

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Docket Nos. 09-0155 and 10-0418

In re: Terranova Enterprises, Inc., a Texas corporation
d/b/a Animal Encounters, Inc.;
Douglas Keith Terranova, an individual;
Will Ann Terranova, an individual;
Farin Fleming, an individual;
Craig Perry, an individual d/b/a
Perry's Exotic Petting Zoo; Perry's Wilderness
Ranch & Zoo, Inc., an Iowa corporation;
Eugene ("Trey") Key, III, an individual;
and Key Equipment Company, Inc.,
an Oklahoma Corporation d/b/a
Culpepper & Merriweather Circus,

Respondents.

**DECISION AND ORDER (TERRANOVA ENTERPRISES, INC. d/b/a ANIMAL
ENCOUNTERS INC. and DOUGLAS KEITH TERRANOVA)**

I. INTRODUCTION

The above captioned matters involve administrative disciplinary proceedings initiated by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), an agency of the United States Department of Agriculture ("USDA"; "Complainant"), against Terranova Enterprises Inc., d/b/a Animal Encounters, Inc.; Douglas Terranova; Will Ann Terranova; Farin Fleming ("Terranova Respondents")¹; Perry's Wilderness Ranch and Zoo, Inc., d/b/a Perry's Exotic Petting Zoo; Craig Perry ("Perry Respondents"); Eugene "Trey" Key, III; and Key Equipment Company, Inc. ("Key Respondents"). Complainant alleges that Respondents violated the Animal

¹ I have issued separate Decisions and Orders addressing the charges against the other named Respondents.

Welfare Act, as amended (7 U.S.C. §§ 2131- 2159; “the Act”), and the Regulations and Standards issued under the Act (9 C.F.R. §§ 1.1-3.142; “Regulations and Standards”).

Procedural History

In a Complaint filed on July 23, 2009, amended on June 8, 2010, Complainant alleged that the Terranova, Key and Perry Respondents² willfully violated the Act and the Regulations on multiple occasions between 2005 and 2008. Complainant filed another Complaint on September 7, 2010, charging the Terranova Respondents with additional violations of the Act. Generally, the Complaints allege that Respondents failed to properly handle and care for a variety of animals; failed to maintain proper records and facilities; failed to allow access to facilities for inspection by inspectors; and exhibited animals without proper licenses.

The two Complaints were consolidated, but in deference to the joint request of the Key and Perry Respondents, I found it appropriate to partition the hearing between the allegations raised in the 2009 Complaint and those raised in the 2010 Complaint. The events allegedly underlying the 2009 Complaint were addressed in a hearing that commenced on February 17, 2011 and continued through February 25, 2011, held in person in Washington, D.C., and through audio-visual equipment located in Texas, Iowa and Missouri. Events involving the Terranova Respondents alone were addressed at a hearing that was held on June 1 and 2, 2011 in Dallas, Texas.

² The complaint also named an individual, Sloan Damon, as a Respondent, but Complainant and Respondent Damon entered into a Consent Decision dismissing Mr. Damon from the cause of action, which was filed with the Hearing Clerk for OALJ on January 31, 2011. Accordingly, I shall not specifically address charges against Mr. Damon in this Decision and Order.

Complainant is represented by Colleen A. Carroll, Esq., Office of the General Counsel, Washington D.C. The Terranova Respondents are represented by Bruce Monning, Esq.; the Perry Respondents are represented by Larry Thorson, Esq.; and the Key Respondents are represented by Derek Shaffer, Esq. and Michael Weitzner, Esq. At the hearings, witnesses testified and I received into evidence³ the parties' exhibits. At the hearing that commenced on February 17, 2011, I admitted to the record Complainant's exhibits identified as CX-1 through CX-67; Terranova Respondents' exhibits TX-1 through TX-41; Key Respondent exhibits KX-1 through KX-30; and Perry Respondents' exhibits PX-1 through PX-8. In addition, the parties entered into stipulations regarding the admissibility and authenticity of the documentary evidence, with the exception of certain photographic and holographic evidence. Tr. at 90-140.

At the hearing that commenced on June 1, 2011, I admitted to the record exhibits CX-68 through 93, and TX-42, 43. I granted Respondent's objection to the testimony of Margaret Whittaker. Tr. at 3162 - 3206. The witness was called by Complainant to provide opinions regarding what she believed to be the best training methods for working with elephants, which may have led her to conclude that Respondents did not use the best methods to handle animals. However, Ms. Whittaker had not reviewed the evidence regarding the incidents involved in the instant matter, and could formulate no opinion regarding whether the animals at issue had been handled properly in the incidents underlying the alleged violations. Tr. 3187 -3190. Though I credit Ms. Whittaker's training and expertise, I concluded that the proffered testimony regarding her opinion on

³ I excluded from the record CX-23. Tr. at 116.

the best methods to use to train animals in general is not material to my inquiry, as the Act and controlling regulations do not specify a particular method to train and handle animals. Moreover, Ms. Whittaker is not a fact witness, and was given no evidence relating to the events of this case to allow her to formulate an expert opinion that could be rebutted by Respondent.

Pursuant to my Order of June 28, 2011 the parties submitted corrections to the transcript, which I adopted by Order issued August 8, 2011. The parties submitted written closing argument pursuant to my Order of June 28, 2011. The instant decision⁴ is limited to Terranova Enterprises Inc., d/b/a Animal Encounters Inc. and Douglas Terranova, and is based upon consideration of the record evidence; the pleadings, arguments and explanations of the parties; and controlling law.

II. ISSUES

1. Did the Terranova corporate Respondents violate the Animal Welfare Act, and if so, what sanctions, if any, should be imposed because of the violations?
2. Is Douglas Keith Terranova personally liable for acts of the corporate Respondents?
3. Are the Terranova Respondents responsible for any violations of the Act pertaining to tiger cubs owned by the Key Respondents?

III FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Admissions

⁴ In this decision, exhibits shall be denoted as follows: Complainant's shall be "CX-#"; Terranova Respondents' shall be "TX-#"; Perry Respondent shall be "PX-#"; Key Respondents shall be "KX-#". References to the transcript of the hearing shall be denoted as "Tr. at [page] #".

In its Answer to the Amended Complaint filed July 23, 2010, Respondents admitted that Terranova Enterprises, Inc. is a Texas corporation doing business as “Animal Encounters, Inc.”, corporate Number 159995901. The corporation’s registered agent, President, and director is Douglas Keith Terranova, whose residential address in Kaufman, Texas 75142 is also the corporation’s registered address. The corporate charter was forfeited during the period from February 11, 2005 until on or about November 30, 2005, for failure to file or pay state franchise taxes. The charter was again forfeited for noncompliance with state tax law for the period July 25, 2008 through March 11, 2009. Terranova Enterprises, Inc. and Mr. Terranova continued to operate as an exhibitor and held Animal Welfare Act license number 74-C-0199 during the periods relevant to this adjudication.

Terranova admitted to operating a moderately-sized animal exhibition business. They are aware that the Perry Respondents operate a business that exhibits exotic and farm animals and that Terranova Enterprises contracted with the Perry Respondents to provide animal exhibition services at the Iowa State Fair. Terranova Respondent believed that Key Equipment operates a circus under the name Culpepper & Merriweather Circus and that Key Respondents had leased space at Terranova’s property in Kaufman, Texas where the Key animals were lodged during the winter.

Terranova admitted that elephants that it owned appeared in a parade at a circus festival in Baraboo, Wisconsin in June, 2005 and that they exhibited animals at the Circus World Museum in Baraboo on June 15, 2006, where a camel was tangled in a rope for a short time. Terranova Enterprises exhibited animals at a circus in Landover, Maryland in

June, 2007, where a mountain lion was inadvertently sprayed with fresh water while its cage was being cleaned.

The Terranova Respondents admitted that the Key tiger Delia delivered three cubs that she refused to nurse, and that one died shortly after its birth, while a second died a few days later. Veterinary advice and care were sought and followed. Sloan Damon had the surviving tiger cub in a kennel at the Iowa State Fair in August, 2008. The cub was seen by Fair veterinarians who declared him healthy, but USDA confiscated the cub on August 16, 2008.

The Terranova Respondents exhibited two elephants at WaKeeney, Kansas in June, 2008 when winds caused an inflatable slide to be blown near the elephants, thereby instigating their escape. The elephants were recaptured after one was sedated. The Terranova Respondents exhibited elephants at the Iowa State Fair in August 2003, and inspections revealed that their feet and skin were in less than desirable condition. In addition, a coaxial cable and a mooring rod were present in the area where the elephants were penned, but were immediately removed. A broken light frame was repaired. No injuries occurred to the elephants.

The Terranova Respondents admitted that no one was available at their home facility in Kaufman Texas to allow access to inspectors on June 9 and 10, 2008.

B. Summary of Factual History

During the period encompassed by the instant causes of action, all of the Respondents were in the business of exhibiting animals. From 1987 until sometime in 2010, Douglas Keith Terranova trained animals under contract with their owners, and presented instructional programs at fairs and facilities using animals that he owned. Tr.

at 2509; 2511; 2517-18. He also provided animals to circuses and production crews for television shows and films and acted with his animals. Tr. at 2517-2518. Mr. Terranova owns many different animals, including a number of tigers, camels, a cougar, and spider monkeys. Tr. at 2518-2523; CX-68. He owned two elephants, Kamba and Congo, until he donated them to the Dallas zoo in 2010. Tr. at 2801.

Craig Alan Perry has been involved with exotic animals since he was sixteen years of age. Tr. at 1700. He has exhibited animals as an individual and through the auspices of a corporation, “Perry’s Wilderness Ranch & Zoo, Inc.” (“PWR”), which is licensed by USDA. Tr. at 1700-1701; PX-1, 2; Attachments to Answer filed September 9, 2009. PWR owns a number of different animals, including bobcats, servals, lynx, leopards, mountain lions, tigers, lions; and animals shown in a “petting zoo”, such as zebras, kangaroos, goats, cattle, and water buffalo. Tr. at 1701. The petting zoo has been in operation for many years and is not a separate entity from PWR, but rather exhibits certain animals under the name of “Perry’s Exotic Petting Zoo”. Tr. at 1702.

Eugene Key, III, familiarly known as “Trey”, manages the Culpepper and Merriweather Circus (“the Circus”). Tr. at 2217. Mr. Key is President of Key Equipment Company, which bought the Circus approximately ten years ago. Tr. at 2217. The Key Respondents hold an exhibitor’s license, and Mr. Key performs in the Circus with Respondents’ two tigers, Delia and Solomon, and a lion named Francis. Tr. at 1222.

In December, 2007, Respondent Perry executed a contract with the Iowa State Fair (“the Fair”) to provide entertainment in the form of a petting zoo and animal rides during the August, 2008 Fair. PX-3; Tr. at 1709. Seeking to enhance the quality of his services, Mr. Perry arranged for horse and camel rides, and engaged the Terranova

Respondents to provide elephant rides. Tr. at 1707-1708; 2654-2657; 2660. Mr. Perry provided the equipment for camel rides and the Terranova Respondents provided camels that they had purchased from the Perry Respondents⁵. Tr. at 2654-2656; 2657-8. Mr. Terranova provided two zebu for Mr. Perry's petting zoo. Tr. at 2666.

It was anticipated that the elephants would be brought to the Fair from the Circus, where they were performing under an agreement between the Terranova and Key Respondents. Tr. at 2553. The Circus travels to different venues from Chicago and the Mississippi to the West Coast, putting on two daily shows under "the Big Top". Tr. at 2218-19. Mr. Key performs in the Circus with two tigers, Solomon and Delia, and a lion, Francis, which the Circus acquired in 2005. Tr. at 2207. The tigers are of the golden tabby variety and were litter mates. Tr. at 2213-2214.

Before the 2008 circus season began, the Key Respondents' big cats were housed in a compound on Mr. Terranova's facility. Tr. at 2222; 2551-2. The compound was built to ensure separation of Delia from Solomon when necessary, and Mr. Terranova agreed with Mr. Key that the tigers should not be allowed to breed considering the risk of genetic mutation in offspring of litter mates. Tr. at 2223- 2225. Mr. Terranova supervised the care of the cats in Mr. Key's absence, and Mr. Key was not at the Terranova property to confirm that the tigers were kept apart when Delia was "in heat". Tr. at 2224; 2551-2552. The cats did socialize together at times. Id.

At the start of the 2008 circus season, Terranova's elephant handler delivered the Key cats and Kamba and Congo to the Circus, but he soon returned to the Terranova

⁵ The camels belonged to Perry in April, 2008, when arrangements were made with Terranova to provide camel rides at the Fair, but the Terranova Respondents owned the camels by the time of the Fair. Tr. at 2049.

facility with the elephants and quit his job. Tr. at 2556. Mr. Terranova could not show the elephants himself because of personal circumstances, and he therefore hired Mr. Sloan Damon upon a friend's recommendation. Tr. at 2557-2559. Mr. Damon trained under Mr. Terranova's supervision at his home for about two weeks before taking the elephants back to the Circus with Richard Childs. Tr. at 233; 2561-2562. Mr. Damon hired Mr. Childs to drive the semi-trailer that was used to transport the animals. Tr. at 231; 238. 230; 239. The semi-trailer was partitioned to transport the elephants in the front and the cats in the rear. Tr. at 239. Mr. Damon and Mr. Childs traveled with the animals in the semi until sometime in June or July, when Mr. Key purchased a truck to carry the cats. Tr. at 239. Mr. Damon also looked after Mr. Key's cats because Mr. Damon had large cat experience. Tr. at 2228.

