger escaped, she started following the cage in front of her. Tr. 451. Mr. Terranova screamed to shut the back door to the outside, and to close all of the doors. Tr. 451-452.

44. The building staff moved people away from the concourse and Mr. Curtis, the ringmaster, instructed patrons to stay in their seats and remain calm. CX 11 at 5; Tr. 377-378, 461.

45. The tiger turned and went back into the arena, first going to the large performance cage where she had been performing. Tr. 452.

46. The tiger then walked around the arena, which was separated from the seating area by elevated walls. Tr. 298, 453-462.

47. Mr. Terranova and Mr. Quinones ran after the tiger and tried to stay between her and the audience as she walked around the perimeter of the arena. Tr. 453-456.

48. Mr. Quinones then was able to observe and talk to the tiger. He could tell that she was listening because she was walking slowly and not growling. Tr. 363-366, 375.

49. The tiger entered the concourse area, with food stands and restrooms, and entered the women's restroom. CX 8, video 3. The restroom is at an angle with an entrance and exit on opposite sides which are not visible from each other from either inside or outside.

CX 9; CX 11; Tr. 247; Tr. 85. Mr. Terranova and Mr. Quinones thought that the restroom was empty. Tr. 368.

50. The building management reported that they "removed patron simultaneously as handler pushed tiger into restroom." CX 11 at 5. Mr. Terranova heard the security guard yell at someone to get back in the women's restroom. Tr. 463-464.

51. Mr. Terranova told two or three women to wait and asked if anyone else was in the women's room. Once the tiger entered the women's room from the entrance, Mr. Terranova entered from the exit. Mr. Terranova yelled "is anybody in there," looked under the stalls, and confirmed that Mr. Quinones was okay. Tr. 466-467.

52. Mr. Quinones went into the bathroom with the tiger while a cage was moved into place. Tr. 369, 467. Once the cage was in place, he said "Leah, house" and she jumped in the cage. Tr. 370. When the tiger went into the bathroom, Mr. Quinones was right behind her. Mr. Quinones did not see anyone in the bathroom other than Mr. Terranova. Tr. 372, 376-377.

53. Jenna Krehbiel, who was at the circus that evening with her family, testified that she went into the women's restroom on the south side of the concourse, which has both an entrance and an exit. Tr. 247; Tr. 85; CX 9; CX 10; CX 11. When Ms. Krehbiel attempted to exit, she was instructed by a staff person to go back into the restroom. CX 10; Tr. 239. She testified that she turned around and went back into the restroom (through the exit door) as instructed, and a tiger was inside the restroom walking towards her. CX 10; Tr. 240. She turned around and walked back out the same exit door and the staff said to get out because there was a tiger in the restroom. CX 10; Tr. 240. It is not clear exactly how close Krehbiel was from the tiger. CX 10; Tr. 251, 246, 471.

54. The tiger was loose from approximately 7:25 p.m. to 7:32 p.m. and was secured in the women's restroom for part of that time. CX 11 at 1.

55. The tiger suffered no trauma. Mr. Quinones, who had trained Leah for seven years, sat with the tiger and determined that she was ok. Tr. 372. He did not notice any problems in her next performance. Tr. 378. A veterinarian examined the tiger after the incident and reported that Leah appeared to be "emotionally, neurologically, and physically healthy." RX 2; Tr. 388.

Lighting for monkeys, tiger housing, housekeeping – September 25, 2013

56. Prior to this inspection, Mr. Terranova had a very cordial relationship with ACI Fox, and they often shared ideas on how to address an issue. Tr. 699-700. Usually ACI Fox conducted the inspection by himself. Tr. 700.

57. Respondents had been on the road all summer and they had just returned the evening before the inspection. Tr. 701-702. Mr. Terranova believed the agency timed their inspection to coincide with Mr. Terranova's return when his facility would most likely be in need of some repair. Tr. 700. Mr. Terranova hadn't been back long enough to get to all of the housekeeping and maintenance issues. CX 14 at 4.

58. Mr. Terranova was present for the entire inspection. Tr. 704.

59. On September 25, 2013, ACI Fox conducted an inspection of Respondents' facility, equipment, and animals, and wrote that Respondents failed to provide areas housing nonhuman primates with a regular diurnal lighting cycle. CX 16; CX 17.

