

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

FILED

In re:)	AWA Docket No. 09-0200
)	
WILBUR D. DAVENPORT; MAXIMUS)	
"TONS OF FUN" LLC, a Texas limited)	
liability company.)	
)	
Respondents.)	COMPLAINT

There is reason to believe that the respondents named herein have willfully violated the Animal Welfare Act, as amended (7 U.S.C. § 2131 et seq.) (the "Act" or "AWA"), and the regulations issued pursuant thereto (9 C.F.R. § 1.1 et seq.) (the "Regulations"). Therefore, the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), issues this complaint alleging the following:

JURISDICTIONAL ALLEGATIONS AND
ALLEGATIONS REGARDING THE SIZE OF RESPONDENTS' BUSINESSES.
THE GRAVITY OF THE ALLEGED VIOLATIONS, AND
RESPONDENTS' GOOD FAITH AND COMPLIANCE HISTORY

1. Respondent Maximus "Tons of Fun" LLC ("MTF"), is a Texas limited liability company (Number 800785967), whose registered agent for service of process is Judy Jacobs. The business address of the registered agent and the registered office address of respondent MTF is 704 S. Weaver Street, Gainesville, Texas 76246. On August 7, 2009, the Texas Secretary of State ordered the corporate charter of respondent MTF forfeited for failure to file a franchise tax return and/or to pay state franchise tax. At all times mentioned herein, respondent MTF was operating as an exhibitor, as that term is defined in the Act and the Regulations, and held Animal Welfare Act license number 74-C-0762.

2. Respondent Wilbur Davenport ("Davenport") is an individual whose mailing address is 106 Paducah, Livingston, Texas 77351. Said respondent is the "governing person" and sole

manager of respondent MTF. On its 2007, 2008, and 2009 license renewal applications submitted to the complainant, respondent MTF identified respondent Davenport as the only person "authorized to conduct business" for respondent MTF. At all times mentioned herein, respondent Davenport was (1) operating as an exhibitor, as that term is defined in the Act and the Regulations, and/or (2) acting for or employed by an exhibitor or exhibitors (including without limitation respondent MTF), and his acts, omissions or failures within the scope of his employment or office are, pursuant to section 2139 of the Act (7 U.S.C. § 2139), deemed to be his own acts, omissions, or failures, as well as the acts, omissions, or failures of respondent MTF.

3. Respondents MTF and Davenport operate a moderately-sized animal exhibition business, exhibiting, and leasing for exhibition, three female elephants: Jewel, Tina, and Boo (also known as "Queenie").

4. The gravity of the violations alleged in this complaint is great. They include repeated instances in which respondents failed to handle the elephants as carefully as possible, failed during exhibition to ensure the safety of the animals and the public, failed to provide minimally-adequate veterinary care to the elephants, and failed to adequately feed the elephants, to the extent that, by July 2009, one of the elephants (Jewel) was in serious physical condition and was suffering to the extent that required confiscation of the animal by complainant on August 15, 2009.

5. Respondents have not shown good faith. They have repeatedly demonstrated an unwillingness to comply with the Act and the Regulations and Standards, after having been advised of deficiencies. In August 2007, respondents were advised by a veterinary consultant with expertise in elephants to have the elephants weighed to monitor the animals' health and well-being. Nevertheless, respondents repeatedly failed to do so during 2008 and 2009. On or about June 7,

2009, respondent Davenport announced to an APHIS inspector that he "was not going to weigh them anymore." On June 22, 2009, APHIS advised respondents in writing that respondents' continuing to transport the elephants for use in respondents' circus act and respondents' elephant ride concession against the recommendation of a qualified veterinarian would constitute a violation of the Regulations.