Shortly after he joined the Circus, Mr. Damon noticed that Mr. Key's female tiger was exhibiting behavior associated with pregnancy, although she did not appear to be expecting cubs. Tr. at 241; 2225-7. While the Circus was in Glasgow, Missouri on May 3, 2008, Delia delivered three cubs, which Mr. Damon found outside the mother's cage. Tr. at 2229-2230. It was presumed that the cubs were the offspring of Delia and her sibling. Id. Mr. Damon alerted Mr. Key to the births and Mr. Key observed as Mr. Damon replaced the cubs in the cage with Delia, who pushed them away. Tr. at 2232. Mr. Damon was reluctant to expose the cubs to further rejection from their mother, and Mr. Key gave him approval to hand-raise the cubs. Tr. at 2233. Mr. Key was a risk to the newborns' immune systems because he lived with house cats, and he relied upon Mr. Damon's experience with large cats and his reassurance that he had hand-raised tigers in the past. Tr. at 2233; 226-230. A local veterinarian, Dr. Miller, was called to the site to

examine the cubs on the night they were born. Tr. at 180-184; 2236. The doctor helped supply kitten milk replacer (“KMR”) and vitamins for the cubs, and injected Delia with antibiotics. Tr. at 185-188; CX-7.

Although the cubs appeared to be flourishing with hand feedings, the smallest died on May 6, 2008. Tr. at 246; 2239. It was buried at the Circus site, and the Circus moved to its next engagement in Kansas. Tr. at 2240. When one of the remaining cubs refused to eat on May 12, 2008, Mr. Key authorized Mr. Damon to make an appointment to take the cubs to the Kansas State University Veterinary School for examination. Tr. at 247; 2241. The cub soon showed signs of a seizure and Mr. Damon drove both cubs to the Veterinary School. Tr. at 247-248; 2242. By the time they arrived for examination by Dr. Gary West, the ailing cub had suffered additional seizures and was confirmed dead on arrival. Tr. at 248; 2242; 680; CX-9. Dr. West ordered a necropsy, and placed the surviving cub in intensive care for observation. Tr. at 2243; Tr. at 680-1; CX-9; CX-12, duplicated at CX-44(a). The following day, the doctor discharged the survivor, a male that Mr. Damon named “Tubbs”, with a prescription for dietary changes. Tr. at 692-4; 2244; CX-12. Mr. Damon continued to feed and care for Tubbs, who was kept in a transport carrier in the cab of the truck used to transport the elephants and adult tigers. Tr. at 269-272.

On August 3, 2008, Mr. Damon left the Circus to travel to the Fair under the arrangement between the Perry and Terranova Respondents. Tr. at 2259. Mr. Damon set up the elephant ride arena in an area close to the Petting Zoo and camel rides. Tr. at 259-260; CX-35 at p. 4. He kept the semi, with Tubbs in the cab, parked away from the public. Tr. at 270-273; CX-35 at pp. 121, 122, 127. Nearby, Mr. Damon erected a large

outdoor pen where Tubbs spent some time together with a dog that Mr. Damon had found in his travels. Tr. at 272; CX-35 at p.128.

On August 13, 2008, APHIS inspectors Dr. Zeigerer and Dr. Sofranko, together with APHIS investigator Mike Booth, arrived at the fairgrounds to inspect the facilities and animals. Tr. at 1715; 2536; 1919; CX-38, 39. The trailers belonging to Perry and Terranova were parked in close proximity, and were inspected, as were the Petting Zoo, and the elephant and camel ride areas. Tr. at 1721; CX-38, 39. The inspectors continued to visit the Respondents over the course of several days at the Fair, and on the second day of their inspection, they observed Tubbs in the cab of Terranova's trailer. Tr. at 2602; 2612-13; CX-35 at pp. 121, 122. Mr. Damon did not have a written plan of veterinary care⁶ (Tr. at 233-234) and the inspectors instructed Mr. Damon to have Tubbs examined by a qualified veterinarian (Tr. at 288; 2612-4).

Mr. Terranova asked the Fair veterinarians to examine the cub, and Dr. Clothier, Dr. Lucien and two veterinary school students examined Tubbs. Tr. at 2614-2615. Dr. Clothier brought the other vets with her because it was an opportunity to see an exotic species, and Dr. Lucien had a lot of experience with a variety of animals. Tr. at 2101-2103. Dr. Clothier physically examined the cat, reviewed his history of prior veterinarian examinations, and expressed concerns about a worming regimen. Tr. at 2104-2107. She made some recommendations about diet, based upon Mr. Terranova's description of the cub's nutrition. Tr. at 2108. Dr. Clothier produced a certificate of health in which she basically concluded that Tubbs was healthy. Tr. at 2106; 2109; 2113; CX-32.

⁶ I infer that the Key Respondents had not developed a written plan for veterinary care of their big cats,, since Mr. Key had asked Dr. West to draft one, and Dr. West declined on the basis of potential conflict of interest. Tr. at 2550-2552.

Dr. Clothier met with Drs. Zeigerer and Sofranko, and spoke with USDA's veterinarian Dr. Gage. Tr. at 2116-2121. Based upon her discussions with Dr. Gage, Dr. Clothier revised her dietary recommendations for Tubbs. Tr. at 2121; CX-32. Dr. Clothier's examination report was provided to the inspectors on August 15, 2008. Tr. at 2119-2121; 2629; CX-32.

Meanwhile, the inspectors were concerned about the cub's welfare, as they believed the cab of the truck where he was kept during the day was too hot; that his container was too small; that he was underweight due to an inappropriate diet; and that his living conditions were unsanitary. CX-38, 39, 48, 49. The inspectors conferred with other USDA personnel, in particular Dr. Gage, USDA's large cat expert. Id. It was decided that Tubbs' interests would be best served if he were confiscated by the inspection team and relocated to another facility. CX-50. The confiscation was effected on Saturday, August 16, 2008, after which the cub was transported to a USDA approved facility, the Blank Park Zoo, where he was examined by Dr. June Olds. CX-52; CX-54; CX-55, 55(a), 55(b). Dr. Olds concluded that the cub had worn an ill-fitting harness that caused skin abrasions, that he was underweight, and had suffered a wound near his right eye. CX-54, 55. X-rays needed to be highlighted to see the tiger's bone structure, but Dr. Olds did not have enough experience reading X-rays to say whether they depicted normal or abnormal tiger cub bones. Tr. at 573; CX-53.

The inspectors cited all of the Terranova and Key Respondents with violations of the Act regarding the care of the tiger cubs. CX-48, 49. The inspectors cited the Terranova and Perry Respondents with violations pertaining to the care, feeding and housing of the elephants, who were inspected on Saturday morning at the Fair in August

2008. Tr. at 2630-2631. Terranova and Perry Respondents were also charged with failure to handle the elephants in a manner sufficient to avoid harm, and with failure to provide sufficient barriers between the public and elephants during elephant rides. Terranova was also charged with failure to provide adequate veterinary care and maintain a program of adequate care for the elephants.

APHIS investigator Rodney Walker traveled to the Fair from Kansas as part of his investigation into reports that Terranova's elephants had escaped on June 4, 2008, while traveling with the Circus in WaKeeney, Kansas. Tr. at 427; 439; CX-21. Strong winds were present and although Mr. Key denied awareness of tornado advisories for the area, the weather was uncommonly changeable. Tr. at 252-254; 430; 2347. Mr. Key monitored the weather before determining that the Circus could be set up. Tr. at 252; 2344-2346. Mr. Damon had unloaded the elephants, but they were not prepared to conduct rides or show them because the weather was questionable. Tr. at 253-254. He was concerned about leaving the animals in the truck for too long. Tr. at 253. Although Mr. Damon said the decision to conduct the rides was his, he also testified that he would consult Mr. Key, who could override him. Id.

At some point it was decided that that the worst of the weather would bypass the Circus site, and the Circus began to set up attractions. Tr. at 253; 2279. The wind suddenly picked up, and the elephants spooked when a large inflatable amusement slide was blown toward⁷ them, and they escaped from their handler. Tr. at 254. They wandered onto nearby private property and were reclaimed only after one was

⁷ There is conflicting testimony regarding whether one of the elephants was struck by the inflatable device or whether the device was blown near the elephants. I need not determine which version is accurate because the significance of the event is that it precipitated the elephants' escape.

tranquilized. Tr. at 255-256; CX-18, 21, 22, 26. Apparently, the elephants suffered no permanent injury as the result of this incident in June, because they continued to work at the Circus with Mr. Damon and travel with him to the Fair in August. Tr. at 234. There is conflicting evidence regarding whether Mr. Damon was injured by an elephant during this incident. See, Mr. Damon's testimony, cf. CX-26.

After the Iowa Fair, Mr. Damon rejoined the circus with the elephants, but he quit his job in September, 2008. Tr. at 234. Mr. Terranova took over the work of handling the animals and was with them on November 4, 2009, at the Family Fun Circus in Enid, Oklahoma, when Kamba escaped and ran onto a highway where she was struck by a vehicle. Tr. at 3483 -3514; CX-70. She sustained various injuries, including lacerations on her right side, a fractured tarsal bone, a broken tusk, bruised trunk, and numerous abrasions. CX-74 through 76. When Mr. Terranova and his employee Carlos Quinones gave chase to Kamba, they left the other elephant, Congo, unattended for a period of time. Tr. at 3141. Kamba's injuries were treated at the Oklahoma State University School of Veterinary Medicine on the following day. CX-74 through 76. Kamba recovered from her injuries, and in approximately February, 2010, Terranova sold her and Congo to the Dallas Zoo. Tr. at 3517-3520. Mr. Terranova worked at the Zoo until February, 2011, when he resigned following negative publicity involving this case. Tr. at 3520.

Inspections of Terranova's exhibitions at other facilities were conducted and resulted in citations of violations of the Act. It is undisputed that spider monkeys on display at the Circus World Museum in Baraboo, Wisconsin in June, 2005 were provided a variety of foodstuffs and entertainment, but there was no formal enrichment program

for primates in place. CX-1. Other inspections revealed that on June 15, 2006, a camel became entangled in a loose rope barrier that separated Terranova's camels and elephants at the Circus World Museum (Tr. at 88; CX-2) and inspections further found that two camels were left unattended on that day (Tr. at 3444; CX-2). In addition, it was determined that there were insufficient distance and insufficient perimeter fencing at the Circus World Museum in July, 200. Tr. at 3449; CX-4.

The record reflects that on June 5, 2007, an APHIS Veterinary Medical Officer ("VMO") observed Terranova's mountain lion being inadvertently sprayed with water and exposed to detergent during the cleaning of his cage at the Universoul Circus in Landover, Maryland. CX-3.

Terranova admittedly failed to provide a written program of veterinary care and other records required by the Act while exhibiting at Turner Field in Atlanta, Georgia in February, 2008. CX-6. Further, on June 9 and 10, 2008 no one was available to allow inspection of the Terranova home facility in Kaufman, Texas. CX-6.

C. Prevailing Law and Regulations

The purpose of the Animal Welfare Act, as it relates to exhibited animals, is to insure 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 by (7 U.S.C. §§ 2143(a), 2151). The Act requires exhibitors to be licensed and requires the maintenance of records regarding the purchase, sale, transfer and transportation of regulated animals. 7 U.S.C. §§2133, 2134, 2140. Exhibitors must also allow inspection by APHIS inspectors to assure that the provisions

of the Act and the Regulations and Standards are being followed. 7 U.S.C. §§ 2142, 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 was modified under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note) and various implementing regulations issued by the Secretary. Though the Act originally specified a \$2,500 maximum, between April 14, 2004 and June 17, 2008 the maximum for each violation was \$3,750. In addition, 7 U.S.C. § 2149(b), was itself amended and, effective June 18, 2008, the maximum civil penalty for each violation was increased to \$10,000.

The Act extends liability for violations to agents, pursuant to 7 U.S.C. §2139, which states, in pertinent part: “the act, omission, or failure of any person acting for or employed by . . . an exhibitor or a person licensed as . . . an exhibitor . . . within the scope of his employment or office, shall be deemed the act, omission or failure of such . . . exhibitor as well as of such person.” 7 U.S.C. §2139.

Regulations promulgated to implement the Act provide requirements for licensing, record keeping and attending 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 regulations 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. *Id.* Exhibitors are also required to engage a veterinarian and develop a written plan of veterinary care appropriate for each species of animal exhibited.

The burden of proof on Complainant is the preponderance of the evidence. *In re John Davenport, d/b/a King Royal Circus*, 57 Agri. Dec. 189 (1998).

D. Discussion

Before determining whether Complainant has established that Terranova's activities constitute violations of the AWA and prevailing regulations, I must determine the extent, if any, to which the Terranova Respondents are responsible for alleged violations relating to tigers owned by the Key Respondents. Respondents have admitted the jurisdiction of the Secretary in this adjudication, and I have considered that no one raised the defense that the Act should not apply to the tiger cubs, who had not been exhibited in any manner. Accordingly, I find that activities related to the tiger cubs born at the Circus are subject to the AWA.

Complainant contends that the Terranova Respondents are jointly responsible with the Key Respondents for any violations involving the Key's tigers and lion. The principal-agent relationship established by the AWA provides the foundation for Complainant's position, in that the statute states, in pertinent part: "[w]hen construing or enforcing the provisions of this chapter, the act, omission, or failure of any person acting for or employed by ...an exhibitor or a person licensed as...an exhibitor...shall be deemed the act, omission or failure of such exhibitor...[or] licensee...as well as of such

person”. 7 U.S.C. § 2139. The language specifically provides a statutory method for “piercing the corporate veil”, since the “the term ‘person’ includes any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity.” 7 U.S.C. § 2132(a).

