

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 (KEY EQUIPMENT COMPANY, INC., d/b/a
CULPEPPER & MERRIWEATHER CIRCUS and EUGENE ("TREY") KEY**

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"); 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")¹. 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 Key, Terranova, 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 Complaints 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-68-93, and TX-42, 43. I granted Respondent's objection to the testimony of Margaret Whittaker. Tr. at 3162 - 3206. 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 Eugene ("Trey") Key, III, an individual and Key Equipment Company, Inc., d/b/a Culpepper & Merriweather Circus, and is based

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

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] #".

upon consideration of the record evidence; the pleadings, arguments and explanations of the parties; and controlling law.

II. ISSUES

1. Is either the Key corporate Respondent or Eugene Key IIIs responsible for any violations of the Act pertaining to elephants owned by the Terranova Respondents?
2. Did the Key corporate Respondents violate the Animal Welfare Act, and if so, what sanctions, if any, should be imposed because of the violations?
3. Is Eugene (“Trey”) Key, III personally liable for acts of the corporate Respondents?

III FINDINGS OF FACT AND CONCLUSIONS OF LAW⁵

A. Admissions

In its Answer to the Amended Complaint filed June 23, 2010, Respondents admitted that Key Equipment Company, Inc. (“Key Equipment”) is an Oklahoma corporation, number 1900657188 doing business as “Culpepper & Merriweather Circus” (“the Circus”). The corporation’s registered agent, is Brian Galvano. Respondents held Animal Welfare Act license number 73-C-0144 during the periods relevant to this adjudication, and they operated as an exhibitor under the Act at all pertinent times. Respondent Eugene “Trey” Key, III, is the president of Key Equipment Company, Inc., and Manager of the Circus. The Circus is an animal exhibition business operated for

⁵ The discussion focuses on the facts pertinent to the Key Respondents.

profit, and as of 2008, when its AWA license was renewed, Key Equipment owned three exotic animals.

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. 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 his circus with two tigers, Delia and Solomon, and a lion named Francis that are owned by Key Equipment. Tr. at 1222

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.

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. 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 ranging from Chicago, to the Mississippi River, to the West Coast, putting on two daily shows under “the Big Top”. Tr. at 2218-19. Mr. Key performs in the Circus with large cats that 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, as 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; 2341. 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; 23030-2304. The cats did socialize together at times. Tr. at 2304.

Sometime in late March, 2008, Mr. Terranova's employee elephant handler brought the cats and elephants to the Circus, but returned shortly with the elephants to quit his job. Mr. Terranova hired Sloan Damon to replace the handler, and Mr. Damon brought the elephants back to the Circus with Richard Childs, who was hired to drive the semi-trailer that was used to transport the animals. Tr. at 231-233; 238. 230; 239; 2561-2562. 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 Mr. Damon as he replaced the cubs in the cage with Delia, who pushed them away. Tr. at 2231; 2234. 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 2233-2335; 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. During his travels with the Circus, Mr. Damon consulted veterinarians, who examined Tubbs and wormed and vaccinated him. Tr. at 2252-2253; CX 11, 13, 15, 16, 17.

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.

APHIS investigator Rodney Walker traveled to the Iowa State Fair, where he understood the elephants were working, in order to investigate 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 believed that Mr. Key could override his decisions. 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 toward⁶ them, and they escaped from their handler. Tr. at 254. They wandered onto nearby private property and were reclaimed only after one was 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. Mr. Key denied that he had any control over the elephants, observing that he was not competent to handle them. Tr. at 2280.

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 care (Tr. at 233-234) for the cub, 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.

⁶ 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.

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.

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.

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

1. Liability of Key Respondents for Terranova Actions

The AWA provides, 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. “[T]he term ‘person’ includes any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity.” 7 U.S.C. § 2132(a).

a. Actions related to tigers owned by Key Respondents

I have considered that no one raised the defense that the Act should not apply to the tiger cubs, which had not been exhibited in any manner. Therefore, I find that activities related to the tiger cubs born at the Circus are subject to the AWA.

