

USA
09-0200
2005

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:

WILBUR D. DAVENPORT,
an individual; and
MAXIMUS "TONS OF FUN" LLC,
a Texas limited liability company,

Respondents.

AWA No. 09-0200

CONSENT DECISION

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) (the "Act" or "AWA"), by a complaint filed by the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture ("APHIS"), alleging that the respondents willfully violated the Act and the regulations and standards issued pursuant to the Act (9 C.F.R. §§ 1.1-3.142) (the "regulations" or "AWA regulations"). This decision is entered pursuant to the consent decision provisions of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.138).

Respondents Wilbur D. Davenport, an individual, and Maximus "Tons of Fun" LLC, a Texas limited liability company, admit the jurisdictional allegations in the complaint and specifically admit that the Secretary has jurisdiction in this matter, neither admit nor deny the remaining allegations, waive oral hearing and further procedure, and consent and agree, for the purpose of settling this proceeding, to the entry of this decision.

Complainant agrees to the entry of this decision.

FINDINGS OF FACT

1. Respondent Wilbur D. Davenport (“Davenport”) is an individual whose mailing address is Post Office Box 273, Leggett, Texas 77359, and whose physical address is 106 Paducah, Livingston, Texas 77351.

2. Respondent Maximus “Tons of Fun” LLC (“MTF”) is a Texas limited liability company whose “governing person” and sole manager is Davenport.

3. Respondents Davenport and MTF (collectively “respondents”), at all material times mentioned in the complaint, were operating as an exhibitor, as defined in the Act and regulations.

CONCLUSION

Respondents having admitted the jurisdictional facts and the parties having agreed to the entry of this decision, such decision will be entered.

ORDER

1. Animal Welfare Act license number 74-C-0762, issued to “Maximus ‘Tons of Fun’ LLC” and voluntarily relinquished by respondents in August 2009, is hereby revoked and respondents are hereby permanently disqualified from obtaining an AWA license.

2. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations issued thereunder, and in particular, shall cease and desist from engaging in any activity regulated under the Act and/or regulations, except as provided below.

3. Respondents Wilbur Davenport and Maximus “Tons of Fun” LLC, are, jointly and severally, assessed a civil penalty in the amount of \$100,000, of which \$85,000 shall

be held in abeyance, provided respondents: (a) comply with the provisions in paragraph 4 (¶ 4) below; and (b) do not engage in any activity regulated under the Act and/or Regulations, except as provided in paragraph 4. The remaining \$15,000 shall be paid within 45 days of service of this Order by certified check or money order made payable to the Treasurer of the United States and sent to:

United States Department of Agriculture
Attn: Babak A. Rastgoufard
Office of the General Counsel
Marketing Division, Room 2343-South
1400 Independence Avenue, SW.
Washington, DC 20250-1417

Respondents shall state on the certified check or money order that the payment is in reference to AWA Docket No. 09-0200. In the event respondents fail, within 45 days of service of this Order, to pay the remaining \$15,000, as described above, an administrative law judge shall issue an order finding respondents to be in violation of this consent decision and directing respondents to pay that portion of the civil penalty in this paragraph 3 (¶ 3) held in abeyance, in addition to any unpaid portion of the \$15,000 civil penalty. Respondents agree to a prospective waiver of any right to notice and opportunity for a hearing pursuant to section 2149 of the Act (7 U.S.C. § 2149) as to any such failure to comply with this paragraph.

4. To effectuate the provisions of this Order, and to facilitate the care and disposition of animals at respondents' facility, the parties agree that respondents shall sell and/or donate the Asian elephant known as Boo (aka Queenie) as provided in this paragraph, and only as so provided, and APHIS agrees to provide to respondents an exemption from section 2134 of the Act (7 U.S.C. § 2134) to allow such sale or donation as specified herein:

- a. On or before April 26, 2010, respondents shall sell or donate, and transfer physical possession of, the Asian elephant known as Boo

(aka Queenie) to the San Antonio Zoo (aka the San Antonio Zoo and Aquarium), 3903 North Saint Mary's Street, San Antonio, Texas 78212. Respondents have selected the San Antonio Zoo as the facility to which they intend to sell or donate the elephant and APHIS has approved respondents' selection. Respondents agree that should they fail to transfer physical possession of Boo (aka Queenie) or fail to sell/donate Boo (aka Queenie) to the San Antonio Zoo on or before April 26, 2010, ownership and custody of Boo (aka Queenie) shall be surrendered by respondents and transferred without compensation to the United States Department of Agriculture.

- b. If respondents fail to sell or donate or fail to transfer physical possession of the Asian elephant known as Boo (aka Queenie) to the San Antonio Zoo (aka the San Antonio Zoo and Aquarium) as specified above, respondents shall be deemed to be in violation of this paragraph and shall, as provided in this Order, be assessed the entire civil penalty in the amount of \$100,000, with no portion thereof held in abeyance.
- c. Nothing herein shall be construed as a modification or derogation of the revocation of respondents' Animal Welfare Act license, as provided in paragraph 1 (¶ 1) above, or be construed as allowing respondents to acquire any new animals for the purpose of engaging in those activities for which an Animal Welfare Act license is required. The provisions contained in this paragraph are solely to allow for the proper care and disposition of animals at respondents' facility and to effectuate the provisions of this Order.

5. On or before April 30, 2010, the parties, individually or jointly, shall file a notice with the hearing clerk stating that, as of the date of such notice, the provisions of this order, and in particular, the provisions in paragraph 4 (¶ 4) above, have been complied with. In the event respondents fail to comply with the provisions in paragraph 4 (¶ 4) above, an administrative law judge shall issue an order finding respondents to be in violation of paragraph 4 (¶ 4) and directing respondents to pay that portion of the civil penalty in paragraph 3 (¶ 3) above held in abeyance, in addition to any unpaid portion of the \$15,000 civil penalty. Respondents agree to a prospective waiver of any right to notice and opportunity for a hearing

pursuant to section 2149 of the Act (7 U.S.C. § 2149) as to any such failure to comply with paragraph 4.

6. The Secretary of Agriculture retains jurisdiction of this matter to enforce the terms of this consent decision, and, in particular to ensure compliance with paragraphs 3 and 4 (¶¶ 3, 4) above.

7. The provisions of this order shall become effective on the first day after service of this decision on the respondents.

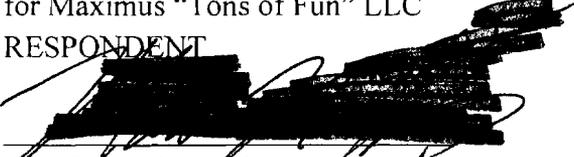
8. Copies of this decision shall be served upon the parties.



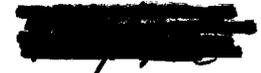
Wilbur D. Davenport
RESPONDENT



Wilbur D. Davenport, Manager
for Maximus "Tons of Fun" LLC
RESPONDENT



Matt D. McCormick
Moak & Moak, P.C.
ATTORNEY FOR RESPONDENTS



Babak A. Rastgoufard
Office of the General Counsel
United States Department of Agriculture
ATTORNEY FOR COMPLAINANT

Done at Washington, D.C.

this 16th day of April, 2010



Peter M. Davenport
Acting Chief Administrative Law Judge