The common law of Agency was adopted by the United States Supreme Court in *U.S. v. Goodry*, 25 U.S. 460 (1827). Subsequently, in considering whether an agency relationship exists, courts have looked at the Restatement of Agency, and concluded that the parties, a principal and his agent, must manifest their assent to create the relationship. *Jade Trading LLC v. U.S.*, 81 Fed. Ct. 173 (2008); Restatement of Agency, 3d, 1.01. In addition to consenting to act, an agency relationship requires that the principal retain the right to control the means and details of the acts that the agent performs. *Meyer v. Holley*, 537 U.S. 280, 283 (2003); *Northwinds Abatement, Inc. v. Employer’s Insurance of Wausau*, 258 F.3d 345, 351 (5th Cir. 2001). In the absence of the principal’s control or mutual consent, common law does not generally recognize an agency relationship. Restatement of Agency, 3d. An agency relationship imposes upon the agent a fiduciary duty to act in the principal’s interests. *Id.*

Principals are liable for acts performed by their agents within the scope of their authority. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). Unless a principal has expressly or impliedly made an agent his representative, the principal is not liable for the acts of another who assumes to represent him, and a person dealing with an agent cannot hold the principal liable for any act or transaction of the agent not within the scope of his actual or apparent authority. *Leach & Co. v. Peirson*, 275 U.S. 120 (U.S. 1927). The knowledge of an agent may be imputed to the principal where it is relevant to the

agency and to the matters entrusted to the agent. *Fleming v. United States*, 648 F.2d 1122 (7th Cir. Wis. 1981).

In determining whether an agency relationship exists, courts have looked at factors such as compensation to the agent from the principal; whether the agent is designated in writing; whether the agent's activities are subject to the principal's approval; whether the agent transfers funds to the principal; whether the principal indemnifies and insures the agent; whether the agent is financially accountable to the principal; whether the manner and means of the agent's activities are subject to the principal's control; the skill required of the agent; the source of instrumentalities and tools; the location of the agent's performance; the duration of the relationship between the parties; the role of the principal in hiring personnel for the agent's use; whether the principal has the right to assign additional projects to agent; the extent of the agent's discretion over when and how long to work; the method of payment; whether the work is part of the regular business of the principal; whether the agent receives employee benefits; and how the agent is taxed. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989); *Nationwide Mut. Ins. Co. v. Darden*, 508 U.S. 318 (1992); *Centillon Data Systems, LLC v. Qwest Communications Int'l Inc.*, 2011 WL 167036 (Fed. Cir. 2011); *Akami Technologies Inc. v. Limelight Networks, Inc.*, 629 F.3d 1311 (Fed. Cir. 2010); *Lubetzky v. U.S.*, 393 F.3d 76 (1st Cir. 2004); *Vizcaino v. Microsoft Corp.*, 142 F. Supp 2d 1299 (W.D. Wash, 2001); aff'd 290 F. 3d 1043 (9th Cir. 2002).

There is no documentary evidence that establishes an agency relationship between the Key and Terranova Respondents. No written contracts or other memorialized indicia regarding compensation, obligations owed to each other, or agreed damages for breach

are of record. Complainant alleged in Part A ¶ 2 at page 2 of the Amended Complaint that “Respondent Key Equipment Company, Inc. on its 2007, 2008 and 2009 AWA license renewal applications identified Doug Terranova as its agent and/or person “authorized to conduct business” for respondent Key Company, Inc.” See, Complaint. Such documentation would clearly establish an agency relationship, and it is disconcerting that Complainant withdrew⁸ Key’s corporate and licensing records, which were originally identified as Complainant’s exhibit CX-58⁹. Nevertheless, there is ample evidence that Terranova Enterprises Inc. acted as the Key Respondents’ agent with respect to the Key’s adult tigers and lion in certain circumstances, and over a period of years. There is also evidence of instances where the Terranova Respondents acted as the Key Respondents’ agent regarding tiger cubs.

The Key big cats were housed at a compound specially built at Terranova’s property for that purpose. Tr. at 2684. Mr. Terranova trained the Key cats while at the Circus World Museum in 2007. Tr. at 3450-3451. Terranova’s employee Sloan Damon transported the cats in a vehicle owned by Terranova when they traveled to and with the Circus. Tr. at 238. The Key Respondents paid the Terranova Respondents for using the elephants at the Circus, and Mr. Damon was paid out of those funds. Tr. at 237. Mr. Terranova approved Mr. Damon raising the Key tiger cubs while simultaneously handling Terranova’s elephants. Tr. at 242. Mr. Damon “answered to” both Mr.

⁸ Such conduct would merit the contemplation of sanctions under the Federal Rules of Civil Procedure 11(b), in that it represents factual contentions and allegations which have no evidentiary support. Since I have found the existence of an agency relationship on the strength of other evidence, this conduct is merely offensive.

⁹ CX-68 represents Terranova’s AWA license application dated January 5, 2009, which identifies Doug Terranova as the person authorized to conduct business for Terranova Enterprises, Inc.

Terranova and Mr. Key. Tr. at 323. Mr. Terranova provided advice about caring for the cubs. Tr. at 242, 307-308; Tr. at 2701. 2707-2708; CX-65. Mr. Damon secured the paperwork to transport the elephants and the cub to the Fair (Tr. at 285-285) and listed the surviving cub, “Tubbs”, as Terranova’s animals for economic reasons (Tr. at 309; CX-44). Mr. Terranova sought out a veterinarian to examine Tubbs at the Fair. Tr. at 2724; 2733; CX-32. Mr. Terranova offered to take Tubbs from the Fair to his home facility in Kaufman, Texas, and also offered to house all the cubs after they were born. Tr. at 2708, 339. Mr. Terranova interacted with APHIS inspectors at the Fair with respect to the cub. Tr. at 2734.

Each of these activities signifies the exercise of control over animals, and to that extent, Mr. Terranova acted as agent for the Key Respondents. Although Mr. Terranova explained that he failed to advise inspectors of Tubbs’ presence at the Fair because he wanted to avoid additional problems, the fact that he could anticipate that he might be implicated for problems is tantamount to an admission of his involvement with Key’s cub. Because Terranova employee Sloan Damon became primary caretaker of the cubs with Mr. Terranova’s knowledge and consent, Terranova Enterprises, Inc. is responsible for the activities of its employee under the Act.

1. Did Terranova Enterprises Inc. violate the AWA

The Terranova Respondents are charged with violations of the Act that fall within several general categories: access to records and facilities; maintenance of facilities and food supply; maintaining sufficient barriers; handling and care of animals; retaining veterinarians and a plan of care; and providing veterinary care. The Complaint includes every violation cited against the Terranova Respondents since 2005, even though it is

clear that many of the violations would not have generated a Complaint under the Act against Terranova. In addition, Terranova was charged with certain violations that I find are not supported by the evidence. The allegations and evidence are summarized as follows:

a. **Access to Records and Facilities**

Plan of environmental enhancement for primates

I accord substantial weight to the testimony of Cynthia Neis regarding the results of her inspections of Terranova exhibitions at the Circus World Museum in Baraboo, Wisconsin, which were admitted by Mr. Terranova. Tr. at 3442-3444. On June 23 through 25, 2006, Inspector Neis' inspection showed that Terranova failed to maintain a written plan of environmental enhancement for two spider monkeys. CX-1. I credit Inspector Neis' testimony that despite the lack of a documented plan, she observed evidence of environmental enhancement for the monkeys' psychological well-being. Tr. at 3029-3030. Inspector Neis allowed Terranova ninety days to implement a written plan (CX-1) which suggests that she did not find that this violation required immediate correction.

Failure to have plan of veterinarian care

Terranova was cited for failure to have an attending veterinarian and adequate veterinary care while exhibiting animals at Turner Field in Atlanta, Georgia on February 26, 2008. CX-6. Inspector Rhudy Ayers testified that the original inspection report cited the incorrect violation, and that the problem he had observed was the failure to have proper paper work, not the failure to have an attending veterinarian. Tr. at 2995-2998.

Inspector Ayers prepared additional corrective reports that charged Terranova with failure to allow examination of required records. Id.; CX-6.

Inspector Donovan Fox, who conducted regular inspections of Terranova's home facility, was aware that Terranova had a plan for veterinary care and he confirmed his familiarity with the plan that Mr. Terranova produced as evidence. Tr. at 3064-3065; TX-21. Inspector Fox further testified that he could not say whether Inspector Ayers had contacted him to confirm whether Terranova had a plan in place in February, 2008. Tr. at 3064-3067. I fully credit Inspector Ayer's testimony and the corrected inspection reports that reflect that Terranova was cited for a paperwork violation, and not for failure to have a plan of veterinary care. Tr. at 2696-2698; CX-6. The preponderance of the evidence establishes that Terranova employed a veterinarian, and had a written plan of veterinary care at all times relevant to this adjudication. TX-19, 21, 28; c.f., Complainant's Proposed Findings of Fact, etc. at page 4, ¶ A.16. Therefore the charge regarding the failure to maintain a veterinarian is dismissed.

Inspection of Kaufman, Texas facility

Exhibitors must also allow inspection by APHIS inspectors to assure compliance with Sections 2142, 2143, 2143 (a)(1) and (2), 2146 (a) of the Act. The regulations provide that "a responsible adult shall be made available to accompany APHIS officials during the inspection process". 9 C.F.R. §2.126(b). It is undisputed that Mr. Terranova was not on site on June 9, 2008 and again on June 10, 2008, when Inspector Donovan Fox arrived to inspect the Terranova facilities in Kaufman, Texas. Tr. at 3056-3058; CX-27; Respondents' admissions. Mr. Fox did not know which, if any, of the animals owned by Terranova were on site at the time of his attempted inspections. Tr. at 3064. Mr. Fox

had inspected Terranova facilities in the past, and had found no problems with them. Tr. at 3062-3063.

Although I credit Mr. Terranova's testimony that he was absent from his facility for only a brief time on both occasions (Tr. at 3463-3464), the regulations require exhibitors to have a responsible individual available during business hours to allow access to inspectors. Mr. Terranova testified that individuals were on site, as he was hosting children from China, (Tr. at 3463) but these individuals were obviously not responsible as anticipated by the regulation. On the application to renew Respondents' license, no other individual but Doug Terranova is listed as authorized to represent the Terranova Respondents. CX-68. The evidence establishes violation of the regulations regarding access for inspection.

b. Maintenance of Barriers

Unattended camels at Circus World

Inspector Neis observed that on June 15, 2006, Terranova's two camels were left unattended, and one became entangled in ropes separating the elephant and camel areas. Tr. at 3031. Only the rope barrier separated the camels from the public area, and although the inspector did not observe any members of the public in the vicinity at the time, she explained that the public had free access to the area where the camels were kept. Tr. at 3033. Without the presence of handlers, the rope barrier was insufficient to prevent direct contact by the public with the camels. Tr. at 3034. It is undisputed that the camels were left in the care of employees who abandoned them, and that Mr. Terranova credibly testified that he was upset with the employees. Tr. at 3445-3447. This charge is substantiated.

Lack of perimeter fencing at Circus World

On July 24, 2007, Inspector Neis found that outdoor housing facilities in Baraboo had no perimeter fence at the enclosure where Terranova kept two tigers and a lion. CX-4; Tr. at 3034-3036. Inspector Neis cited Terranova for inadequate barrier between the animals and public areas, because she considered Terranova to be other than a temporary exhibitor, having been on site since June 1, 2007. Tr. at 3034. The only fence was shorter than eight feet, and the lack of a perimeter fence created a hazard in containing animals escaping from the primary enclosure. Tr. at 3035-3036. Terranova was given until September 7, 2007 to correct the issue. CX-4.

Mr. Terranova respected Inspector's Neis conclusion that temporary fencing rules should not have applied in those circumstances, but he noted that the area in question was secured from the public. Tr. at 3448. Mr. Terranova further testified that he had used that same area with the same stationery permanent fencing constructed by the Circus World Museum, and a large hill and river bed as barriers, in addition to tents around the tiger area in other years without being cited for violations. Tr. at 3448-3450. Terranova believed that Inspector Neis wanted to encourage Circus World to construct a perimeter fence for future exhibitors, and he recalled discussing the matter with Circus World officials together with Inspector Neis. Tr. at 3452. Mr. Terranova had no authority to construct a fence at that facility, and since he did not return to that area after 2007, he does not know if a fence was constructed. Tr. at 3452-3453. This technical violation is established.

Inadequate barrier between elephants and public at State Fair

Inspectors at the Iowa State Fair observed on August 13, 2008, that elephant rides were conducted in a manner that they concluded did not provide sufficient distance between the animals and the public¹⁰. CX-41. Relying upon photographs taken at the Fair, Dr. Zeigerer testified that people riding one elephant could easily reach out and touch the other in the center of the ring. Tr. at 1166. Mr. Damon worked on the ride, and he believed that the elephants were sufficiently under the control of the three individuals working at the exhibition. Tr. at 318-319. The elephant not carrying people was separated by a rope in the center of the ring. Tr. at 319. Mr. Terranova disagreed with the assessment that there was insufficient barrier, but he nevertheless abided by the inspectors' instructions to chain the elephant that wasn't working when she was left in the center of the work ring. Tr. at 2538-2539.

I accord equal weight to the contradictory evidence regarding the barriers. It is axiomatic that an elephant ride amusement will bring the public in close contact with the animals, and the question of proper barrier is within the judgment and expertise of the handler. Since neither Dr. Zeigerer nor Dr. Sofranko have any experience with handling animals, I decline to accord additional weight to their opinions. Accordingly, the evidence regarding this allegation is in equipoise, and the allegation is dismissed.

Elephants at Family Fun Circus

Respondents are charged with failure to maintain sufficient barriers between the public and the elephants during an exhibition on November 4, 2009 in Enid, Oklahoma. It is not entirely clear from the evidence or Complainant's argument exactly which

¹⁰The Perry Respondents were also charged with this alleged violation, and by separate Decision relating to the Perry Respondents only, I have found that they are not liable for any charges related to the elephants.

incidents at the Family Fun Circus are involved in this allegation. I infer from the preponderance of the evidence that this charge arises from Mr. Terranova's failure to maintain control over the elephants as he led them into the ring without any assistance from other personnel, leading to Kamba's escape and Congo's solitary walk around the circus ring.

