

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;
Eugene ("Trey") Key, III, an individual;
and Key Equipment Company, Inc.,
an Oklahoma Corporation d/b/a
Culpepper & Merriweather Circus,

Respondents.

**DECISION AND ORDER (CRAIG PERRY d/b/a PERRY'S EXOTIC
PETTING ZOO; PERRY'S WILDERNESS RANCH & ZOO, INC.)**

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., Douglas Terranova, Will Ann Terranova, Farin Fleming ("Terranova Respondents")¹; Craig Perry ("Perry Respondent"); and Eugene "Trey" Key, III, and Key Equipment Company, Inc. ("Key Respondents"). Complainant alleges that Respondents violated the Animal 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").

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

A. 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 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.

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

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 address charges against Mr. Damon in this Decision and Order.

Key Respondents are represented by Derek Shaffer, Esq. and Michael Weitzner, Esq. At the hearings, the testimony of witnesses was transcribed, 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-1; 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.

The hearing that commenced on June 1, 2011, pertained to violations brought against the Terranova Respondents, and the Perry and Key Respondents declined to attend. 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 the Perry Respondents, 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 Perry Respondents violate the Animal Welfare Act, and if so, what sanctions, if any, should be imposed because of the violations?
2. Is Mr. Perry personally liable for acts of the corporation PWR?

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] #".

3. Are the Perry Respondents responsible for acts of other exhibitors who performed at the Iowa State Fair upon Mr. Perry's invitation?

III FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Admissions

The Perry Respondents admit that Perry's Wilderness Ranch & Zoo, Inc. (PWR) is an Iowa corporation that holds an AWA license in the corporate name.

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. 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.", which is licensed by USDA. Tr. at 1700-1701; PX-1; 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.

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. He owned two elephants, Kamba and Congo, until he donated them to the Dallas zoo in 2009. Tr. at 2801.

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 to uses animals owned by Key as well as subcontracts other acts. Tr. at 1222. He performs in his circus with two tigers, Delia and Solomon, and a lion named Francis. Id.

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 1707-1712; 2654-2657; 2660. Mr. Perry provided the equipment for camel rides and the Terranova Respondents provided the camels, which they had recently purchased from PWR⁵. Tr. at 1706; 2654-2656; 2657-8. Mr. Terranova also 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

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 the Fair took place in August, 2008. Tr. at 2049.

Respondents⁶. 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. 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 hired Mr. Childs to drive the semi-trailer that was used to transport the animals. Tr. at 231; 238. 230; 239. Mr. Damon also looked after Mr. Key’s cats because Mr. Damon had large cat experience. Tr. at 2228.

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 also brought with him a tiger cub named Tubbs that belonged to Mr. Key, which Damon kept in the cab of the elephant tractor-trailer. Tr. at 270-273. The cub was the lone survivor of a litter of three cubs that Mr. Key’s tiger named Delia gave birth to in April, 2008 while the Circus was on the road. Nearby, Mr. Damon erected a large outdoor pen where Tubbs spent some time with a dog that Mr. Damon had found in his travels. Tr. at 272.

Mr. Perry wanted to make a good impression at the Fair, and in order to present a professional appearance, he asked Mr. Terranova and his employees to wear shirts that he provided, which had Perry’s logo on the front. Tr. at 1711-1712; CX-35 at p. 92. Mr. Perry compared the circumstances to working as a contractor at a zoo and wearing the zoo’s logo. Tr. at 1712. Mr. Perry had no authority over any of the people working the

⁶ The facts pertaining to allegations regarding tiger cubs are not material to the Perry Respondents, and therefore, are largely omitted.

rides except for his employees. Tr. at 1713. According to the agreement between Mr. Perry and Mr. Terranova, the Petting Zoo's ticket booth also sold tickets to the elephant and camel rides, but the money was not mingled and settlement of the ride proceeds was made daily. Tr. at 1828. The elephants were brought to the Fair upon Mr. Perry's recommendation, and the Terranova Respondents did not have a separate agreement with the Fair officials to exhibit the elephants. Tr. at 1826.