The record establishes that the Key corporate Respondent, which is licensed under the Act, is responsible for the acts of Mr. Damon that affected the animals that Respondent owned. Mr. Key entrusted the care of the newborn tigers to Mr. Damon. Tr. at 2233-2234. Although Mr. Damon was not paid by Respondents (Tr. at 275-276), he “answered to” Mr. Key and Mr. Terranova (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 and his employee acted as agents for the Key Respondents. 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). 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).

Mr. Key traveled with Mr. Damon and checked with him about the condition of the tiger cubs “five times a day”. Tr. at 2240. Mr. Key reimbursed Mr. Damon for expenses related to the care of the tiger cubs and paid for veterinary care. Tr. at 287-289; KX-16. Mr. Key claimed that the corporation owned the tigers, and by extension, the cubs. Tr. at 2209.

I find that the Key corporate entity is liable for any violations arising from actions relating to their tigers and their offspring.

b. Actions regarding Terranova Elephants

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; Tr. at 2345-2350. 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 their transportation vehicle.

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, high winds always portend the risk of bodily injury and property damage. Mr. Damon's decision to expose the elephants to fluctuating and severe weather conditions jeopardized their safety. Despite Mr. Damon's opinion that Mr. Childs was competent to handle the elephants, the record does not establish a basis for that opinion, and rather demonstrates that Damon had insufficient help. See, Tr. at 232, 311-312.

There is evidence that Mr. Damon had been injured by his charges on several occasions⁷, 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 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.

Mr. Key credibly testified that he had no experience handling the elephants and could not have recaptured them, but he followed his protocol for escaped animals when the elephants got loose in WaKeeney. Tr. at 2282. Although he testified that the Circus did not have a written escape and capture plan⁸, he reviews the protocol with staff regularly. Tr. at 2353. He considered the elephants to be entirely within Mr. Damon's

⁷ There is contradictory evidence regarding whether Mr. Damon was injured on June 5, 2008. CX-26; 18.

⁸ The record includes an undated written "Animal Retrieval Protocol" for Respondents. KX-15.

control, and did not have a plan specifically addressing them. Tr. at 2280; 2354. Mr. Key did not know how long Mr. Damon had trained with the elephants, and was not too concerned about them, as they were not his. Tr. at 2355. Mr. Terranova expected Mr. Damon to take whatever actions promoted the elephants' interests, regardless of Mr. Key's opinion. Tr. at 2677.

I find no evidence of an agency relationship between the Key and Terranova Respondents relative to the elephants. Mr. Key did not pay Mr. Damon for his activities relative to the elephants, and Mr. Damon was free to take the elephants away from the Circus. Although there was a verbal agreement between the Terranova and Key Respondents to exhibit the elephants at the Circus, there is little evidence regarding who profited from the arrangement.

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. Mr. Damon trained with Mr. Terranova and the elephants for a brief period before setting off for the Circus in the spring of 2008 with no other help but an individual whose highest credential was the possession of a commercial driver's license. 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. I decline to hold the Key Respondents liable for actions of Terranova's elephant handlers that led to their escape, and those allegations are dismissed.

I further dismiss allegations charging the Key Respondents with failure to have an attending veterinarian to care for Terranova's elephants. The record does not establish

that the Key Respondents acted as the Terranova's agents regarding the exhibition of Terranova's elephants, and those charges are likewise dismissed.

2. Did Key Respondents violate the AWA

The Key Respondents are charged with violations of the Act that generally fall within the categories of failing to notify APHIS regarding changes in corporate management or location; handling and care of animals; retaining veterinarians and having a plan of, and providing, veterinary care. The allegations and evidence are summarized as follows:

a. **Failure to Notify APHIS of Changes in Corporate Management**

Respondents are charged with violating 9 C.F.R. §2.8 because it has been alleged that Key Equipment has been an inactive and suspended corporation during the period pertinent herein. See, amended Complaint. No record evidence has been submitted to support these allegations, and I find that they are unsubstantiated on those grounds.

Further, the prevailing regulation states in its totality:

A licensee shall promptly notify the AC Regional Director by certified mail of any change in the name, address, management, or substantial control or ownership of his business or operation or of any additional sites within 10 days of any change.