I accord substantial weight to the testimony of experienced elephant handler Tim Hendrickson, who opined that "you have to be in the elephant's head" to control the animal, which is "too big, too strong and too fast" to otherwise control. Tr. at 3258-3259. Mr. Terranova described a scenario where he was distracted and responding to unexpected circumstances. As the primary barrier between the public and the elephants during a circus act is the handler, it is clear that Mr. Terranova did not provide a sufficient barrier between the elephants and the public in Enid, Oklahoma. Congo walked around the circus ring alone, and Kamba escaped. The preponderance of the evidence establishes that Respondents failed to have sufficient barriers, in the form of trained personnel, to control the elephants, thereby putting them and the public at risk of harm. Indeed, members of the public were actually harmed when their car collided with Kamba on the highway.

Respondents are further charged with failure to enclose outdoor housing facilities by an adequate perimeter fence. It is clear that there was no separate perimeter fence at the facilities used by the Family Fun Circus. TX-42, 43. The existence of an additional fence may have thwarted Kamba in her journey to the highway, and thereby prevented

her injury, as well as the injury¹¹ to the occupants in the vehicle. This allegation is sustained.

c. Maintenance of Facilities and Food Supply

Fencing at Circus World

Inspector Neis issued another citation to Terranova at Baraboo on June 11, 2008, for dilapidated fencing that could have harmed his camels. CX-29; Tr. at 3036.

Terranova's employee had made the repairs when the inspector returned to conduct her exit interview. Tr. at 3037. This allegation is substantiated.

Facilities at State Fair

An August 13, 2008 inspection of the facilities used to transport and house elephants at the Iowa State Fair revealed lengths of cable within the elephants' outdoor enclosure; a 15 to 18 inch metal protrusion from the ground in the enclosure; and a sharp edged piece of metal within their trailer. CX-42; CX-35 at pp. 53; 79-85; 1169.

Inspector Michael Booth testified that all of potential hazards were repaired or removed. Tr. at 1925.

The inspection at the Fair also revealed fecal matter in an area where hay was stored. CX-35 at pp. 35-37. Mr. Damon testified that he kept the feed hay separated and above the ground, to keep it clean and dry. Tr. at 319-320. Photographs clearly show that the vehicle where the hay was stored belonged to Mr. Terranova. CX-24, 77. Mr. Terranova explained that the feed hay was stacked on wooden pallets, and was separate from areas where animals were kept. Tr. at 2546-2548. He said that a zebu had been

¹¹ I decline to draw any conclusions regarding the severity of injuries on which insurance was paid, particularly given the paucity of reliable evidence on this issue. See, Tr. at 3433-36.

enclosed in that area and that the area had not yet been cleaned at the time of the inspection. Tr. at 2770. I accord substantial weight to the opinions of the exhibitors, both of whom credibly explained that the animals' feed was not exposed to fecal matter. The preponderance of the evidence fails to establish that the fecal matter was mixed with animal feed.

Insufficient shade for elephants

At the Fair in August, 2008, inspectors observed that elephants were left in the sun when they were not being used in the elephant ride amusement. CX-42. Dr. Zeigerer testified that no shade was provided during the elephant rides at the Fair. Tr. at 1169-1171. This is undisputed, as the rides were conducted with the non-working elephant restrained in the middle of the ring that the other animal walked around with a rider. Id.

d. Handling of Animals

Unattended camels at Circus World

As noted above, on June 15, 2006, Terranova's two camels were left unattended at Circus World in Baraboo, Wisconsin. I credit Mr. Terranova's testimony that confusion among his employees caused the problem (Tr. at 3444-3446), but such a lapse reflects failure to handle animals as carefully as possible to prevent harm, injury, or distress. One of the camels was entangled in a loose rope, which could have caused harm. I credit Mr. Terranova's testimony that his elephants were with him and therefore, find no violation with respect to the handling of the elephants on June 15, 2006.

Water sprayed mountain lion at Universoul Circus

While conducting a routine inspection of Terranova's exhibition at the Universoul Circus, APHIS inspector Dr. Gloria McFadden observed a mountain lion sprayed with

water and exposed to cleaning detergent during the cleaning of its cage by Terranova's employee Carlos Quinones¹². Tr. at 3008-3013; CX-3. The lion demonstrated its discomfort by growling, turning its back to people, and not responding to its handler. Tr. at 3012; 3014-15 Dr. McFadden discussed the cleaning method with Mr. Quinones, and when she returned to the site on the following day, Mr. Quinones had changed the procedure so that animals were not in cages during the cleaning process. Tr. at 3017. Mr. Terranova was not at the site during this incident. Tr. at 3447. Although the amount of distress suffered by the mountain lion is indeterminate, I accord substantial weight to Dr. McFadden's opinion, considering her credentials as a licensed veterinarian, and find that this violation has been established. CX-3; Tr. at 3006.

Elephants in WaKeeney, Kansas

On June 5, 2008, those responsible for handling Terranova's elephants failed to handle the elephants as carefully as possible, resulting in their escape. Severe weather was in the area, resulting in uncertainty about whether the Circus would perform. Tr. 253. Mr. Damon was placed in a tenuous position on this date, as he needed to let the elephants out of their trailer to avoid them being unduly confined, which would have violated the Act. Tr. at 287. However, considering Mr. Damon's credible testimony about Mr. Key's surveillance of weather forecasts (Tr. at 252-253), Mr. Damon's decision to unload the elephants presented risks related to the unpredictable state of the weather that appear to outweigh any risk presented by their confinement to the semi.

¹² Mr. Quinones speaks Spanish as his first language, and testified with the aid of an interpreter. See, Transcript June 1, 2011.

Although weather can pose unpredictable hazards, the forecast on June 5, 2008 included predictions of high winds, resulting in the delay of the Circus. Tr. at 253-254. Although it is unlikely that anyone could have foreseen that wind would blow an inflatable amusement slide close enough to the elephants to provoke a stampede, and high winds always portend the risk of bodily injury and property damage. Mr. Damon's decision to expose the elephants to fluctuating severe weather conditions jeopardized their safety.

The peril was compounded by Mr. Damon's relatively outdated experience with handling elephants and his limited experience with the elephants at issue. Before joining Terranova, Damon's most recent work was with big cats, although he worked with elephants in the 1970's and 1980's. Tr. at 222-224. He trained with Terranova's elephants for about two weeks before taking them to the Circus. Tr. at 226, 306. Mr. Childs had no special experience with elephants and his training was limited to helping Mr. Damon. CX-5, CX-18. Mr. Childs helped during exhibitions by walking with Mr. Damon and the elephants into the Circus ring, and despite Mr. Damon's opinion that Mr. Childs was competent to handle the elephants, the record does not establish a basis for that opinion. See, Tr. at 232, 311-312. There is evidence that Mr. Damon had been injured by his charges on several occasions¹³, including an incident where he allegedly suffered broken teeth and ribs. CX-26; Tr. at 250-251.

Considering Mr. Damon's history of problems from the elephants, the potential for severe weather should have inspired extra caution from the handler. Although the

¹³ There is contradictory evidence regarding whether Mr. Damon was injured on June 5, 2008. CX-26; CX-18.

event ended with no long-term negative implications, the elephants were out of their handler's control for hours, and one had to be tranquilized before being restrained, which most certainly represents harm and stress to an animal.

The preponderance of the evidence establishes that Terranova failed to exercise sufficient care when assigning Mr. Damon full responsibility to travel and care for elephants on the road. I fully credit the testimony of elephant handler Tim Hendrickson, who believed that training and adequate personnel are crucial when working with elephants. Tr. at 3258-3275. This violation is sustained.

Elephants at Family Fun Circus

On November 4, 2009, as Mr. Terranova prepared to enter the circus ring to exhibit the elephants, a confluence of unexpected mishaps converged and created a catastrophe. Mr. Terranova was not totally prepared to enter the ring when he heard the signal for his act, as earlier in the day, a horse act had preceded his. Tr. at 3486-3487. When he heard the music signaling the start of the elephant act, Mr. Terranova rushed to the entrance of the tent without first ascertaining that Mr. Quinones was with him and the elephants. Tr. at 3487. Mr. Terranova was between the elephants, at Congo's rear, and expected the entrance to be lit and opened, ready for his entrance. Tr. at 3488. To his dismay, the light was out, and the tent flap was lowered, requiring Mr. Terranova to wait for the person responsible for opening the tent to arrive. Tr. at 3489-3491. The boy came running by the elephants, and Mr. Terranova warned him to stop running. Tr. at 3492. Mr. Terranova speculated that the boy startled Kamba, who turned around and left the tent site, while Congo proceeded unaccompanied into the ring. Tr. at 3493. Mr.

Terranova was left with the choice of securing Congo, who was alone in a ring with hundreds of people, or chasing Kamba. *Id.*

Mr. Terranova admitted full responsibility for the series of poor decisions that led to Kamba's tragic collision with a vehicle on a highway some distance from the circus site. CX-71, 72; Tr. at 3547. I accord substantial weight to the testimony of elephant handler and expert Tim Hendrickson, who stressed the importance of having adequate personnel on hand when handling elephants. Tr. at 3273. Mr. Terranova did not have the assistance of a skilled elephant handler with him in Enid. In June, 2011 Mr. Quinones described himself as a tiger handler, who had worked in the field for five years. Tr. at 3121. Mr. Quinones testified that in November 2009, he was a "tiger trainer and elephant assistant". Tr. at 3121. His training with respect to working with elephants involved "basically maintenance duties, like cleaning. Just how to call them, how to approach them." Tr. at 3122. Mr. Quinones had never exhibited the elephants in the circus ring. *Id.* The other two employees with Mr. Terranova in Enid were casual laborers. Tr. at 3540-3542.

Mr. Quinones corroborated Mr. Terranova's description of the events in Enid, Oklahoma. Mr. Quinones was feeding the tigers and unexpectedly heard music that indicated that the elephants were next to enter the circus ring. Tr. at 3131. The order of acts in the show changed from time to time, but he did not expect the elephants to appear when they were called. *Id.* Mr. Quinones dropped what he was doing and hurried to join the elephants and Mr. Terranova, only to see Kamba turn away from Terranova, who was in front with Congo. Tr. at 3131-3132. He called to Mr. Terranova to wait, but saw that Kamba kept moving past her trailer, while Congo and Mr. Terranova entered the circus ring. Tr. at 3132-3134. Mr. Quinones was familiar with Mr. Terranova's protocol in the

event of an escape, even though it was written in English, and he understood that he needed to try to catch Kamba and keep her away from people. Tr. at 3135-3136. The escape plan anticipated that the police would be called, but Mr. Quinones did not have a phone. Tr. at 3138.

Mr. Quinones tried to stop Kamba by using his ankus on her shoulder, but she continued to walk, and he stayed with her, talking to her to try to convince her to stop. Tr. at 3136-3137. She proceeded onto the highway, where Mr. Quinones watched as she was struck by a vehicle. Tr. at 3138-3139. After the collision, Kamba left the highway and hid in some trees, where Mr. Quinones stayed watching over her. Tr. at 3139. Another employee of Mr. Terranova, Joe Miller, joined them, and Mr. Quinones denied that Kamba struck Mr. Miller with her trunk. Tr. at 3140. Mr. Terranova arrived on the scene, having left Congo alone, but secured, for five to ten minutes. Id. Mr. Quinones left Kamba with Mr. Terranova and Mr. Miller, and returned to watch over Congo. Tr. at 3141. Mr. Quinones believed that Kamba escaped because only Mr. Terranova was with the elephants, and he was in front of them. Tr. at 3145. Usually he is behind them, but on that night, Mr. Quinones believed there was time to feed the tigers before he expected the elephants' show to start. Tr. at 3146.

I credit Mr. Hendrickson's testimony that elephants who have escaped are likely to escape again. Tr. at 3284. Considering the fact that the elephants had already escaped at least once, Mr. Terranova's decision to proceed to the ring alone represents disregard for the potential of an escape. The events in WaKeeney demonstrated that those who handled Kamba and Congo needed to be prepared for the unexpected. I find that the series of mistakes that Mr. Terranova made on November 4, 2009 represent failure to

handle the elephants as carefully as possible, in a manner consistent with their good health and well being.

Elephants at the Fair

Complainants have alleged that the elephant rides that were conducted at the Fair did not provide for adequate safety for the animals and the public. I accord substantial weight to the opinions of the handlers, who believed that the elephants were sufficiently controlled by the three people involved in the exhibition. Tr. at 318-319; CX-35 at p. 58. Dr. Sofranko testified that the handler was not between the elephants and individuals riding on the working elephant, noting that the handler would not be able to see what the center elephant was doing. Tr. at 1416; 1448-1449; CX-35 at pp. 64-69; 89-91. Dr. Zeigerer testified similarly. Tr. at 1164-1165.

Mr. Damon worked on the ride, and he believed that the elephants were sufficiently under the control of the three individuals involved in the exhibition. Tr. at 318-319. The elephant not carrying people was separated by a rope in the center of the ring, and Mr. Damon maintained eye contact with that elephant at all times. Tr. at 319. Mr. Terranova disagreed with the assessment that the center elephant was not well controlled. Tr. at 2538-2539. Unlike the incidents in WaKeeney, Kansas and Enid, Oklahoma, three individuals were involved in close proximity to the elephants during the duration of the elephant ride amusement.