60. Mr. Terranova had followed his inspector's earlier instructions to install lighting, but had not understood that the inspector wanted the lights to be off at night and on in the day. Tr. 716-718; CX 20 at 20. In the earlier inspection, ACI Fox had told Mr. Terranova that

lights needed to be installed for cleaning, but he said nothing about diurnal lighting. Tr. 718, 720, 799.

61. The monkeys received natural light through two 14' x 20' barn doors. Tr. 718-719; CX 20 at 14.

62. Respondents changed the lighting well before the inspector's November 25 deadline and built an outside enclosure connected by a tunnel. Tr. 719-721.

63. ACI Fox did not see any evidence of rat infestation. Tr. 636-638. ACI Fox was able to inspect the animals. Tr. 638.

64. During the September 25, 2013 inspection, ACI Fox wrote that the roof panels on the top of the covered portion of the tiger exercise yard had become unfastened from the top rails of the enclosure. CX 14 at 4; CX 16; CX 17.

65. Mr. Terranova was in the process of welding the roof panels in the tiger enclosure, and ACI Fox admitted at the hearing that the panels on the tiger structure were not in danger of imminent collapse, "it simply presented itself as a possibility." Tr. 638-640.

66. During his September 25, 2013, inspection, ACI Fox wrote that Respondents failed to remove from an area adjacent to the tiger facility an accumulation of unused building materials, including livestock panels and old lumber, and other miscellaneous items not used for animal husbandry, and that Respondents maintained unused chain link pens containing wood structures that were in disrepair, and had weeds growing inside of them that could provide harborage for pests. CX 14 at 4; CX 16; CX 17.

67. The alleged accumulation of unused building materials, old lumber and other odds and ends was in an unused area that would not interfere with the animals. Tr. 709. The chain link area was no longer in use. Tr. 710.

68. ACI Fox testified that overgrown weeds and grass outside the enclosures would cause potential injury to tigers from snakes, rats, and insects. Tr. 565. The weeds were on the backside of the facility in an unused area of the yard. Tr. 706. The inspectors had no problems with grass inside the tiger enclosure, as the high grass is considered enrichment. Tr. 705; *See* CX 20 at 5.

69. Mr. Terranova had the grass in the front and sides cut before returning but planned to get to the back when they returned home. Tr. 706.

70. The APHIS inspectors did not take photographs of the alleged deficiencies on September 25, 2013. Tr. 553; Tr. 704.

Tiger shelter – January 8, 2015

71. On January 8, 2015, ACI Fox inspected Respondents' facility and thought that the enclosure housing five tigers had a single housing structure that did not accommodate all five tigers. CX 18.

72. ACI Fox cited Respondents because he believed that Mr. Terranova was housing five tiger cubs in a facility with only one complete housing structure during cold weather. CX 18. According to ACI Fox, the primary purpose of the structure was to house the tigers when they were sleeping. Tr. 569-570. He opined that the housing was too small, and unless there was heavy bedding they would have no means to maintain their body temperature except for piling on top of each other, "which they have that choice to do." Tr. 569.

73. ACI Fox was referring to a structure with three enclosures separated by a chain link fence with an open door. Tr. 728; CX 20 at 7; RX 8. Within each enclosure was a cinder block house. Cinder blocks are hollow and the air inside them can become warm from the

tigers' body heat. Tr. 728-729. The first house was completely finished when the cubs arrived, the second house was finished except for a strip of about a foot over the front edge, and the third house had no top. Tr. 729.

74. ACI Fox was not aware that there was a door between each enclosure that would allow the tigers to roam freely among the enclosures and the tigers had access to all of the houses. Tr. 641-642, 729.

75. There was hay in the two houses that could have sheltered the tigers. Tr. 731. ACI Fox acknowledged at the hearing that there may well have been bedding. Tr. 644. When Mr. Terranova went to see the tigers in the mornings, he found them all in the house together. Tr. 732.

76. ACI Fox was not able to observe all of the tigers within the housing structure to determine if they actually could fit comfortably inside, nor did he see whether one "low man on the totem pole" tiger had been excluded due to lack of room. Tr. 644.

Veterinary care regulations – May 13, 2015

77. On May 13, 2015, Respondents' agent, Michelle Wallace, provided ACI Fox and VMO DiGesualdo a form dated 2/11/15, and identified it as Respondents' current PVC. VMO DiGesualdo took a photograph of the PVC provided by Ms. Wallace. CX 20.