9 C.F.R. §2.8.

The record fails to establish that Respondents neglected to abide by the directives encompassed by the prevailing regulation. Respondents have admitted that Eugene Key III is the manager and operator of the business enterprise, and therefore there is no evidence of a change in the name, address, management, control or ownership of Respondents' operation. Moreover, Respondents have

provided notice to APHIS of changes in exhibition sites during the time period at issue. KX-19, 20. I note that APHIS made no effort to verify the legal status of the corporate entity before reissuing its AWA license. KX-17; 18. Inspection Reports are directed to Key Equipment Co. KX-1, KX-2, KX-3, KX-4, KX-21. This charge is not substantiated and is hereby dismissed.

b. Handling of Animals

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 shortly before the birth that may have signified pregnancy, 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. It was assumed that the siblings were kept separate. 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 a couple weeks 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. Mr. Key testified that he kept the tigers out of the show for two to three weeks after Delia gave birth. Tr. at 2307. The record does not reveal 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 that 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 that died, the regulations do not require such, and the early death of rejected cubs is not uncommon. The regulatory scheme does not require an examination by an expert with exotic cat experience. 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; CX-9a; CX-12. The seizing cub had died en route, 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 heating blanket. 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.

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 that 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. 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; 9;11; 13; 15; 16; 17.

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 setting⁹, 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. I credit Dr. West’s opinion 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 always 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 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.

⁹ 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.

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. Tr. at 727. 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 accord substantial weight to Dr. West's opinions, and find that they outweigh the speculative conclusions made Dr. Gage. 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; CX-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 one¹⁰. Tr. at 2321. When consulted after the birth of the cubs, Mr. Terranova made recommendations of a diet that more closely resembled that endorsed by Dr. Gage. See, 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

¹⁰ Mr. Damon testified that Mr. Key had never refused to pay for Tubbs' care. Tr. at 288.

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 Fair¹¹, 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.

The deficiencies in Tubbs' nutrition are imputed to Key Equipment. Mr. Key was in daily contact with Mr. Damon regarding the welfare of the tiger cubs. He spoke with Dr. West, who reviewed his examination of the tiger and his prescription for his growth. Tr. at 2247. Having entrusted the cub's welfare to Mr. Damon, Mr. Key, on behalf of Key Equipment, assumed liability for the acts of its agent. Accordingly, Key Equipment is jointly and severally responsible for the acts of the Terranova Respondents and Mr. Damon regarding Tubbs' nutrition.

Adequacy of Tubbs' living facilities and restraints

¹¹The meat was added to the cub's diet at the Fair after Mr. Terranova's discussion with Dr. Clothier. Tr. at 2759.

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 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 where he spent his time, and for how long. 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), although 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 temperatures¹². 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

¹² Parenthetically, there is no evidence of the outdoor temperatures at the Fair in Iowa in August.

inappropriate to conclude that Respondents failed to take measures to alleviate any impact from the climate inside the truck.

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 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. Further, 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 evidence¹³ 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

¹³ 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.

representing harm or imposing stress on a growing tiger¹⁴, considering the fact that the cub had survived until August, 2008, and a number of veterinarians considered him 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. It follows, therefore, that Tubbs' had spent most of his life in a cleaner environment. 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.

¹⁴ 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.

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 documenting discussion 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.

c. Adequate Veterinary Care and Attending Veterinarian

Allegations regarding animals owned by Key Respondents

Respondents are charged with failure to provide adequate veterinary care and attending veterinarians with respect to the 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 tigers¹⁵; he followed veterinary advice that

¹⁵ Indeed, Mr. Damon ignored Mr. Terranova's early advice about hand-raising the cubs.

Mr. Key paid for; and appeared to take an ad hoc approach to consulting veterinarians, relying upon Mr. Key's direction and the needs of the cub. CX 11, 13, 15, 16, 17. 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. When Dr. West was unable to draft a plan of care, Respondents failed to seek out a veterinarian who would be willing to do so.

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. The preponderance of the evidence establishes that the Key Respondents alone were responsible for developing a plan of adequate veterinary care for their cats, and this allegation is sustained.