I accord equal weight to the contradictory evidence. The opinions of a licensed, well experienced handler are of equal weight to those of the inspectors in this instance. Dr. Zeigerer's experience with elephants was limited to training and previous inspections in the four years of her employment with USDA (Tr. at 1206) and Dr. Sofranko, although

extremely knowledgeable about elephants, had no hands on experience handling them (Tr. at 1457). Her expertise developed as the result of her work as a veterinary inspector for the USDA. Tr. at 1405-1408. I also question whether the inspectors considered the ride to be particularly unsafe, as they did not point out their concerns when they first observed them, but waited for days to deliver their inspection report to the Respondents. Tr. at 1209-1210.

Mr. Damon testified that at some point in the summer of 2008, a child almost slipped from an elephant when it continued to walk from a loading platform. Tr. at 279. I fully credit Mr. Damon's account of the incident, as it is not contradicted. Dr. Sofranko's testimony about "an injury" involving a child is unsubstantiated. See, Tr. at 1421-1422. I further note that the incident described by Mr. Damon did not involve the risk that individuals astride an elephant could physically interact with the elephant in the center of the ring, as the inspectors feared. Additionally, Mr. Terranova heeded the inspectors' advice and chained the elephant in the center, which did not result in more space between the elephants and the public.

I assign equal weight to the opinions of the handlers and the inspectors, neither of whom had hands on experience handling elephants. The evidence is in equipoise on this issue, and fails to establish the existence of a violation.

Allegations of failure to handle animals as carefully as possible relating to Delia's pregnancy, and birth and death of cubs

On May 2 or 3, 2008, the Key's female tiger, Delia, gave birth to three cubs while traveling with the Circus in Glasgow, Missouri. Tr. at 239. I fully credit Mr. Damon's testimony that although Delia exhibited behaviors compatible with some discomfort, she

did not have the appearance of pregnancy. Tr. at 241. Delia and her litter mate were generally kept separated when housed at the Terranova facility to avoid the chance of their mating because offspring of litter mates are predisposed to genetic mutations, as Dr. Gage conceded. Tr. at 2224-2234; 2683-2694; 952; 241. Dr. Mohr issued a certificate of veterinary inspection of his examination of Delia on February 29, 2008 before she was transported to the Circus, and did not note that she was pregnant. KX-6; TX-25. The preponderance of the evidence demonstrates that Delia's pregnancy was not apparent and not known until ten or so days before she gave birth. The surprise birth of her cubs while traveling with the Circus does not constitute mishandling of Delia. Mr. Key's authorizations for veterinary care for Delia and the tiger cubs that were eventually born demonstrate his attention to the well-being of the animals.

Mr. Key testified that Delia appeared eager to exercise and workout in her regular routine after the birth of the cubs. Tr. at 2307. I accord weight to his opinion, considering his familiarity with the tiger. In addition, there is no evidence that Delia's activity posed a risk of harm or discomfort to her. I cannot say from the record before me whether Delia participated in Circus acts after her pregnancy was suspected.

Respondents acted in a responsible manner after Delia rejected the cubs following their birth. Mr. Damon and Mr. Key immediately contacted a veterinarian, Dr. Stephen Miller, who examined her and administered antibiotics. Tr. at 185; CX-7. Dr. Miller found no evidence of stress, physical harm or discomfort. Id. Dr. Miller also examined the newborn cubs and provided kitten milk replacement (KMR), as it was apparent that Delia had rejected them and would not nurse them. Tr. at 186-188. Dr. Gage agreed with Mr. Damon that it was not uncommon for tigers to reject their first litter, and in such

event cubs would be hand reared. Tr. at 951; 888; 358.. Although Mr. Damon acknowledged that raising cubs by human hand may make them easier to train (Tr. at 358), I credit his testimony that he reintroduced them to their mother before volunteering to raise them (Tr. at 358-359).

The record establishes that the Respondents exercised care in handling the newborn cubs. They were examined by a licensed veterinarian within hours of their birth, and they followed his advice about nutrition. Although the smallest of the cubs died within days of birth, it has been generally acknowledged that newborns who do not have the benefit of colostrum are likely to have compromised immune systems. Tr. at 189; 690-699; 895-898. Although a necropsy was not performed on the first cub who died, the regulations do not require such, and the early death of rejected cubs is not uncommon. KX-26.

On May 12, 2008, one of the remaining male cubs developed seizures, and Mr. Damon took the survivors to Kansas State University, where Dr. Gary West, a veterinarian with large felid experience, examined them. Tr. at 681; CX-8; 9; 9a; 12. The seizing cub had died before he could be examined, and necropsy revealed that the animal was immuno-compromised and had suffered from a fatal e-coli infection. Id. The lone survivor was kept for observation, and Dr. West found evidence of hypoglycemia, hyponatremia and hypochloridema, which he related to improper diet. Tr. at 684-680; CX-9, 12. Dr. West released the cub the following day with a prescription for proper nutrition and the recommendation that the cub be weighed daily. Tr. at 692-695.

Respondents' newborns slept in a laundry basket lined with blankets over an electric heater. Tr. at 194; CX-7. They were kept in the cab of the semi that was used to

transport the elephants and tigers from site to site. Tr. at 270-272. At the Fair, Tubbs was fed with a recycled soda pop bottle. CX-44. I credit Mr. Key's testimony that Mr. Damon was provided help with laundry, food, and living quarters when he was with the Circus, and that he disapproved of Tubbs' living conditions at the Fair. Tr. at 2380; 2384; See, CX-47. I further credit Mr. Key's explanation that he turned over the care of the tiger cubs to Mr. Damon because Mr. Key's association with house cats presented an additional risk to the cubs. Tr. at 2230-2233; 891. The record supports the testimony that Mr. Key authorized veterinary care for the cubs from the time of their birth. CX-12; KX-7; KX-9; KX-11.

The contrast between Dr. Gage's description of best practices for raising newborn tigers and the living quarters of Delia's cubs could not be starker. I fully credit Dr. Gage's opinion regarding the best care that could have been provided to cubs whose mother rejected them before they had the benefit of colostrum. Dr. Gage testified that in the facility where she worked, newborn cubs who are hand raised are kept in the equivalent of sterile surroundings, in specially designed water warmed isolettes. Tr. at 891-894. Every care is taken to keep too many people from handling the cubs, in order to minimize risks from exposure to disease on their delicate immune systems. Tr. at 891-892; 896-900. Dr. Gage expressed her surprise that the cub survived the conditions of its surroundings, which she found unsanitary. Tr. at 930-950. She testified that the dirty conditions of a truck, and the potential risk of burns from heating pads, were evidence of unsafe handling. She believed that more sanitary and better physical facilities would possibly have saved the lives of the other cubs.

I have no doubt that Respondents could have provided a cleaner environment and better equipment, had they been prepared for the birth of cubs, which was unexpected. The question is whether the Act and regulations required Respondents to do more than they were able to improvise. Neither the Act nor regulations define the level of care suggested by USDA. There is no bright line rule that defines how animals are to be “handled as carefully as possible”. Dr. Gage described best practices in an idyllic setting¹⁴, but there is no evidence that her recommendations constitute the standard of care for the typical animal exhibitor. As the 6th Circuit Court of Appeals observed in *Hodgins v. U.S.D.A.*, 59 Agric. Dec. 534 (6th Cir. 2000) the regulations do not contemplate “utopian conditions”. *Hodgins*, supra. Dr. West observed that newborns in zoos are not kept in sterile incubators, and so long as the surroundings were “fairly clean” and isolated from other animals, cubs should thrive. Tr. at 731-732.

In addition, although Dr. Gage saw pictures of the cubs shortly after their birth, the bulk of the pictures in evidence depict the conditions of Tubbs' living arrangements at the Fair. The record establishes that when Mr. Damon was traveling with the Circus he had help that was unavailable at the Fair. Moreover, Dr. Gage admitted that the best of care was not enough to prevent disease in cubs that were raised under her supervision (Tr. at 923-924) and further admitted that “[s]ometimes animals will die through no fault of anyone” (Tr. at 986). Although Dr. Gage would have prescribed Ebisilac, Dr. West, who has experience with large felids, recommended that the surviving cub continue to take the KMR that had been prescribed by Dr. Miller. CX-8, 9; 12. Tubbs was seen by a number

¹⁴ It is axiomatic that animals born at a zoo with research facilities and a host of volunteers will have more luxurious surroundings and better equipment than an animal born at a traveling circus.

of veterinarians who pronounced him healthy. The consensus of the medical opinions of record is that hand reared cubs are hard to raise under the most sterile and supportive conditions. Dr. Gage's opinion that cleaner facilities may have prevented the death of the two cubs is speculative and not fully supported by the evidence, most persuasively, the survival of one of the cubs.

The preponderance of the evidence fails to demonstrate that the newborn cubs were mishandled from the time of their birth until the events that led them to Dr. West at Kansas State University. They were immediately examined by a veterinarian, who prescribed a diet that the Respondents followed, although it is difficult to determine how carefully Respondents adhered to the instructions. There is agreement among the veterinarians of record that cubs who do not nurse are at heightened risk of developing problems, as the lack of colostrum compromises their immune systems. The cubs were at further risk because of their heritage as offspring of sibling tigers.

Although no necropsy was performed on the first cub that died, she was at risk due to her size and compromised immune system. The second death was due to an infection that the cub's compromised immune system could not ward off. Dr. West had seen hand raised cubs succumb to secondary infections. The record does not support the conclusion that the cubs died because of unsanitary conditions. I credit Dr. West's testimony "that septicemias can occur in the cleanest of conditions" and "that the mortality rate for hand raised carnivores is fairly high". Tr. at 708; 712. It is significant that Dr. West observed that cubs who have received colostrum may still fall to bacterial infection. Tr. at 712. Dr. West did not attribute the death of either cub to actions of any

of the Respondents, and he was satisfied that Mr. Damon had acted appropriately on behalf of the animals. Tr. at 732.

I conclude that Respondents' care of Delia and her cubs, both before and immediately after they were born, constitutes safe handling of animals under the Act, with the exception of providing adequate nutrition.

Tubbs' nutrition

Mr. Damon took on the demanding job of hand rearing tigers amidst his other duties relating to exhibiting the Terranova elephants. Although Mr. Damon may have successfully hand reared many tiger cubs in his career, he testified that he had last hand raised a cub from birth in 1984. Tr. at 257. He used his own feeding formula, which was based on estimates. Tr. at 228-230; 249. Mr. Damon rejected Mr. Terranova's advice, and did not carefully follow Dr. West's prescription, and as a result, Tubbs' growth and well-being were compromised. Laboratory tests conducted by Dr. West at his examination of Tubbs on May 12, 2008, when Tubbs was 10 or 11 days old, revealed hypoglycemia, hyponatremia and hypochloridema, which the doctor related to improper diet. CX-9; 12. Dr. West released the cub the following day with a prescription for proper nutrition and the recommendation that the cub be weighed daily. Id.

Although Mr. Damon may have believed that he fed Tubbs in a manner consistent with Dr. West's prescription, Mr. Damon admittedly failed to weigh the cub daily, lacking a scale, and presumably failing to ask Mr. Key to buy one¹⁵. Tr. at 2321. When consulted after the birth of the cubs, Mr. Terranova made recommendations of a diet that

¹⁵ Mr. Damon testified that Mr. Key had never refused to pay for anything requested for Tubbs' care. Tr. at 288.

more closely resembled that endorsed by Dr. Gage. CX-67 (email from Terranova dated May 6, 2008). Mr. Damon relied upon his own formula instead, which failed to keep up with Tubbs' nutritional needs. Photographs relating to Mr. Damon's preparation of Tubbs' meals depict a less than scientific approach to volumes and measures. CX-47. He also had not supplemented the cat's diet with meat until advised to do so at the Fair. I credit Mr. Damon with making adjustments to Tubbs' diet at certain times, but the record conclusively establishes that the cub was underweight by a significant proportion. Tr. at 556.

I decline to speculate whether Tubbs would have suffered metabolic bone disease had Mr. Damon continued the dietary regime in place. There is no definitive diagnosis of that condition, even though X-rays needed to be highlighted to reveal the cub's bone structure. Tr. at 650 . I note that ground turkey meat had been added to the diet sometime during the Fair¹⁶, and that Dr. Clothier intended to share a more rigorous diet plan with Mr. Damon that was recommended by Dr. Gage. Dr. Gage testified that metabolic bone disease was reversible with sufficient calcium. Tr. at 909; CX-40(a). Therefore, it is possible that Tubbs' dietary deficiencies would have been corrected. Regardless, the haphazard approach to Tubbs' nutrition resulted in the cub being significantly underweight, which constitutes a failure to handle an animal carefully.

Adequacy of Tubbs' living facilities and restraints

Respondents are charged with housing Tubbs in a small dog carrier in an overly hot transport truck, with insufficient ventilation. I accord weight to Mr. Damon's

¹⁶The meat was added to the cub's diet at the Fair after Mr. Terranova's discussion with Dr. Clothier. Tr. at 2759.

testimony that Tubbs was free to roam the entire interior of the truck's cab, and was confined to the carrier for limited periods of time during the day. Tr. at 271-272. The carrier allowed the cub to fully stand and turn, contrary to testimony from inspectors. See, CX-47. Respondents provided a large outdoor pen where Tubbs was allowed to exercise. Tr. at 273; CX-47. Mr. Damon kept Tubbs in the pen at night, while he slept nearby. Id.

APHIS inspectors did not observe the cub for an entire day and night, and were unable to render a reliable opinion regarding how long and where he spent his time. There is no credible testimony demonstrating how Tubbs suffered from confinement for periods of time in a dog carrier that was the size of one used to restrain him when the government confiscated him and transported him to a distant facility. In addition, the inspectors' opinion totally disregarded the evidence involving the outdoor kennel, and the likelihood that he was free to roam the cab of the truck at times. This charge is not supported by the preponderance of the evidence.