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-35; 45; 46. Mr. Perry learned of the inspection from his helper, Kathy Miller, who called him at another Fair exhibit to report the presence of people who were taking photographs. Tr. at 1716-1717. Mr. Perry testified that in his experience, inspectors usually identify themselves and tour the premises with him, but by the time he arrived at the petting zoo at the Fair, the inspectors "had pretty much been everywhere". Tr. at 1718.

The inspectors wanted to see his paperwork (Tr. at 1730) and his animal feed, as they had seen animal feces in hay in a trailer (Tr. at 1718). Mr. Perry stores his hay on pallets under tarps in his trailer, after the animals and equipment are offloaded, which the inspectors commended. Tr. at 1719-1720; 1731. The trailers belonging to PWR and Terranova were parked in close proximity, and the trailer that contained fecal matter belonged to Doug Terranova. Tr. at 1721-1722; CX-35 at p. 70. Mr. Perry testified that there was a lot of rain during the Fair, and yet the pictures taken of the Petting Zoo and adjacent attractions show a clean environment. Tr. at 1723; CX-35.

Mr. Perry told the inspectors that they needed to see Mr. Terranova about the elephant and camel rides, and that he had only provided a stand for the camel rides because Mr. Terranova did not have room in his truck for that equipment. Tr. at 1731-1733. His people were not allowed to be in the elephant area because of safety reasons. Tr. at 1742. Mr. Perry asked the inspectors if he would get a report reflecting compliance, and understood from Dr. Sofranko that she would give him a copy of the report after using the copier from her car. Tr. at 1734. He asked the inspectors to tell his volunteer, Ms. Miller, to contact him so that he could meet them for an exit interview. Tr. at 1735-1736. Mr. Perry did not get a report on that first day, August 13, 2008. Tr. at 1737.

The following day, Mr. Perry saw the inspectors reviewing the elephant area, and he asked for his inspection report. Tr. at 1738. He was concerned that the inspection was continuing, and he recalled Dr. Sofranko telling him that the ongoing inspection did not concern him and that he was not in violation of anything. Tr. at 1739. Mr. Perry was concerned that Drs. Zeigerer and Sofranko would interfere with how the elephant rides were being conducted, because they were asking the elephant handlers to demonstrate behaviors, even while rides were being given. Tr. at 1744-1746. Mr. Perry did not receive a report that day, although he asked the inspectors for it several times on August 14, 2008. Tr. at 1740.

At some point Mr. Perry talked to Inspector Mike Booth, who told him that the report was not going to be good. Tr. at 1741. Mr. Perry asked for a report again on August 15, 2008 when he saw the inspectors on site, and did not get one. Tr. at 1747. Mr. Perry told the inspectors that he had to leave on the 17th, and he still did not get a

report. Tr. at 1755. His helper Mike Pacek was given a copy of a report dated August 17, 2008, on the morning of August 18, 2008, and Mr. Pacek had refused to sign for it because it cited violations regarding Terranova's elephants. Tr. at 1756-1780. Mr. Perry was surprised and upset that he was cited for violations pertaining to the care, housing and handling of the elephants that belonged to Mr. Terranova. Tr. at 1781.

Mr. Perry described how the inspectors arrived on site on the night of August 16, 2011, accompanied by security and the police, to confiscate the tiger. Tr. at 1765-1775. At about 6:00 p.m., the police shut down the petting zoo and animal ride attractions, and he could not re-open until after the Fair was just about closed. Id. Mr. Perry's business realized a significant loss of income, as the shut-down occurred on one of the busiest nights of the Fair, the final Saturday night. Id. He had been upset to see the tiger, and wanted nothing to do with it. Tr. at 1785-1786. Mr. Perry resented having his business closed over a matter that did not concern him. Tr. at 1786.

Mr. Perry believed that some APHIS inspectors did not agree with the decision to cite him for the elephants, and he described a meeting at his home with Dave Watson and Mike Boothe that lasted for hours. Tr. at 1772-1773. Mr. Perry was advised to ask USDA for information about the inspection under the Freedom of Information Act, and he took notes about the topics discussed at the meeting. Tr. at 1772-1775.