78. Section II.A. of the form PVC contains a space for the schedule and frequency of vaccinations for dogs and cats. It appears that the document provided to the inspectors was a photocopy that did not contain the entirety of Section II.A. CX 20; RX 7.

79. In his inspection report, ACI Fox wrote that the "PVC was updated on 2/11/15 but the vaccination section was left blank." CX 19; Tr. 684. Actually, the form had hash marks on each portion of the vaccination section and was not blank. RX 7.

80. The PVC is a standard form and it should have been immediately obvious that this was a photocopying error which could have been resolved on-site if the inspectors had inquired further. *Compare* RX 7 *with* CX 20.

81. VMO DiGesualdo did not ask about whether the dogs actually had been vaccinated. Tr. 685.

82. Ms. Wallace provided an entire folder on each dog that had all of their vaccinations in there. Tr. 826.

83. Respondents at all times had a program of veterinary care, and it is undisputed that their dogs had been vaccinated. Tr. 735-739, 825-826; RX 7.

Itinerary requirements – May 13, 2015

84. On May 13, 2015, ACI Fox and VMO DiGesualdo determined that two groups of animals were not present at Respondents' facility, but were "out on exhibit," and Respondents' March 18, 2015, itinerary represented that all animals would be returned to the facility by April 2015. CX 19 at 1.

85. Mr. Terranova testified that he did submit an itinerary prior to May 13, 2015, via e-mail but he could not find a copy. Tr. 740-741.

86. The agency does not rely solely on itineraries to inspect on-the-road licensees, and so the lack of an itinerary does not prevent the agency from inspecting. *See* Tr. 650-651.

Housekeeping – May 13, 2015

a. Clutter in building with spider monkeys

87. The monkeys were kept in a barn that was used as such, and things had been stored there for years. The tractor had been there for sixteen years, and ACI Fox had seen the barn on

multiple prior inspections. Tr. 743-744. Mr. Terranova had never seen ACI Fox have a problem moving around the barn. Tr. 749-750.

88. Two days prior to the inspection, there had been a tornado and bad flooding and the wind had "blown a lot of stuff around," and Respondents were cleaning it up. Tr. 749-750, 827-829. For example, there was a piece of plywood that had blown onto the top of the walkway next to the monkey cage. It had been there a day and was not obscuring the view of the monkeys. Tr. 745-746, 829; CX 20 at 14.

89. ACI Fox had inspected Mr. Terranova's facility about twenty times. Tr. 545. Included in the "clutter" was a non-working freezer used to store feed that ACI Fox himself had recommended. Tr. 745.

b. Spider monkey cage rust

90. There was about eight inches of rust on a monkey cage. CX 20; Tr. 742. The rust was not affecting the integrity of the structure. Tr. 742.

c. Spider monkey area lighting

91. Both the natural light and the lighting fixture over the cage are clearly visible in the photos. CX 20 at 14, 20. The inspectors were able to see the monkeys and speak with them. Tr. 827. If ACI Fox had wanted something moved, Respondents would have assisted. Tr. 748-750.

92. The inspectors photographed the monkeys while they were outside, in more than sufficient light for inspection and their well-being. CX 20 at 16-17.

d. Enrichment plan

93. Respondents had an environmental enhancement plan. The inspectors were told that it was not in the book that was there but was most likely in the barn and the inspectors did

not ask to go see it. Tr. 831. It is undisputed that the monkeys had enhancement. *See* Tr. 658-659.

e. Tiger enclosures (Roof and floors)

94. On May 13, 2015, ACI Fox and VMO DiGesualdo thought that Respondents housed tigers in facilities containing shelters that were in disrepair, with rotted plywood and pallets covering the floors and the roof of one of the shelters was damaged. CX 19; CX 20 at 9-12.

95. The enclosures alleged to have rotting plywood floors and damaged roof were not in use. Tr. 771.

96. The tiger depicted in one of the photographs of the enclosure had come into the enclosure through a guillotine door that Michelle Wallace had opened at the inspector's request. The tiger was removed after the inspection. CX 20 at 9-12; Tr. 771-772, 830.

97. The metal roof panels were not clamped because they had been welded. RX 9 at 3-4; Tr. 756-757.

f. Tiger enclosures (Structures)

98. The rusted doors depicted in the photographs taken during the inspection had never been painted during their twelve to fourteen year existence. They were made from very thick drill-stem pipe, and the surface rust was not going to affect their integrity. Tr. 758-759. The other side of one of the doors was painted, so the animal would not come into contact with the rust. Tr. 756-757, 763.