Additionally, the record does not substantiate that the cab of the truck was routinely unventilated and overly hot. Mr. Damon kept the windows and vents open and ran a fan constantly when Tubbs was in the truck. Tr. at 271-272. I accord substantial weight to Mr. Damon's testimony that during their inspection, one of the inspectors, either Dr. Sofranko or Dr. Zeigerer, asked him to turn off the fan that he otherwise ran continually. Id.; Tr. at 281. A kestrel recorded the interior of the cab without the fan, and the temperature registered above that recommended by Dr. West for the comfort of a tiger cub. CX-47. However, there is no evidence of the temperature of the cab while the fan was running. Mr. Damon testified that the inspectors wanted the fan off to "get an

accurate reading” (Tr. at 281), but the accurate temperature would have been taken in the conditions in which Tubbs was kept, i.e., with a fan circulating the air. I fully credit Mr. Damon’s testimony on this issue, noting his general concern for Tubbs’ welfare.

Dr. Gage testified that Tubbs would not be comfortable at high temperatures all day long, but could tolerate them for a time. Tr. at 931. Overall, as I credit the testimony that the cub was free to roam the entire cab and was allowed outside intermittently to spend time in a large kennel, I am unable to conclude that he was consistently confined in an area with unhealthy temperatures¹⁷. Even crediting the somewhat unreliable evidence regarding the temperature of the cab, there is no meaningful explanation of record as to why exposure to a high temperature for a portion of the day posed a hazard to the cub. I decline to give additional weight to Drs. Sofranko and Zeigerer, who have no special experience with tigers. I accord some weight to the article entitled Survey of the Transport Environment of Circus Tigers (KX-27) but am unable to equate the conditions of tigers described therein to Tubbs’ confinement in the truck cab.

Furthermore, the inspectors appeared to have no immediate concerns for the temperature of the enclosure, as the inspectors did not provide Respondents with the opportunity to resolve the issue immediately. Respondents were not advised of the alleged violation until late at night on August 14, 2008. Tr. at 290. Therefore, it is inappropriate to conclude that Respondents failed to take measures to alleviate any impact from the climate inside the truck.

¹⁷ Parenthetically, there is no evidence of the outdoor temperatures at the Fair in Iowa in August.

Similarly, there is no credible evidence that Respondents played loud music to mask the tiger's cries, as alleged by Dr. Gage. Tr. at 926. Dr. Sofranko testified that Mr. Damon told her and Dr. Zeigerer that he had the radio on so people would not hear the tiger. Tr. at 1558. Mr. Damon testified that he wasn't trying to hide Tubbs, but he "did not want him on display". Tr. at 328. Dr. Sofranko did not offer any evidence regarding the volume of the radio, and only asserted that Mr. Damon turned it off when the inspectors approached the truck. Tr. at 1558. Dr. Zeigerer testified that she did not recall whether she heard a radio as she approached the truck. Tr. at 1219. Dr. Gage was not at the Fair during the relevant period, and based her opinion on a conversation with Dr. Sofranko. CX-34. The preponderance of the evidence does not establish that a radio was played loudly to camouflage Tubbs' vocalizations. Whether loud music played or not, there is no evidence about how that condition would pose harm or stress to the tiger, as Dr. Gage merely testified that it "did not sound like a good situation" to her. Tr. at 926. That opinion is less than academic and is insufficient to sustain this allegation.

The photographic evidence of the cab of the truck is decidedly aesthetically unpleasing. CX-47. However, there is no credible evidence¹⁸ demonstrating that the presence of trash in a slovenly kept truck represented anything but an eyesore to the inspectors. The record fails to establish how the truck was unsanitary to the point of representing harm or imposing stress on a growing tiger¹⁹, considering the fact that the cub had survived until August, 2008, and a number of veterinarians considered him

¹⁸ Although it is common knowledge that unsanitary conditions can lead to certain diseases, I decline to take official notice that the conditions of the truck posed a health risk to Tubbs. This conclusion requires a medical opinion, which has not been proffered.

¹⁹ Or growing children, for that matter. As a parent of three children who survived adolescence, I take official notice that a slovenly bedroom does not ipso facto represent unhygienic conditions.

healthy. Although I credit Dr. Gage's testimony about the benefits of sanitation, particularly for an immuno-compromised animal, the record does not support that Tubbs' health was adversely affected by his dirty surroundings. I have already concluded that the physical surroundings of the infant tigers while at the Circus were cleaner than at the Fair, relying upon Mr. Key's reliable testimony. This charge is dismissed.

Respondents are charged with keeping Tubbs in a harness that was too small and that caused discomfort that was evidenced by the condition of the tiger's skin. Dr. Olds believed that a growing cat could quickly outgrow a harness, and she found that Tubbs had chafed skin under his axilla Tr. at 553-554. Photographic evidence depicts areas under the tiger's legs that appear pink. CX-59. Dr. Clothier did not believe that the tiger's skin was chafed, noting that the animal had very little hair in the areas where the strap met the skin. Tr. at 2144. Although Dr. Clothier did not inspect the tiger's underarms, she was able to examine him without removing the harness, and assured herself that it was not too tight by placing her fingers between the strap and the animal. Tr. at 2143-2144. In any event, any problem posed by a too tight harness would have been easily remedied by removing it, as Dr. Olds acknowledged, and which the inspectors failed to advise Respondents. I find that the evidence on this issue is in equipoise and Complainant has not met its burden of proof.

Wound treatment

Mr. Damon told Mr. Key that Tubbs suffered a scratch wound to his nose when exposed to his seizing sibling during the ride to Kansas State Veterinary School. Tr. at 2244-2245. Mr. Key testified that Tubbs' nose "wound healed terribly slowly". Tr. at 2245. Although Mr. Key stated that doctors told Mr. Damon that it would have been

inappropriate to dress the wound, there is no record in veterinarians' records of the wound. It appears that Respondents did little but wait for time to heal the wound, and I find that the failure to seek affirmative treatment for the wound represents failure to handle Tubbs carefully.

e. **Adequate Veterinary Care and Attending Veterinarian**

Plan of veterinary care relating to Terranova owned animals

There is no reliable evidence that Respondents failed to develop and maintain an adequate plan of veterinary care. Inspector Ayers made it clear that he cited Respondents for a record keeping violation because they did not have the plan at an exhibition in Georgia. Tr. at 2997. Inspector Fox testified that a plan was in place during the years that he inspected Terranova's facilities in Kaufman, Texas. Tr. at 3065-3066. Neither the Act nor regulations require that Respondents' regular attending veterinarian be on site with the animals in order to fulfill Respondents' obligation regarding attending veterinarian. In both instances where the elephants escaped, a local veterinarian was on hand to examine the animals, and in the WaKeeney incident, administer a tranquilizing agent to Kamba. Kamba was examined by a veterinarian in Oklahoma who called to the scene of the accident.

The record further demonstrates that Respondents had in place a capture and restraint plan. TX-19; Tr. at 256; Tr. at 3477-3479. When the elephants escaped in WaKeeney, Kansas, they were followed, contained, and captured according to the plan. Id. In the case of the WaKeeney, Kansas incident, although Mr. Damon did not travel with a tranquilizer, there is no evidence that he was trained to administer such a potentially dangerous medication to an elephant. Terranova's plan prudently called for a

trained veterinarian to administer tranquilizer agents in circumstances where the handler realized the elephants were otherwise non-responsive to usual methods of recapture.

Regrettably, things did not go quite as well in Enid, Oklahoma. Although Mr. Quinones was unable to read the plan prepared by Mr. Terranova because it is written in English, he testified that he knew what to do in the event of an escape. Tr. at 3133-3134. Mr. Quinones' quick wits and calm demeanor demonstrate his familiarity with and ability to execute Respondents' escape plan. In both instances, the escape of the elephants and the trauma of being tranquilized and struck by a vehicle are directly related to mishandling of the animals, and not the failure to have in place a plan.

Both incidents involving elephants escaping demonstrate the consequences of having an inadequate number of trained personnel to deal with crises. The escape and rescue plan may have been more rapidly and efficiently carried out had more trained individuals been available and involved. Charges related to the failures in handling and failure to have adequate personnel are supported by the record. The preponderance of the evidence establishes that the Terranova Respondents had an attending veterinarian in Kaufman, Texas, and had an adequate plan of veterinary care. TX-21; 28. Accordingly, charges related to failure to have an adequate plan of care are hereby dismissed.

Adequate veterinary care for Terranova owned animals

Dr. Sofranko took issue with the appearance of the elephants' foot pads during her inspection at the Fair. CX-51. Dr. Sofranko believed that they needed to be trimmed, noting that they were exposed to foreign material that could get imbedded in the foot. Tr. at 1431-1441; CX-51. She and Mr. Terranova discussed the issue, and Mr. Terranova explained that he generally trimmed the elephants' feet twice a year and had done them

before the elephants went to the Circus. Tr. at 2565; 2684. Kamba required specialized foot care, and Mr. Terranova was uncomfortable allowing Mr. Damon to trim the feet. Tr. at 2566. He had anticipated that the elephants would be back at his facility after the Circus was over and he expected to do their foot care then. Tr. at 2567. In deference to Dr. Sofranko's concerns, he trimmed the elephants' feet in September, 2008. Tr. at 2781.

I accord weight to Dr. Sofranko's opinion, based upon her experience with elephants in general, and her position as USDA's elephant specialist CX-39. Although, I fully credit Mr. Terranova's concern about Mr. Damon's experience trimming the feet, he acquiesced to Dr. Sofranko's opinion regarding the state of his elephants' feet, and took care of them within the time provided by the citation. Accordingly, this charge is sustained.

Mr. Terranova freely admitted that he was unhappy with the condition of the elephants' skin, as he expected that Mr. Damon would have taken better care of the animals, given his experience. Tr. at 2563-2564. I accord substantial weight to Dr. Sofranko's concern about the origins of discolored skin on Kamba's back and legs, and the failure to address the accumulation of dead skin. Tr. at 1441-1443; CX-51. Dr. Zeigerer testified that an accumulation of dead skin could give rise to infections. Tr. at 1224-1226. Respondents failed to obtain and apply adequate veterinary care with respect to the elephants' skin.

Allegations regarding animals owned by Key Respondents

Terranova Respondents are charged with failure to provide adequate veterinary care and attending veterinarians with respect to Mr. Key's tigers. Although I have imputed responsibility for handling the tigers to the Terranova Respondents, I decline to

extend all responsibility under the Act to the agents of a principal who was on site with the tigers, in control of compensating veterinarians, and who had the ability to engage a veterinarian to develop a plan of care.

Agents are responsible for acts that they consent to undertake and there is no evidence that Mr. Damon assumed responsibility for developing a plan of veterinary care. The evidence demonstrates the opposite: Mr. Damon consulted with Mr. Key and not Mr. Terranova regarding veterinary care for the tigers²⁰; he followed veterinary advice that Mr. Key paid for; and appeared to take an ad hoc approach to consulting veterinarians, relying upon Mr. Key's direction. I decline to hold the Terranova Respondents responsible for acts outside the scope of the responsibilities they assumed when agreeing to raise the newborn cubs.

Tubbs was seen shortly after his birth by Dr. West, a veterinarian with large felid experience, and he was later seen by a number of other veterinarians of unknown backgrounds (KX-7; KX-9) and by Dr. Clothier (CX-32). However, there is no record that anyone engaged a primary veterinarian for Tubbs' care, or that the Circus had a veterinarian on staff. Indeed, Tubbs' care followed no demonstrable pattern. The preponderance of the evidence establishes that the Key Respondents alone were responsible for developing a plan and providing for adequate veterinary care, and that they failed to do so.

However, once Mr. Terranova arrived at the Fair and acted on behalf of the Key Respondents by asking the Fair veterinarians to examine Tubbs, the Terranova

²⁰ Indeed, Mr. Damon ignored Mr. Terranova's early advice about hand-raising the cubs.

Respondents became responsible for providing Tubbs with adequate veterinary care. I do not find Mr. Terranova's guarded answers to questions about ownership of the tiger represent bad faith, but rather concluded that his responses reflect that he was concerned about the inspectors' perceptions of his involvement with Tubbs. Since I have concluded that Terranova's consent to Mr. Damon's raising the tiger was tantamount to consenting to be the Key Respondents' agent, that caution was misplaced. Further, there was no effective way to hide the tiger from the inspectors, considering that it was listed as Terranova's animal on Terranova's certificate of veterinary inspection (CX-44), and was visible in the truck cab and outdoor kennel.

Complainant contends that the examination provided by Dr. Clothier did not meet the standards of adequate veterinary care, as she had no large felid experience, other than observing large cats during veterinary school. Tr. at 2092. However, Dr. Clothier's credentials are at least equivalent to those of the inspectors who were on site at the Fair. Dr. Clothier is a licensed veterinarian, an adjunct professor, and in addition to being an accredited, licensed DVM, Dr. Clothier holds a PhD in epidemiology. Tr. at 2085-2093; CX-32. In addition to working with the United States Department of Justice, Dr. Clothier was selected as one of the attending veterinarians at the Iowa State Fair in 2008. Tr. at 2088, 2093-2095.

The Fair inspectors relied upon the opinions of Dr. Gage, who looked at pictures and made assessments about the cub's well being. Dr. Gage's credentials with respect to large felids are superlative, and it was sensible for the comparatively inexperienced inspectors to consult her. CX-34(a). However, despite Dr. Gage's opinion that the cub was poorly cared for, undernourished, and poorly treated, she did not have the benefit of

examining the cub, as did Dr. Clothier. The regulations do not specify that a veterinarian must be experienced with the species being examination in order to be qualified. If that is the case, then Dr. Zeigerer was not qualified to inspect elephants, and neither she nor Dr. Sofranko were qualified to inspect a tiger cub.