On December 15, 2009, Mr. Perry was called away from his place of business to respond to a medical emergency suffered by his long-time friend and volunteer, Michael Pacek. Tr. at 1776-1782. Mr. Pacek was hospitalized after a heart attack, and Mr. Perry tried to visit him. Tr. at 1782. When Mr. Perry was denied access to his friend, he returned home to find that an inspector had been there to inspect his facility. Tr. at 1782.

He called the inspector and explained the circumstances, and was advised to have his attorney respond to the citation. Tr. at 1783.

Mr. Boothe lacked any independent recollection of the events involved in the 2008 Fair, and the meeting at Mr. Perry's home. He could not recall exactly what he saw at the Fair, or why he was invited to participate with two other inspectors at the inspection, although he allowed that it was unusual to have so many inspectors. He did not recall leaving the Fair before the other inspectors because he was ill. Tr. at 1978-1995.

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 had been 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, recordkeeping 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..

D. Discussion

1. Did PWR, Craig Perry, and/or Perry’s Exotic Petty Zoo engage in conduct that violated the AWA?

a. Failure to allow access to facilities for inspection

Exhibitors must also allow inspection by APHIS inspectors to assure compliance with provisions 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. Perry was not on site on December 15, 2009, when an inspector arrived to inspect the facilities where he kept his animals. CX-60. No one was at Mr. Perry’s facilities to allow access to the inspector, as a medical emergency that resulted in the hospitalization of Mr. Perry’s primary volunteer and replacement, Mike Pacek, was the reason for Mr. Perry’s absence.

I credit Mr. Perry’s testimony that his absence was of short duration, and in response to an emergency. Mr. Pacek testified that he was Mr. Perry’s long-time friend and volunteer animal caretaker, and had been hospitalized for a cardiac emergency in December, 2009. Tr. at 2008. I also credit Mr. Perry’s testimony that he contacted the inspector immediately to explain his absence and advise that he was back at his business. I accord further weight to Mr. Perry’s testimony that other inspections conducted in 2008 revealed no issues resulting in complaints. PX-5 and PX-6.

Although the record reflects that inspections were not consistently conducted, and were not conducted in a consistent manner, this finding is immaterial to the question of whether the Perry Respondents failed to allow an inspection. Inspectors have latitude in the method and manner in which inspections are conducted, so long as they are not

disruptive to business⁷. *In re Sema, Inc.*, 49 Agric. Dec. 176 (1990). Further, it has been held that agency policies may change without notice to those affected. *In re Jerome Schmidt*, 66 Agric. Dec. 159 (2007). The inspection that was attempted on December 15, 2009 was conducted at a reasonable time of day at the Perry Respondents' home facility, and Mr. Perry was absent and had failed to appoint a responsible person to replace him. Unforeseen emergencies are predictable events, and the Act and prevailing regulations provide no exemption for the need to have a responsible individual on site in the eventuality of emergency absences. The Perry Respondent's home facility was left unattended and an inspection could not be conducted. The violation is sustained.

b. Exhibiting without a license issued by USDA

Complainant alleges that Respondent Craig Perry acted on his own behalf during the period underlying the instant complaint, and failed to hold a valid exhibitor's license. Over the years, APHIS has issued licenses to entities associated with Mr. Perry and to Mr. Perry as an individual and as owner of PWR. The record establishes that in 2002 the corporate entity PWR renewed AWA license No. 42-C-0101 in its own name and held the license at all times pertinent to this adjudication. PX-1, 2. Perry's Exotic Petting Zoo is part of PWR, and was operated by Mr. Perry. Tr. at 1678-1701.

Neither the Act nor regulations require employees of a licensee to be licensed, although USDA has the power to impose such a requirement. See, *In re William Joseph Vergis*, 55 Agric. Dec. 148 (1996). In addition, APHIS is not restricted from issuing

⁷ The Perry Respondents have argued through Mr. Perry's testimony that the APHIS inspectors spent an undue amount of time at the Fair, and interfered with business. I find no other evidence of record to support this allegation, although it is axiomatic that closing exhibitions to confiscate a tiger cub did interfere. However, those circumstances were unique, and only tangentially related to the inspection.

multiple licenses to entities whose ownership and directorship overlap, such as a corporation and a partnership. *Longhi v. APHIS*, 165 F. 3d 1057 (6th Cir. 1999). However, the Judicial Officer for USDA dismissed a complaint against an individual cited for failure to obtain an exhibitor's license while finding that the corporate entity was required to be licensed. *In re Daniel J. Hill and Montrose Orchards Inc.*, 67 Agric. Dec. 196 (2008). In addition, in *In re John F. Cuneo*, 64 Agric. Dec. 1318 (2005), it was determined that an independent contractor hired to handle and train elephants did not need a separate license. *Cuneo*, supra.