The record demonstrates that the Key tigers were provided veterinary care. Tubbs and his siblings and mother were seen immediately after the birth by Dr. Miller. After a cub experienced seizures, they were seen by Dr. West, a veterinarian with large felid experience, and Tubbs was later seen by a number of other veterinarians of unknown backgrounds (KX-7; 11, 13, 15, 16) 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 an attending veterinarian on staff. Indeed, Tubbs' care followed no demonstrable pattern, and the daily observations of Tubbs' care by Mr. Damon ignored recommendations by veterinarians and resulted in the cub being underfed. The preponderance of the evidence establishes that the Key Respondents failed to have an attending veterinarian, in violation of the Act and regulations.

I find that the Terranova Respondents generally were not responsible for providing veterinarian care for Tubbs. However, when Mr. Terranova volunteered to have Tubbs examined at the Fair upon order of APHIS inspectors, he acted as agent for the Key Respondents. 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. Dr. Clothier worked with the United States Department of Justice, and was selected to serve 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. Tubbs had been seen by a number of veterinarians during the few months he lived with Mr. Damon, all of whom found him healthy. The regulations do not specify that a veterinarian be experienced with the species being examination in order to be qualified to examine an animal. If they did, then Dr. Zeigerer was not qualified to inspect elephants, and neither she nor Dr. Sofranko were qualified to inspect a tiger cub.

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 veterinarians¹⁶ at the Fair.

3. Is Mr. Key personally liable for the acts performed on behalf of Key Equipment?

All acts of the corporate entity in these circumstances arose out of decisions made by Mr. Key. 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. Key may be held personally liable for acts he performed on behalf of Key Equipment. 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

¹⁶ 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.

(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 the 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. The Key Respondents demonstrated a shockingly cavalier attitude regarding the health and safety of animals that they owned. Although I have found that the evidence of record does not establish that Delia' surprise pregnancy and subsequent birth of three cubs constitutes mishandling of animals, a prudent animal handler would have had the potentially pregnant tiger examined by a veterinarian.

Once the cubs were born, they were left in the care of an individual who was expediently on hand, and very economical, as Mr. Damon received no extra remuneration for rearing the tiger cubs. Although I credit Mr. Key's testimony that he had conducted some research into Mr. Damon's background and satisfied himself about the handler's experience with tiger cubs (Tr. at 2290-2291), it is unclear whom Respondents would have charged with the onerous task of hand-raising cubs in Damon's absence. It is troubling that Mr. Key purposely ignored the advice of Mr. Terranova regarding the care and feeding of the animals (Tr. at 2332-2333), particularly given Key's personal relationship with Terranova, compared with his relative lack of knowledge about Mr. Damon.

Mr. Key's operation of the Circus did not include close concern about the welfare of his animals. He had no plan of veterinary care, and no attending veterinarian, preferring to use whatever local veterinarian worked in proximity to wherever the Circus

pitched its tents. This lack of plan, and Mr. Key's misplaced reliance upon Mr. Damon's self-related experience with hand-rearing tigers, led to the undernourishment of a tiger cub. In addition, by charging Mr. Damon with the sole responsibility for caring for the cubs, Mr. Key showed little regard for Mr. Damon's responsibilities to the elephants, thereby jeopardizing their well-being. The record demonstrates that the elephants' skin and feet were poorly maintained, conditions that Mr. Terranova attributed to the burden of Mr. Damon caring for the tiger cub. Tr. at 2563; CX-42. The Key Respondents' failure to provide a plan of veterinary care and failure to safely handle Tubbs represent careless disregard of the Act and regulations that led to harm, discomfort and risk to animals.

Considering the preponderance of the evidence, I find that the Key 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 alleged failure to handle elephants as carefully as possible, leading to an escape, and failure to handle tigers carefully, leading in deaths.

I have found that the preponderance of the evidence establishes that the Key Respondents are not responsible for actions relating to the Terranova elephants. I have further found that the evidence does not demonstrate that two of the cubs died because of

mishandling; there is insufficient evidence to directly relate the cause of their deaths to any actions taken by any of the Respondents. I have given careful consideration to the sanction proposed by APHIS. The sanction recommended 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).