Although the record establishes that there was no attending veterinarian for the Key Respondents' tigers and lion, and no plan for veterinary care, the animals were seen by vets. Tubbs had been seen by a number of veterinarians during the few months he lived with Mr. Damon, all of whom found him healthy.

There is no doubt that Tubbs' diet was less than optimum, a condition that was in the process of being reversed at the Fair, when he was introduced to meat. Dr. Gage believed that more calcium was needed, and she provided a diet plan to Dr. Clothier, who did not have the opportunity to share it with Respondents because Tubbs was confiscated by USDA. CX-32; Tr. at 2126. The deficiencies in Tubbs' diet represents lack of attention to his care by his handler, and not inadequacy of veterinary care. The preponderance of the evidence establishes that Tubbs was seen by qualified veterinarians²¹.

2. Did Terranova exhibit animals without a license issued by USDA

Complainant notes that at times relevant to this adjudication, Respondent Terranova Enterprises Inc. had forfeited its corporate charter for state tax irregularities. Although there does not appear to be an allegation in the Complain that specifically

²¹ It appears from the record that even if Dr. Clothier had first hand experience with tiger cubs, APHIS officials would not have been impressed, as the decision to confiscate Tubbs appears to have been made before they received the report of her examination.

charges Terranova Enterprises Inc.²² with exhibiting without a license, or with failure to comply with any regulation pertaining to the AWA because of lapses in its corporate charter, I see no other reason for Complainant including this information. Ergo, in an abundance of caution, I address these factual circumstances.

Complainant makes no argument, nor cites to any law standing for the proposition that a lapse of corporate charter invalidates an otherwise valid license issued under the AWA. Accordingly, I decline to reach that conclusion. The record establishes that at all times pertinent to this adjudication, Terranova Enterprises Inc. held AWA license number 74-C-0199.

In addition, neither the Act nor regulations require employees of a licensee to be licensed. *In re Daniel J. Hill and Montrose Orchards Inc.*, 67 Agric. Dec. 196 (2008). The statutory scheme of the AWA obviates the need for individual licenses, as the Act mandates that the conduct of a corporation's officers, agents, and employees may be considered the acts of the corporate entity in addition to the acts of the individual. Therefore, any suggestion that Douglas Terranova needed his own license is not supported by the plain language of the Act, or by judicial interpretations of the AWA. Mr. Terranova and Terranova Enterprises, Inc. may be held jointly liable for violations of the Act because of the statute's plain language. See, 7 U.S.C. § 2139. I dismiss any charge by Complainant that Mr. Terranova himself needed a license.

3. Is Mr. Terranova personally liable for the acts performed on behalf of Terranova Enterprises Inc., and the Key Respondents?

²² Complainant has charged the Key Respondents with this violation. See Amended Complaint, ¶D.2; Complainant's Proposed Findings of Fact, page 3, ¶A.11.

All acts of the corporate entity in these circumstances arose out of decisions made by Mr. Terranova. It has been settled that individuals who direct licensee's activities are individually liable pursuant to 7 U.S.C. §2139. See, *In re Coastal Bend Zoological Ass'n, etc. et al*, 67 Agric. Dec. 154 (2008). I find that Mr. Terranova may be held personally liable for acts he performed on behalf of Terranova Enterprises, Inc. A corporation and the individual who exercised sole control over corporate activities are jointly assessed penalties under 7 U.S.C. § 2149 pursuant to the operation of 7 U.S.C. § 2139. *Irvin Wilson and Pet Paradise Inc. v. U.S.D.A.*, 54 Agric. Dec. 111 (1995)

E. Willfulness

The Administrative Procedures Act, 5 U.S.C. § 558 (c) provides for the:

Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. 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.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

5 U.S.C. § 558 (c).

Willfulness under the AWA has been defined as “an act done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements”. *In re Pet Paradise*, 51 Agric. Dec. 1047, 1067 (Sept. 16, 1992). A willful violation occurs when a prohibited act is intentionally performed without regard to motive or erroneous advice, or is performed with careless disregard of statutory requirements. *In re Terry Lee & Pamela Sue Harrison*, 51 Agric. Dec. 234 (1992). Pursuant to 7 U.S.C. § 2149 (a), the only requirement for the suspension or revocation of an exhibitor’s license is willfulness of at least one violation. *In re Big Bear Farm, Inc. et al.*, 55 Agric. Dec. 1107 (1996); *In re Cecil Browning, d/b/a Alligatorland Safari Zoo, Inc.*, 52 Agric. Dec. 129 (1993). Willfulness is not required for cease and desist order or for monetary fine. *Id.*

This case illustrates the tension inherent in commercial use of animals and their welfare, as many of the incidents that led to violations of the Act could have been avoided with additional help and some forethought about the consequences. Overall, the Terranova Respondents appeared to care for the health and safety of animals that they owned, but the extent of that care depended on the exigency of circumstances presented to Respondents.

Mr. Terranova hired Mr. Damon when his trained elephant handler quit at the start of the Circus season. Mr. Damon was recommended based upon his decades old experience with elephants, and after a mere few weeks of training by Mr. Terranova, Mr. Damon was sent to the Circus to handle two elephants with no other trained help. When

the elephants were startled by a large inflatable slide in WaKeeney, Kansas, Mr. Damon could not control them alone. Mr. Childs was not trained to handle or control the elephants, although he was able to help Mr. Damon perform some tasks relating to the elephants' under Damon's supervision and helped recapture them.

When the tiger cubs were born, Mr. Terranova agreed that Mr. Damon could raise them, apparently without much thought about how the added burdens of hand feeding newborn, immuno-compromised cubs would affect the care of the elephants. This is particularly troubling considering that Mr. Terranova had himself raised tigers and was uniquely situated to predict the trials involved in the enterprise. The condition of the elephants' skin and feet at the Fair showed lack of attention to their care on the road with the Circus. Visual inspection of temporary facilities for animals by Mr. Terranova appeared less than thorough, judging by misshapen fencing in Baraboo, and the deficiencies of facilities at the Fair.

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. He acted personally, and through Mr. Damon, as the Key Respondents' agent vis-a-vis the tiger cubs, without considering the impact of the responsibilities that he assumed. It 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 and the less than optimum care and nutrition of the lone surviving tiger cub of a litter of three.

Mr. Terranova's lack of attention to the requirements of the Act and regulations is also apparent in his failure to maintain proper records, to travel with a plan of veterinary

care, and his decision to leave his facilities in Kaufman, Texas unattended. No one else was designated to act on Mr. Terranova's behalf, although it is clear that he could not be expected to be on site 24 hours a day, particularly when he had child care responsibilities and the animals needed to be fed. CX-68. Although some of the violations disclosed by inspections were beyond Mr. Terranova's ability or authority to fix, such as the perimeter fence in Baraboo and the way his employee cleaned the cats' cages in Maryland, taken in the aggregate, Terranova's actions represent a pattern of careless disregard of the Act and regulations that led to harm, discomfort and risk to his animals, and actual harm to members of the public.

I do not doubt that Mr. Terranova is well-intentioned regarding the health and safety of his animals. When a risk factor was pointed out, he fixed it. However, as has been observed, "while corrections may be taken into account when considering sanctions, even immediate correction does not eliminate the fact that the violation occurred". *Volpe Vito, Inc., d/b/a Four Bears Water Park and Recreation Area*, 56 Agric. Dec. 166 (1997). Considering the preponderance of the evidence, I find that the Terranova Respondents willfully violated the AWA, prevailing regulations and standards.

F. Sanctions

1. 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 two elephant escapes. APHIS

acknowledged that the sale of the elephants protected them from future risk of harm from the Terranova Respondents, but pointed out that Respondents continue to exhibit dangerous animals.

Mr. Terranova's decision to sell his elephants was an immediate reaction to his concerns about the fate of Kamba and Congo. He testified, "[i]n fact, my decision was to put them in a place where [an accident] would never happen again." Tr. at 3588-3589. I do not doubt that Mr. Terranova was motivated at least in part because of the elephants' welfare, but it would be difficult for an animal owner to have witnessed a confiscation of an animal without wondering whether his actions would result in similar treatment by USDA. Nevertheless, I fully credit that the decision was difficult to make, on many levels. Mr. Terranova realized some income from their sale to the Dallas Zoo, but he lost forever the future income that exhibiting them would have brought him, in addition to their companionship.

The sole violation pertaining to Terranova's conduct respecting his own large cats involves the incident in Maryland when the cougar was inadvertently sprayed by water during the cleaning of his cage²³. Mr. Terranova related an incident concerning Mr. Terranova's injury by the cougar (Tr. at 3216). However, there are few specifics regarding the severity of the injury, or even when it occurred. I have inferred from the evidence that it occurred before Mr. and Mrs. Terranova separated in 2006. Tr. at 3224. In any event, that incident did not constitute a violation of the Act. In addition, Mr. Quinones, and not Mr. Terranova, primarily exhibits Respondents' large cats. Tr. at

²³ I do not consider the anecdote regarding Mr. Terranova's injury from his cougar as reliable evidence.

3472. The evidence does not demonstrate that the Terranova Respondents and employees are less than competent to safely handle the large cats that they own.

The record does establish that Respondents willfully handled elephants in a manner that led to actual harm to them and to persons. Mr. Damon was injured several times, and the individuals involved in the collision with Kamba were paid insurance benefits for personal injuries suffered in the accident. Considering the series of violations regarding Respondents' care and handling of the elephants, I would not want them to ever have the opportunity to engage in any activity with respect to elephants that meets the definitions of "exhibitor" under the Act. 7 U.S.C. § 2132(h). The sale of the elephants has diminished that risk significantly, and in further consideration of Respondents' reduced ability to profit from the elephants, I find that the revocation of Respondents' license would be punitive, rather than remedial.

I have given considerable weight to APHIS' recommendation, but find that the record does not reflect a single violation regarding the safe care and handling of the cats owned by Terranova, with the exception of a cougar being inadvertently sprayed with fresh water and exposed to detergent during cage cleaning. Other cited incidents that posed potential risk of harm to animals or the public can be mitigated, if not eliminated altogether, by Respondents employing adequate personnel. The recommendations 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).

All violations regarding the care of the Key tigers are imputed to the Terranova Respondents only through the operation of the law of agency. If Mr. Terranova were an individual inclined to reflect upon the consequences of his actions, I doubt that he would have authorized Mr. Damon to assume responsibility, and thereby liability, for the care and upbringing of the Key tiger cubs. Mr. Terranova had no opportunity to supervise Mr. Damon's activities regarding the cubs, including his decision to ignore Mr. Terranova's advice on nutrition, which I have found resulted in the most serious violations concerning Tubbs' care. Mr. Terranova's recommended diet for the cub was similar to that approved by USDA experts. It would be nothing more than punitive to revoke the Terranova Respondents' license largely because of Mr. Damon's poor decisions and the Key Respondents' relative disregard for the care and well-being of the cat they owned²⁴.

For the foregoing reason, I find that it is not appropriate to revoke the Terranova Respondents' license, particularly where Respondents voluntarily relinquished the elephants, who were at the heart of the most serious violations directly related to the Terranova Respondents' actual handling.

Although I have found that the circumstances do not support the revocation of the Terranova Respondents' AWA license, I find that all future license approvals shall be conditioned upon the Terranova Respondents not owning, handling, or exhibiting elephants as contemplated under the Act, and further conditioned upon Respondents

²⁴ Parenthetically, I find the proposed sanction of revocation somewhat offensive, considering USDA's total forbearance against Mr. Damon, whose personal actions directly led to the deficits in Tubbs' diet and care.

having sufficient personnel on site, and at the home facility, to aid in the handling and caring for animals.

2. 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 \$2,500 per violation. 7 U.S.C. § 2149 (b). When considering the propriety of assessing civil penalties for violations of the Act, the Secretary shall consider “the size of the business..., the gravity of the offenses, the person’s good faith, and the history of previous violations”. *Id.*; *In re Lee Roach and Pool Laboratories et al.*, 51 Agric. Dec. 252 (1992).

The record reflects that Respondents operate a moderately-sized animal exhibition business, reporting custody of some twenty animals in 2008. CX-68; Respondents’ Admissions. Although there is no record evidence demonstrating Respondents’ annual income, I infer from their admission and the fact that they owned two elephants during the period under consideration, that their business was at least of moderate size. The evidence has established that the Terranova Respondents have a history of previous violations of the Act. An ongoing pattern of violations establishes a history of previous violations under 7 U.S.C. § 2149(b). *In re Jane E. Stephens and Water Wheel Exotics, Inc.*, 58 Agric. Dec. 149 (1999).

The violations are grave, in that they involve the direct care and handling of animals. The gravest of the violations involve the escape of elephants on two occasions, which resulted in harm to them and to the public. Although Mr. Terranova’s good faith in dealing with USDA has been questioned because of his less than forthright answers to questions regarding the provenance of the tiger cub at the Fair, the cub was listed on a

report of veterinary inspection, and was in plain sight during the inspection. Tr. at 1217-1218. Mr. Terranova cooperated with the inspection, which ran into several days. Accordingly, I decline to find that the Terranova Respondents acted in bad faith.

In consideration of the gravity and numerosity of offenses, the size of the business, the absence of bad faith, and my determination that license revocation would be overly punitive, I find that APHIS' recommendation of civil money penalties in the amount of \$25,000.00 is appropriate.

3. 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 Order is appropriate in these circumstances.

4. Selective Enforcement

I have considered and rejected Respondents' contention that they were subjected to selective enforcement of the Act and regulations. Consent decisions in other cases have no weight when assessing the propriety of sanctions in cases that are litigated. *In Re Thompson*, 50 Agric. Dec. 392, 4078 (1991). Respondents imply that at least one APHIS inspector did not agree with the direction of the enforcement action taken against Respondents. See, Tr. at 330, 331. Although Complainant's implication of all Respondents for each other's actions represents a novel theory of liability under the Act, the preponderance of the evidence reflects that violations occurred, and the proposed monetary sanctions are consistent with those recommended in other actions litigated under the Act.