Complainant argues that "Perry insurance coverage for Kamba and Congo at Iowa State Fair" (CX-30) and the "Perry contract with Iowa State Fair" (CX-40, 45; PX-3) demonstrate that Mr. Perry operated as an exhibitor without a license. Complainant misstates the evidence in the case of the insurance policy, which was taken by Terranova and additionally insured Craig Perry and Perry's Wilderness Ranch & Zoo. CX-30. Since it was not Perry's policy, this document fails to demonstrate anything about how the Perry Respondents' perceived their corporate structure. Furthermore, Complainant's allegation is not supported by the statutory scheme, which establishes that the acts of a corporation's officers, agents, employees, may be considered their own.

Therefore, Complainant's allegation regarding Mr. Perry's joint liability for violations of the Act may be demonstrated without requiring Mr. Perry to maintain an individual license in addition to the one issued to PWR. The Act specifically states that actions of any person involving the exhibiting of animals are imputed to the corporate entity. Perry's own acts and omissions may similarly make him culpable as an individual. In the absence of persuasive contrary authority, I find that employees of

PWR, including Mr. Perry, were not required to hold an individual license in addition to the license issued to the corporate entity. Accordingly, I dismiss this charge.⁸

c. Violations arising from association with Terranova at the Fair

Before considering whether the record demonstrates that the alleged violations involving the Fair occurred, I must determine whether the Perry Respondents are bound to the Terranova Respondents so as to be jointly liable for any violations involving Terranova's activities.

As best as I can interpret, Complainant's theory of the case, which is neither fully articulated nor artfully argued, is that because the Perry Respondents invited Terranova and the elephants to the Fair, the Perry Respondents are responsible for any violations involving the elephants. Complainant refers to a contract or joint venture between Perry and Terranova. Complainant's Proposed Findings of Fact, page 3. The Act provides the method for determining joint liability for activities that lead to violations under the theory rubric of a principal-agent relationship.

The AWA in pertinent part states: "[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).

⁸ If the gravamen of this allegation is to suggest that Perry himself needed a license because he was exhibiting Terranova's elephants, the evidence does not establish that the Perry Respondents perceived themselves as being in that position, and therefore would not have sought a license for that purpose.

Since Complainant has declined to cite to cases describing what may be perceived as a joint venture⁹ under the AWA, and since the AWA provides for joint liability under a theory of agency, I find it appropriate to focus on the specific statutory language.

There is little precedent for determining whether two licensed exhibitors who exhibit their animals in close proximity at the same attraction may be held jointly liable for the care and handling of each other's animals when one exhibitor's presence is at the behest of the other. In the absence of controlling precedent, I turn to court adopted common law principals of agency for guidance.

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 consent to act, an agency relationship requires the right of the principal to control the means and details of the acts that the agent performs on behalf of the principal. *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.*

⁹ Parenthetically, it would be unlikely that a theory of contract or joint venture could be applied in circumstances where there is no written agreement between the parties, there is no evidence of joint effort in providing exhibitions, and only Perry was responsible to the Fair for the obligations set forth in the written agreement between Perry and the Fair Authority.

Even absent control, 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). Whether an act is within an agent's authority depends upon facts such as whether the agent was authorized, or apparently authorized, and whether the agent's actions arose from the agency relationship. Rest. 3d, 3.04. 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). The vicarious liability implicit in an agency relationship attaches to the corporate entity, and not officers or directors. *Meyer v. Holley*, supra.

In determining whether an agency relationship exists, courts have looked at factors such as compensation to the agent from the principal; whether agent is designated in writing; whether 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; 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).