Considering that I have failed to find sufficient record support for the most serious allegations charged against the Key Respondents, I find that revocation of Key Equipment's AWA license would be punitive, and would not serve the remedial purposes of the Act.

The record does establish that Respondents willfully failed to develop a plan of veterinary care, and further, willfully allowed the one surviving cub of a litter of three to be hand-raised in a capricious manner that led to poor nutrition, which risked its development and health. The Terranova Respondents are liable for violations regarding the care of the Key tigers only through the operation of the law of agency. Mr. Key had only to consult a veterinarian to develop a proper plan of care for the developing tiger cub (and his other cats) and to supervise Mr. Damon in his execution of the plan, to fulfill his obligations under the Act. The Key Respondents' deliberate failure to do so with obvious disregard for consequences to his animals, and those belong to Terranova, warrant a sanction that will act as a deterrent against circumstances that lead to unavoidable mishandling of animals.

I find that the Key Respondents' actions warrant suspension of the AWA license held by Key Equipment for a period of not less than six (6) months. If the renewal period

for the license falls within that period, then the license may not be issued until the expiration of the suspension period.

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 offenses are grave in that they represent willful violations of the Act that directly affect the welfare of animals. However, the violations that I have found supported by the evidence are not of the gravity alleged by Complainant. There is no evidence that the Key Respondents have a history of previous violations of the Act, and there is no evidence of Respondents’ bad faith. In addition, as the result of their failure to handle Tubbs carefully, USDA confiscated the animal, thereby depriving Respondents of a valuable animal, estimated to be worth \$30,000.00. Tr. at 196.

Respondents disagree with Complainant’s contention that their animal exhibition business is large. Respondents operate a traveling circus that employs between 36 to 38 individuals. Tr. at 2217. The record is devoid of evidence regarding, and little argument has been advanced about, what determines the size of a business. According to regulations governing the Small Business Administration, a “small business” is defined as a place of business in the United States that operates primarily in the U.S. or makes a significant contribution to the U.S. economy; that is independently owned and operated;

and that is not dominant in its field on a national basis. 13 C.F.R. Part 121. In addition, whether a concern is a “small business” depends on the average number of employees it retains in the past 12 months, or the average annual receipts it earns over the prior three years. *Id.*

There is insufficient evidence of record to determine the size of Respondents’ business, and I therefore find that Complainant has failed to meet its burden of proof. However, I find that this issue is immaterial, as I decline to impose monetary penalties, since my determination that Respondent’s license should be suspended shall undoubtedly result in financial hardship during their period of inactivity, and the loss of their valuable animal is the equivalent of a civil money penalty.

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. Defenses

a. **Vagueness of the Act**

As my authority is limited to the consideration of those principles embraced by the Administrative Procedures Act, 5 U.S.C. § 551 et seq. (“APA”), I decline to address Respondents’ defenses regarding the vagueness of the AWA and its implementing regulations.

5. Confiscation

Although I sympathize with Respondents’ argument regarding the lack of due process involved in the confiscation of Tubbs, I am without authority to make a

determination regarding their arguments. My authority is limited by the APA and the AWA and its implementing regulations. 7 U.S.C. § 2149(a), (b), (c).

G. Findings of Fact

1. Key Equipment Company, Inc is. an Oklahoma corporation, number 1900657188, doing business as “Culpepper & Merriweather Circus” (“the Circus”), with a home address in Hugo Oklahoma.
2. Respondent Key Equipment Company, Inc. held Animal Welfare Act license number 73-C-0144 during the periods relevant to this adjudication, and they operated as an exhibitor under the Act at all pertinent times.
3. Respondent Eugene “Trey” Key, III, is the President of Key Equipment Company, Inc. and Manager of the Circus operations of Respondents’ animal exhibition at all times pertinent to this adjudication.
4. Respondents operate an animal exhibition business for profit, viz., a circus, which employs between 36 to 38 people, and in 2008 owned three exotic animals and leased other animal acts.
5. During 2007 and early 2008, Respondents’ tigers and lion were housed at a specially built compound at a facility in Kaufman, Texas owned by the Terranova Respondents.
6. Sometime after December, 2007, the Terranova 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.