99. Mr. Terranova photographed the facility on July 12, 2015, two months after the inspection. RX 14.

g. Tiger enclosures (Weeds and grass)

100. On May 13, 2015, ACI Fox and VMO DiGesualdo reported that there were weeds and grass growing in and around the premises and animal areas that could have offered harborage to rodents and other animals and pests. The size of the weeds and grass is not reported and there was not a report of rodents or other pests. CX 19; CX 20 at 7, 8.

h. Tiger enclosures (Trash)

101. The inspection report noted things like used brick, metal roofing, and a wooden table that the inspector thought were not in use and should have been stored away from the animals. The metal roofing had blown off from the storm a few days before the inspection and there was no tiger in the vicinity. Tr. 767. The bricks had been put down to make a walkway, but the job could not be completed until after the rains subsided. Tr. 768-769; RX 9 at 2. The table was a pedestal that Mr. Terranova used for training. Tr. 769-770.

Itinerary Requirements – November 14-19, 2015

102. On November 19, 2015, VMOs Mary Moore and Elizabeth Pannill conducted an inspection of Respondents' records and determined that five of Respondents' tigers were off-site, and had been for at least five days and nights, but Respondents' most recent itinerary did not include that information, and represented that all of Respondents' animals would be at Respondents' facility after September 2015. CX 22.

103. Mr. Terranova did not submit an itinerary for his traveling tigers at the time of the November 2015 inspection. Tr. 492-495.

B. Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. Respondents are exhibitors within the meaning of the Animal Welfare Act.

3. On August 2, 2010, Respondents willfully violated the Act and regulations by failing to have a responsible person available to provide access to APHIS officials to conduct compliance inspections. 7 U.S.C. § 2146(a); 9 C.F.R. § 2.126(a).

4. On September 8, 2012, Respondents failed to provide access to allow APHIS officials access to their place of business to conduct an inspection, in violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a) and (b). This violation, however, was not willful.

5. On or about April 20, 2013, Respondents willfully violated the regulations by failing, during public exhibition, to handle an adult tiger with sufficient distance and/or barriers between the tiger and the public, and to have the tiger under the direct control and supervision of a knowledgeable and experienced animal handler. 9 C.F.R. §§ 2.131(b)(1), 2.131(c)(1), 2.131(d)(3).

6. From November 14-19, 2015, Respondents willfully violated the regulations, 9 C.F.R. § 2.126(c), by failing to timely submit an accurate travel itinerary.

7. Complainant failed to meet the burden of proving the following violations brought against the Terranova Respondents by the preponderance of the evidence, and they are therefore dismissed:

   a. On March 10, 2011, allegation of a violation of the regulations, 9 C.F.R. § 2.100(a), by housing six tigers in an enclosure that was not structurally sound and maintained in good repair (9 C.F.R. § 3.125(a)); and housing six tigers in transport enclosures that did not provide sufficient space for the tigers to make normal postural and

social adjustments (9 C.F.R. § 3.128).

b. On March 10, 2011, allegation of a violation of the regulations, 9 C.F.R. §§ 2.131(b)(1), 2.131(c)(1), by failing to handle animals as carefully as possible, and by failing, during public exhibition, to handle animals with sufficient distance and/or barriers between the animals and the public.

c. On September 25, 2013, allegation of a violation of the regulations, 9 C.F.R. § 2.100(a), by:

i. Housing nonhuman primates in enclosures without a regular diurnal lighting cycle. 9 C.F.R. § 3.76(c);

ii. Housing tigers in an enclosure that was in disrepair. 9 C.F.R. § 3.125(a);

iii. Failing to keep the area adjacent to the tiger enclosure free of accumulations of discarded items and building materials. 9 C.F.R. § 3.131(c);

iv. Failing to remove weeds and grass in and around the premises and animal areas that offered harborage to rodents and other animals and pests. 9 C.F.R. § 3.131(c); and

v. Failing to maintain the premises clean and free of miscellaneous and discarded items and weeds that could provide harborage for pests. 9 C.F.R. § 3.131(c).

d. On January 8, 2015, allegation of a violation of the regulations 9 C.F.R. § 2.100(a), by failing to meet the minimum standards, by housing five tigers in an enclosure that lacked adequate shelter from inclement weather for all of the animals. 9 C.F.R. § 3.127(b).