In the instant matter, there is little dispute that but for Perry's invitation, Terranova and the elephants would not have exhibited at the Iowa State Fair in August, 2008. The Agreement between the Perry Respondents and the Fair does not require the provision of elephant rides, although I fully credit Mr. Perry's testimony that the presence of the elephants was sanctioned by Fair officials. PX-3; Tr. at 1708. There is no evidence that Terranova entered into a contract with the Fair regarding the elephants, and the record establishes that Terranova verbally agreed to bring elephants to the Fair to provide rides in tandem with Perry's Petting Zoo exhibition. *Id.* Therefore, at least superficially, Terranova's presence at the Fair was as Perry's agent.

Additional indicia of an agency relationship between Perry and Terranova lies in the fact that Terranova provided the camels that the agreement with the Fair required, PX-3, at paragraph A; Tr. at 1730-1731. The camels belonged to Terranova, but Perry provided the camel ride platform. Tr. at 1730. Mr. Terranova brought two zebu to the Fair that Mr. Perry used in his petting zoo. The elephants were housed on the grounds within the space provided by the Fair under the Agreement. *Id.*, Tr. at 1721-1722; CX-35.

In addition, the individuals working the elephant rides, including Mr. Terranova, wore tee shirts with the logo “Perry’s Exotic Petting Zoo” when they were working, at Mr. Perry’s request. Tr. 1710-1711; CX-35 at p. 92. Customers for camel rides, elephant rides, and the petting zoo bought tickets at the same ticket booth, which was manned by a volunteer for the Perry Respondents. Tr. 1714; CX-35.

On the other hand, Perry had no contractual obligation to the Fair to provide elephants. See, CX-33; PX-3. He extended an invitation to Mr. Terranova to bring elephants, but had no written agreement with Terranova. Tr. at 1708. If Terranova had declined to bring the elephants, Mr. Perry would have satisfied his contractual duties. Terranova did not believe that it was indemnified by Perry for Terranova’s activities at the Fair because Terranova secured its own insurance, naming Perry as an additional insured, in consideration of Perry’s invitation for Terranova to exhibit at the Fair. CX-30.

There is no evidence that Perry exercised control over Terranova to a degree anticipated by an agency relationship. There is no evidence that Perry shared the fee paid by the Fair with Terranova. Tr. at 1827. The income from the parties’ activities at the Fair was segregated; each amusement was identified by a different color ticket, and Terranova was paid only for the receipts from the sale of tickets for camel and elephant rides. Tr. at 1828. After figuring the Fair’s take of the gate, each party then received the net from the sale of tickets for the amusements each party operated. Tr. at 1825- 1830. Mr. Perry was uncertain whether he provided Terranova and his employees with

wristbands¹⁰ to enter the fairgrounds or with a parking permit, but he did not believe so. Tr. at 1820-1822. Mr. Terranova credibly testified that he acquired his own parking permits and wrist bands directly from a representative of the Fair. Tr. at 2664. Mr. Perry did not pay Terranova's employees, and he had no control over them. Tr. at 1731-1732. Perry's employees and volunteers were restricted from entering the elephant area for purposes of their safety. Tr. at 1742. Mr. Terranova's employees did not work for Mr. Perry in any manner. Tr. at 1795-1796.

Other than agreeing to arrange for the appearance of the elephants and camels, Perry did not in any other manner take responsibility with Fair officials for their presence and well-being. Tr. at 1732; 1811-1812. Perry had sold the camels to the Terranova Respondents and loaned his camel platform to Mr. Terranova for convenience sake. Tr. at 1731-1732. The Perry Respondents' lack of control over how Terranova exhibited the elephants and camels, and how their housing and other facilities were maintained is the most significant factor demonstrating the lack of an agency relationship. Although Mr. Perry assumed control over Terranova's zebu used in his exhibit, there is insufficient evidence regarding that arrangement to infer an agency relationship on that basis. It is clear that the only violations regarding care and handling of animals leveled against Perry involve Terranova's elephants. See, amended Complaint.

For the foregoing reasons, I conclude that Terranova's activities at the Fair were conducted without Perry's control or consent. Even though the elephants were at the Fair at Perry's invitation, their care was not within the scope of Perry's control. Had Mr.

¹⁰ Under Agreement with the Fair, Perry was promised eight wristbands and three parking spaces for campers. PX 3 at B.7 and B. 8.