G. Findings of Fact

1. Terranova Enterprises, Inc. is a Texas corporation doing business as “Animal Encounters, Inc.”, whose registered agent is Douglas Keith Terranova. The registered office of Respondent is 6962 S. FM 148, Kaufman, Texas 75142.
2. Douglas Keith Terranova is President, registered agent and director of Terranova Enterprises, Inc., whose mailing address is 6962 S. FM 148, Kaufman, Texas 75142.
3. At all times pertinent to this adjudication Respondents operated as an exhibitor as that term is defined in the Act and regulations, whose moderately sized business involves exhibiting animals to the public and leasing animals for exhibition and use.
4. On June 23 through 25, 2005 while exhibiting at the Great Circus Parade and Festival in Baraboo, Wisconsin, Respondents failed to have a documented plan for environmental enhancement designed to promote the psychological well-being of two spider monkeys.
5. On June 15, 2006, at the Circus World Museum in Baraboo, Wisconsin, Respondents left two camels unattended, which resulted in a camel to become tangled in a loose barrier rope.
6. On June 5, 2007, at the Universoul Circus in Landover, Maryland, Respondents’ mountain lion was inadvertently sprayed by fresh water and exposed to liquid dish detergent during the cleaning of its cage by its handler.
7. On June 24, 2007, outdoor housing facilities at Baraboo were not enclosed by a perimeter fence.

8. During 2007 and early 2008, Respondents housed the Key tigers and lion at a specially built compound at its facility in Kaufman, Texas.
9. Sometime after December, 2007, Respondents entered into a verbal agreement with the Perry Respondents to provide camel and elephant rides at the Iowa State Fair in August, 2008, in connection with Mr. Perry's contract with the Fair.
10. Respondents also entered into an agreement with the Key Respondents to provide elephants for the Key's exhibition, the Culpepper & Merriweather Circus.
11. On February 28, 2008, Respondents failed to provide inspectors with their plan for veterinary care while exhibiting at Turner Field in Atlanta, Georgia.
12. On June 11, 2008, fencing in Respondents' camel area was curled upwards, thereby posing a threat to the well-being of the camels.
13. In late March, 2008 or early April, 2008, Respondents' former employee traveled with Respondents' elephants and the Key cats to the site of the Key's Circus.
14. In late March, 2008 or early April, 2008, Sloan Damon replaced the former employee and trained at Respondents' facility to be the elephants' handler while travelling with the Circus.
15. In April, 2008, Sloan Damon transported the elephants to the Circus, where he was responsible for their care and where he helped with the Key large cats.
16. Although the Key cats were meant to be separated at Respondents' facility in Texas, they were allowed time together, and apparently mated.
17. On May 2 or May 3, 2008, Key's female tiger gave birth to three tiger cubs.
18. Respondents' employee Sloan Damon volunteered to hand raise the three tiger cubs.

19. Tiger cubs who are denied colostrum by their mother are at additional risk for illness and death.
20. One of the cubs died within days of its birth, and a second cub suffered seizures and died on May 12, 2008.
21. Necropsy of the second dead cub established septicemia and a widespread e-coli infection as the cause of its death.
22. Examination of the surviving cub by Dr. Gary West of the Kansas State University of Veterinary Medicine on May 12, 2008 revealed hypoglycemia, hyponatremia and hypochloridemia, which are conditions associated with improper diet.
23. Mr. Sloan rejected feeding advice offered by Mr. Terranova, and failed to weigh the tiger daily as recommended by Dr. West, leading to the tiger being underweight.
24. Veterinarians who examined the cub found it healthy, and no reports mention an unhealed wound on its nose.
25. On June 5, 2008, while exhibiting in WaKeeney, Kansas, Respondents failed to handle elephants as carefully as possible, resulting in their escape after severe winds blew a slide in their vicinity. One elephant needed to be tranquilized before it was recaptured.
26. On June 5, 2008, Respondents failed to provide adequate personnel to care for two elephants.
27. On June 9 and 10, 2008, Respondents failed to allow access to their premises to USDA inspector.

28. Sometime during the summer of 2008, Respondents failed to provide adequate veterinary medical treatment and care to two elephants, leading to the overgrowth of foot pads and accumulation of dead skin on their heads, backs and ears.
29. In August, 2008, Mr. Damon brought the elephants to the Iowa State Fair, where he met with Mr. Terranova and set up an elephant ride amusement near the Perry Respondents' exhibit.
30. Mr. Damon brought the surviving tiger cub with him to the Fair.
31. On August 13, 2008, Respondents kept elephants at the Fair in an outdoor enclosure where a 15" to 18" metal rod protruded from the ground, and coaxial cable was on the ground. A broken light fixture in the elephants' trailer exposed them to sharp metal.
32. Respondents did not provide adequate shade to elephants during the elephant rides at the Iowa State Fair in August, 2008.
33. While at the Fair, the surviving tiger cub was housed in the cab of Respondents' elephant trailer, where it was kept at times in a dog carrier, while at other times was allowed to roam inside the truck. The cub spent nights in a large outdoor kennel, where it was free to play with a dog that Mr. Damon had acquired.
34. The tiger cub's diet was inadequate for its age and species, resulting in it being underweight.
35. On or about August 16, 2008, USDA confiscated the cub and relocated it to a facility that was approved by APHIS.
36. On November 4, 2009, at the Family Fun Circus in Enid Oklahoma, Douglas Terranova proceeded to exhibit the elephants in a circus act without adequate

personnel, and with inadequate physical conditions (lack of light; lack of perimeter fence), resulting in one elephant being unattended inside the circus tent which was occupied by spectators, and the other elephant escaping onto a highway where it was struck by a vehicle.

37. As a result of the collision, Kamba suffered a broken tusk, a fractured carpal bone, multiple skin abrasions and a bruised trunk, while the vehicle was damaged and its occupants sustained unknown injuries.
38. After the incident in Enid, Kamba recovered and Respondents sold both elephants to the Dallas Zoo.

H. Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. In his capacity as corporate officer and director of Terranova Enterprises Inc., Douglas Keith Terranova operated as an exhibitor as that term is defined by the Act and regulations.
3. Pursuant to 7 U.S.C. § 2139, Douglas Keith Terranova's acts, omissions or failures in his capacity as corporate officer and director are deemed to be his own as well as those of the corporate entity.
4. Because of the operation of 7 U.S.C. §2139 and 2149, Douglas Keith Terranova did not need a separate license under the AWA.
5. Although Terranova exhibited elephants and camels at the Fair upon the Perry Respondents' invitation, no agency relationship existed between those entities as the result of the exhibition.

6. Terranova's employee Sloan Damon assumed responsibility to raise tigers belonging to the Key Respondents, and accordingly, entered into a consensual agency relationship with the Key Respondents that is imputed to the Terranova Respondents.
7. Complainant has 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) Violations of 9 C.F.R. §§ 2.40(a) and (b)(2), alleging failure to have attending veterinarian, and failure to establish and maintain adequate veterinarian care (allegations regarding the Key animals).
 - (b) Violations of 9 C.F.R. §§ 2.40(a) and (b)(2), alleging failure to have Tubbs examined by a qualified veterinarian at the Fair.
 - (c) Violations of 9 C.F.R. § 2.131 (c)(1) and (d)(2), alleging failure to handle animals with minimal risk of harm to public and with sufficient barriers (elephants at the Fair).
 - (d) Violations of 9 C.F.R. §3.125(a) and (c) alleging failure to provide safe facilities for animals and feed (alleged fecal matter in hay).
 - (e) Violations of 9 C.F.R. § 2.131(b)(1), alleging failure to handle animals as carefully as possible (Key female tiger Delia and newborn tiger cubs).
 - (f) Violations of 9 C.F.R. §§2.131(e); 3.126(a); 3.126(b); 3.128, pertaining to the housing of the tiger cub at the Fair.
 - (g) Violations of 9 C.F.R. §§ 2.40(b)(1) and (b)(4), alleging failure to maintain program of adequate veterinary care including proper escape and capture plan

and equipment (regarding elephants in WaKeeney, Kansas and Enid, Oklahoma).

8. The Terranova Respondents violated 9 C.F.R. § 2.100(a) by failing to have a written plan of environmental enhancement for spider monkeys, which is a technical violation considering that the inspector found environmental enhancements in place.
9. On June 15, 2006, the Terranova Respondents willfully violated 9 C.F.R. §§2.131(b)(1) and (c)(1) by leaving two camels unattended, resulting in one getting tangled in a loose rope that was the only barrier between the camels and the public.
10. On June 5, 2007, 9 C.F.R. §2.131(b)(1) was violated when a mountain lion was sprayed with water and exposed to liquid dish detergent during the cleaning of its cage, an inadvertent and non-willful violation that was immediately corrected.
11. On June 24, 2007, Respondents failed to enclose outdoor facilities for two tigers and one lion with a perimeter fence, which was not a willful violation of 9 C.F.R. § 3.127, as Respondents had no authority to erect fencing or other barriers in the non-public space of the Baraboo Circus World.
12. On February 28, 2008, Respondents failed to show an inspector its plan of veterinary care, which was well known to Respondents' home facility inspector, and constitutes a technical violation of 9 C.F.R. §2.126(a).
13. On June 5, 2008, Respondents willfully failed to handle animals as carefully as possible and failed to provide adequate trained personnel to safely handle

- elephants in violation of 9 C.F.R. §§ 2.131(b)(1); 2.40(b)(1) and (b)(4) (elephants in WaKeeney, Kansas).
14. On June 11, 2008, Respondents failed to ensure that fencing near camels was structurally sound and in good repair in violation of 9 C.F.R. § 3.125(a).
 15. On June 9, and 10, 2008 Respondents failed 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).
 16. In the summer of 2008, Respondents failed to provide adequate veterinary and medical care and treatment to its elephants, whose feet were overgrown and whose skin was neglected in violation of 9 C.F.R. §§ 2.40(a); 2.40(b)(1) and (b)(2).
 17. In August, 2008, while at the Fair, Respondents failed to meet minimum standards with respect to facilities by failing to ensure that the area where elephants were kept was structurally sound and in good repair in violation of 9 C.F.R. § 3.125(a), and by failing to provide sufficient shade in violation of 9 C.F.R. § 3.125(c).
 18. During the period from May 12, 2008 through August 15, 2008, Respondents failed to handle animals as carefully as possible in a manner that does not cause behavioral stress, physical harm, or unnecessary discomfort in willful violation of 9 C.F.R. § 2.131(b)(1), in that the surviving tiger cub's diet was insufficient for proper growth and nutrition.
 19. During the period from May 12, 2008 through August 15, 2008, Respondents failed to provide to a young tiger food of sufficient quantity and quality

- appropriate for the animal's age, species, size and condition in willful violation of 9 C.F.R. § 3.129(a).
20. During the period from May 12, 2008 through August 15, 2008, Respondents failed to handle animals as carefully as possible to prevent trauma and behavioral stress, physical harm and discomfort when Respondents failed to provide care and treatment to a tiger cub for a wound on its nose in violation of 9 C.F.R. § 2.131(b)(1).
 21. On November 4, 2009, at the Family Fun Circus in Enid Oklahoma, Respondents failed to handle animals as carefully as possible to prevent trauma and behavioral stress, physical harm and discomfort when Kamba was allowed to escape and Congo was left alone during Kamba's recapture in willful violation of 9 C.F.R. § 2.131(b)(1).
 22. On November 4, 2009, Respondents failed to handle animals as carefully as possible so that there was minimal risk of harm to them and the public, as Kamba escaped and was struck and injured by a vehicle, while Congo was alone in a circus tent filled with spectators in willful violation of 9 C.F.R. § 2.131(c)(1).
 23. On November 4, 2009, Respondents failed to exhibit animals under conditions consistent with their good health and well being, in that Mr. Terranova proceeded to exhibit the elephants under hurried conditions, without adequate personnel in violation of 9 C.F.R. § 2.131(d)(1).
 24. On November 4, 2009, Respondents failed to enclose outdoor facilities with an adequate perimeter fence, which may have prevented Kamba's escape and accident, in violation of 9 C.F.R. § 3.127(d).

25. No sanction need be imposed for technical violations of the Act to promote the Act's remedial purposes.
26. The Administrator's determination that Respondents' AWA license should be revoked is not warranted, considering that Respondents no longer possess the elephants who were the subject of the most serious violations, so long that their continued license is conditioned upon not owning, handling, or exhibiting elephants, as those terms are defined under the Act, and further conditioned upon engaging sufficient trained handlers when exhibiting animals.
27. The Administrator's proposed civil money penalty of \$25,000.00 is warranted, considering the gravity and numerosity of offenses, the size of Respondents' business, the absence of bad faith, and my determination that license revocation would be overly punitive.

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. Terranova Enterprises, Inc., d/b/a Animal Encounters, Inc. and Douglas Keith Terranova are jointly and severally assessed a civil penalty of \$25,000.00 for the violations established herein. Payment of the penalty shall be by certified check or money order payable to the Treasurer of the United States and sent to:

Colleen A. Carroll, Esq.
United States Department of Agriculture
1400 Independence Avenue, S.W.
South Building
Washington, DC 20250-1417

3. Any future renewal of Respondents' license under the AWA shall be conditioned upon an affidavit that they do not and shall not own, handle, or exhibit elephants, as those terms are defined by the Act and prevailing regulations. Further, Respondents shall provide Complainant with an affidavit describing the number of personnel hired for each exhibit, and the training and experience of animal handlers.
4. This Decision and Order shall become effective and final 35 days from its service upon t 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 ____ day of _____, 2011 at Washington, DC.

Janice K. Bullard
Administrative Law Judge