e. On May 13, 2015, allegation of a violation of the regulations, 9 C.F.R. § 2.100(a), by failing to meet the minimum standards, by:

i. Housing nonhuman primates in housing facilities that were not kept free of clutter. 9 C.F.R. § 3.75(b);

ii. Housing nonhuman primates in enclosures that were not free of excessive rust, and could not be cleaned and sanitized as required. 9 C.F.R. § 3.75(c)(1)(i);

iii. Failing to provide sheltered areas housing nonhuman primates with adequate lighting to permit inspection and cleaning. 9 C.F.R. § 3.77(c);

iv. Failing to make their plan for environmental enrichment for nonhuman primates available for review by APHIS. 9 C.F.R. § 3.81;

v. Failing to maintain their housing facilities for tigers in good repair so as to protect the animals from injury, 9 C.F.R. § 3.125(a), and specifically failing to repair the rotted plywood and pallets covering the floors, and to replace the roof of one of the structures;

vi. Failing to maintain their housing facilities for tigers in good repair so as to contain them, 9 C.F.R. § 3.125(a), and specifically having detached panels on the east side of the roof, structures that could permit the animals to escape, and rusting enclosures;

vii. Failing to remove weeds and grass in and around the premises and animal areas. 9 C.F.R. § 3.131(c); and

viii. Housing tigers in facilities that were not kept clean and free of trash. 9 C.F.R. § 3.131(c).

f. Between February 11, 2015, and May 13, 2015, allegation of a violation of the regulations, 9 C.F.R. § 2.40(a)(1), by failing to maintain an accurate and complete written program of veterinary care.

g. On or about May 13, 2015, allegation of a violation of the regulations, 9 C.F.R. § 2.126(c), by failing to timely submit an accurate itinerary, as required.

8. No sanction need be imposed for the one technical violation of the Act, on September 8, 2012 (access to facilities), to promote the Act's remedial purposes.

9. The Administrator's recommendation that Respondents' AWA license should be revoked is not warranted, although in consideration of the gravity and history of violations, a suspension of thirty (30) days is imposed.

10. The Administrator's proposed civil money penalty of $35,000 for 22 alleged offenses is reduced to $10,000, considering the number of offenses established, the size of Respondents' business, the absence of bad faith, and the determination that license suspension is appropriate.

11. Respondents knowingly failed to obey a cease and desist order made by the Secretary under section 2149(b) of the Act (7 U.S.C. § 2149(b)) on three instances: August 2, 2010 (access to facilities); April 20, 2013 (tiger escape); and November 14-19, 2015 (five days/itinerary). Pursuant to 7 U.S.C. § 2149(b) and 7 C.F.R. § 3.91(b)(2)(ii), Respondents are subject to a civil penalty of $1,650 for each knowing failure to obey the Secretary's cease and desist order for a total of $11,550 for seven days.

ORDER

1. The Terranova Respondents, their agents, employees, successors and assigns, directly or indirectly through any corporate or other device are ORDERED to cease and desist from further violations of the Act and controlling regulations.

2. AWA license number 74-C-0199 is suspended for a period of thirty (30) days.

3. Terranova Enterprises, Inc. and Douglas Keith Terranova are jointly and severally assessed a civil money penalty of $10,000 for the violations established herein.

4. In addition, Respondents Terranova Enterprises, Inc. and Douglas Keith Terranova are jointly and severally assessed a civil penalty of $1,650 for each knowing failure to obey the Secretary's cease and desist order for a total of $11,550.

5. Within thirty (30) days from the effective date of this Order, Respondents shall send a check for the total penalty amount of $21,550 made payable to the Treasurer of the United States and remitted either by U.S. Mail addressed to USDA, APHIS, Miscellaneous, P.O. Box 979043, St. Louis, MO 63197-9000, or by overnight delivery addressed to US Bank, Attn: Govt Lockbox 979043, 1005 Convention Plaza, St. Louis, MO 63101.

6. Pursuant to the Rules of Practice, this Decision and Order will become effective and final thirty-five (35) days this decision is served upon the Respondents, unless an appeal is filed with the Judicial Office pursuant to 7 C.F.R. § 1.145.

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

Entered this 27th day of September, 2016, at Washington, DC.

Erin Wirth
Administrative Law Judge