Perry anticipated that he would be charged with violations pertaining to the elephants, he could have directed Terranova's activities so as to avoid being cited. It is clear that Perry had never intended to make Terranova his agent in fact.

The lack of the Perry Respondents' control over Terranova's activities is further evidenced by Perry's lack of "paperwork" regarding the legal or medical status of the elephants. Tr. at 1811-1812. I note that as agent, Terranova would have had the fiduciary duty to provide all required documentation to Fair officials regarding the health and welfare of the elephants, pursuant to Perry's agreement with the Fair, which required him to comply with federal permit and licensing requirements. PX-3 at C. However, the record is devoid of any evidence reflecting that Perry directed Terranova to provide documentation to Fair officials, or otherwise directed Terranova's actions with respect to licensing requirements for the elephants. I therefore find that Terranova acted on his own behalf when he provided the Fair with paperwork regarding the elephants.

The record establishes that Perry and Terranova exhibited at the Fair for a limited time on a single occasion. There is no evidence that they filed joint tax returns, or reported each other's income from the Fair as taxable income. Pursuant to Perry's agreement with the Fair, Perry alone was paid compensation for his services at the Fair. CX-33; PX-3. Although Terranova's employees wore tee shirts with Perry's logo, Perry had agreed to provide a "clean, courteous staff" (PX-3; CX-33), and considering the lack of laundry facilities at the Fair (Tr. at 332), it was not unreasonable for Mr. Perry to ask for a measure of uniformity to achieve that goal.

Perry testified that he complained to APHIS inspectors about being cited for violations concerning Terranova's elephants. Tr. at 1774. I fully credit Mr. Perry's

testimony that inspector Boothe advised him to request information under FOIA from APHIS officials, and accept that the handwritten notes in evidence represent the notes he made contemporaneously to his meeting with inspectors Mike Boothe and Dave Watson in September, 2008. Tr. at 1773-1778. Inspector Boothe 's testimony reflected an appalling failure to recollect anything about a meeting of several hours of duration involving an inspection that he was personally involved in. Mr. Boothe lacked any recall about anything that had not been committed to writing, although he reluctantly admitted that he may have discussed the events at the Iowa Fair, and may have given advice to Mr. Perry about requesting information from USDA. Tr. at 1945-1952. He could not recall the reason for visiting Mr. Perry at his home the month after the Fair inspection, though he conceded that he may have gone with Mr. Watson to get an affidavit from Mr. Perry about the Fair. Id. I find that Mr. Boothe's testimony on the whole was unaccountably vague and unreliable, considering the length of the meeting and the unusual circumstances involved in the Fair inspection¹¹. Mr. Walker's testimony is similarly unreliable. I accord substantial weight to Mr. Perry's contemporaneously made notes. PX-8.

The preponderance of the evidence establishes that Terranova's appearance at the Fair at Perry's invitation did not constitute a principal-agent relationship as contemplated by the AWA. Complainant's attempts to broaden the specific language of the Act to implicate exhibitors for each other's activities is not warranted in this case, and the Perry

¹¹Although witnesses are not in agreement regarding how long they met in Mr. Perry's home, the consensus is that the meeting exceeded an hour.

Respondents are not liable for the activities of the Terranova Respondents, which are the subject of the violations charged in the inspection report of August 13, 2008 (CX-41).

2. Is Mr. Perry personally liable for the acts performed on behalf of the corporation PWR?

As sole corporate officer, and sole employee of PWR, it is difficult for Mr. Perry to distance himself from acts of PWR. All acts of the corporate entity in these circumstances arose out of decisions made by Mr. Perry. 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. Perry may be held personally liable for acts he performed on behalf of PWR. 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. Sanctions

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). In assessing penalties, the Secretary must give due consideration to the size of the business, the gravity of the violation, the person's good faith and history of previous violations. *In re Lee Roach and Pool Laboratories** 51 Agric. Dec. 252 (1992).