7. Respondents also entered into an agreement with the Terranova Respondents to include Terranova's elephants in the Culpepper & Merriweather Circus.
8. In April, 2008, the Terranova Respondents' former employee, Sloan Damon, traveled with the elephants to the site of the Circus.
9. Sloan Damon was responsible for caring for and handling the elephants and he helped with Respondents' large cats.
10. Although Respondents' tigers were meant to be separated at the Terranova facility in Texas, they were allowed time together, and apparently mated without the knowledge of their caretakers.
11. On May 2 or May 3, 2008, Respondents' female tiger gave birth to three tiger cubs.
12. Sloan Damon volunteered to hand raise the three tiger cubs.
13. Tiger cubs that are denied colostrum by their mother are at additional risk for illness and death.
14. One of the cubs died within days of its birth, and a second cub suffered seizures and died on May 12, 2008.
15. Necropsy of the second dead cub established septicemia and a widespread e-coli infection as the cause of its death.
16. 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.

17. 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.
18. Veterinarians who examined the cub found it healthy, and no reports mention an unhealed wound on its nose.
19. On June 5, 2008, while exhibiting in WaKeeney, Kansas, the Terranova 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.
20. 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.
21. Mr. Damon brought the surviving tiger cub with him to the Fair.
22. While at the Fair, the surviving tiger cub was housed in the cab of the Terranova 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.
23. The tiger cub's diet was inadequate for its age and species, resulting in it being underweight.
24. USDA confiscated the tiger cub and relocated it to a facility chosen by APHIS.

H. Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Key Equipment and Eugene Key III in his capacity as President of Key Equipment and Manager of the Circus, operated as exhibitors as that term is defined by the Act and regulations.
3. Pursuant to 7 U.S.C. § 2139, Eugene Key III's acts, omissions or failures are deemed to be his own as well as those of the corporate entity.
4. The Terranova Respondents' 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.
5. Complainant has failed to meet the burden of proving the following violations brought against the Key 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 Terranova animals).
 - (b) Violations of 9 C.F.R. § 2.131(b)(1), alleging failure to handle animals as carefully as possible (female tiger Delia and newborn tiger cubs).
 - (c) 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 and the environmental conditions of the housing.
 - (d) Violations of 9 C.F.R. §§ 2.40(b)(1) and (b)(4), alleging failure to maintain a program of adequate veterinary care including proper escape and capture plan and equipment (regarding elephants in WaKeeney, Kansas).

- (e) Violations of 9 C.F.R. §§ 2.131(b)(1); 2.40(b)(1) and (b)(4), alleging failure to handle animals as carefully as possible and failure to provide adequate trained personnel to safely handle elephants in (elephants in WaKeeney, Kansas).
- (f) Violations of 9 C.F.R. §§ 2.40(a)(1) and (2); (b)(1) through (b)(3) alleging failure to have tiger cub examined by qualified veterinarian while at the Fair.
6. Respondents failed to develop a plan of veterinary care and failed to have an attending veterinarian provide adequate care to animals in willful violation of 9 C.F.R. §§ 2.40(a)(1) and (2); (b)(1) through (b)(3).
7. 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.
8. 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).
9. 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).

10. The Administrator's determination that Respondents' AWA license should be revoked is not warranted, considering that Complainant failed to prove that Respondents are liable for violations relating to the Terranova Respondents' elephants, and failed to prove that Respondents' actions resulted in the death of two tiger cubs.
11. Respondents' willful neglect and disregard for the Act and regulations warrant a suspension of Respondents' activities under the Act for a period not to exceed six (6) months.
12. The Administrator's proposed civil money penalty is not warranted, considering the gravity and numerosity of offenses, the lack of evidence establishing the size of Respondents' business, the absence of bad faith, my imposition of a suspension of the license, and the fact that USDA confiscated Respondents' sole surviving tiger cub, which was estimated to be valued at \$30,000.00.
13. An Order directing Respondents to cease and desist from violating the Act and regulations is warranted.

ORDER

1. The Key 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. The Key Respondents are hereby prohibited from engaging in any activities contemplated by a license issued under the AWA for a period not to exceed six (6) months, beginning with the date that this Order becomes final.

3. 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