The sole violation of the Act by the Perry Respondents that is supported by the preponderance of evidence is his failure on one occasion to allow access to his facility to inspectors. Most of the charges against the Perry Respondents involve actions pertaining

to the Terranova Respondents at the Fair in 2008. I credit Mr. Perry's testimony that he has not been inspected while exhibiting at the Iowa State Fair since 2008, and that other inspections at his facility disclosed no violations. I also credit Mr. Perry's testimony that he contacted inspectors to advise that he was at his facility after he returned from the hospital, as I find that consistent with his testimony that he repeatedly asked inspectors for the results of the Fair inspection. I find no evidence of a pattern of refusal to allow inspections, and I find no evidence of willfulness in the one violation that occurred on December 15, 2009. As the incident that led to Mr. Perry's absence is unlikely to recur, sanctions would not reasonably provide a deterrent effect.

F. Loss of Business Due to Confiscation

The Perry Respondents have expressed concern and frustration in the manner that USDA confiscated the Key Respondents' tiger cub. The cub was taken at approximately 6:00 p.m. on the closing night of the Fair, which traditionally was a busy and profitable night. The presence of a large number of security personnel and police resulted in the forced closing of the petting zoo, which could not be re-opened before closing time for the Fair.

Although I sympathize with Respondents' contentions and speculate as to the necessity of the time, place and manner of the confiscation, I nevertheless have no authority to determine whether USDA's actions were inappropriate. Neither the Administrative Procedures Act, 5 U.S.C. part 551 et seq. nor the AWA invest me with authority to determine losses caused by government action and order reimbursement. I note that the confiscation was not a routine inspection, and therefore, USDA was not bound by its policies regarding time and manner of inspections.

G. Findings of Fact

1. Craig A. Perry is an individual whose business address is located in, Center Point, Iowa 52213.
2. Perry's Wilderness Ranch & Zoo, Inc.(PWR) is an Iowa corporation that has AWA license No. 42-C-0101 beginning in 2002.
3. Craig A. Perry did not hold an AWA license in his name at any time relevant to the instant adjudication, although he had held licenses in his name in the past.
4. PWR exhibits under the name of "Perry's Exotic Petting Zoo".
5. On December 21, 2007, Craig Perry, on behalf of PWR, entered into an agreement with the Iowa State Fair Authority to provide an exotic petting zoo, camel rides, pony rides and photographs to the Iowa State Fair in 2008.
6. Perry entered into a verbal agreement with the Terranova Respondents to provide camel and elephant rides, and two zebu at the Iowa State Fair in August 2008.
7. Perry provided a platform for the camel rides for Mr. Terranova's use.
8. Mr. Terranova brought two zebu to the Fair for the petting zoo exhibit.
9. The Perry and Terranova exhibitions were located in close proximity at the Fair.
10. All individuals working at the Fair for Mr. Perry and Mr. Terranova wore shirts with Perry's logo at Mr. Perry's request.
11. Inspection of the elephants and their facilities resulted in alleged violations of the AWA that were charged to both the Perry and Terranova Respondents

12. On December 15, 1009, no one was at the Perry Respondents' home facility to allow access to an APHIS inspector.

H. Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. In his capacity as corporate officer and director of PWR, Craig Perry operated as an exhibitor as that term is defined by the Act and regulations.
3. Pursuant to 7 U.S.C. § 2139, Craig Perry'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, Craig Perry did not need a separate license under the AWA.
5. Although Terranova exhibited elephants and camels at the Fair upon the Perry Respondents' invitation, and brought zebu for Perry's use, no agency relationship existed as the result of the exhibition.
6. The following violations that were brought against the Perry Respondents and that arose out of association with Terranova at the Fair are dismissed:
 - a. Violations of 9 C.F.R. 2.40(b)(2), alleging failure to establish and maintain adequate veterinarian care
 - b. 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.
 - c. Violations of 9 C.F.R. 3.125(a) and (c), alleging failure to provide safe facilities for animals and feed.
 - d. Violations of 9 C.F.R. 3.127(a), alleging failure to provide shade

7. On December 15, 2009, the Perry 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).
8. There is no evidence of a pattern of violations, or that failure to allow access to facilities to an inspector was willful.
9. No sanction need be imposed for the sole technical violation of the Act to promote the Act's remedial purposes.
10. An Order instructing Respondents to cease and desist conduct that violates the Act and regulations is appropriate.

ORDER

1. The Perry 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. This Decision and Order shall become effective and final 35 days from its service upon Respondent 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