6. On August 13, 2009, after conducting an inspection of respondents' facility and elephants, complainant notified respondents that it intended to confiscate Jewel, pursuant to section 16 of the Act (7 U.S.C. § 2146) and section 2.129 of the Regulations (9 C.F.R. § 2.129). Upon respondents' failure to correct the conditions and alleviate the animal's suffering and distress, APHIS served a notice of confiscation on respondents on August 15, 2009, and on August 20, 2009, APHIS ultimately took possession of Jewel along with another elephant (Tina) that respondent Wilbur Davenport voluntarily relinquished Tina to the U.S. Department of Agriculture, as part of a settlement of a pending U.S. Fish & Wildlife proceeding against him.

ALLEGED VIOLATIONS

A. Licensing

1. On August 11, 2009, August 13, 2009, August 15, 2009, and August 20, 2009, respondent MTF, through its principal and agent, respondent Davenport, repeatedly interfered with, threatened, abused, and harassed APHIS officials in the course of carrying out their duties, in willful violation of section 2.4 of the Regulations (9 C.F.R. § 2.4).

2. On August 15, 2009, respondent MTF, through its agents, interfered with, threatened, abused, and harassed APHIS officials in the course of carrying out their duties, and specifically, said respondent, having been notified that APHIS had confiscated Jewel, interfered with APHIS's ability

to remove Jewel from respondents' facility in a manner designed to ensure the safety of the elephant, USDA officials, and the general public, in willful violation of section 2.4 of the Regulations (9 C.F.R. § 2.4).

3. On August 20, 2009, respondent MTF, through its agents, interfered with, threatened, abused, and harassed APHIS officials in the course of carrying out their duties, and specifically, said respondent attempted to block APHIS from entering respondents' facility to remove Jewel, in willful violation of section 2.4 of the Regulations (9 C.F.R. § 2.4).

B. Veterinary Care

1. On March 17, 2008, at Phoenix Marketplace, Phoenix, Arizona, APHIS officials inspected respondents' records and determined that respondents had failed to have their attending veterinarian provide adequate veterinary care to respondents' animals, failed to ensure that their attending veterinarian had appropriate authority to provide adequate veterinary care to respondents' animals, and failed to maintain a program of adequate veterinary care that included the use of appropriate methods to prevent and diagnose disease; and specifically (1) although respondents' written program of veterinary care ("PVC") provides that fecal examinations will be taken of three elephants (Jewel, Tina, and Boo) at least every three to four months, none had been taken for Jewel and Tina for over seven months, or for Boo for over five months; (2) although respondents' PVC provides that the three elephants will be vaccinated annually for clostridium, tetanus and West Nile virus, and every three years for rabies, respondents had no records indicating that such vaccinations had been given, in willful violation of sections 2.40(a), 2.40(a)(2), and 2.40(b)(2) of the Regulations (9 C.F.R. §§ 2.40(a), 2.40(a)(2), 2.40(b)(2)).

2. On April 9, 2008, in Los Angeles, California, APHIS officials inspected respondents'

records and determined that respondents had failed to have their attending veterinarian provide adequate veterinary care to respondents' animals, had failed to ensure that their attending veterinarian had appropriate authority to provide adequate veterinary care to respondents' animals, and had failed to maintain a program of adequate veterinary care that included the use of appropriate methods to prevent and diagnose disease; and specifically, although respondents' PVC provided that Jewel, Tina and Boo would be vaccinated annually for clostridium, tetanus and West Nile virus, and every three years for rabies, respondents had no records indicating that such vaccinations had been given, in willful violation of sections 2.40(a), 2.40(a)(2), and 2.40(b)(2) of the Regulations (9 C.F.R. §§ 2.40(a), 2.40(a)(2), 2.40(b)(2)).

3. On November 22, 2008, at Shea Stadium, Queens, New York, respondents had failed to maintain a program of adequate veterinary care that included the use of appropriate methods to prevent and diagnose disease; and specifically, although Jewel and Tina had documented weight loss, respondents had failed to have them weighed, and continued to exhibit them as part of respondents' animal act and elephant ride concession, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

4. On April 4, 2009, at Shrinr Circus, Greenville, South Carolina, respondents had failed to maintain a program of adequate veterinary care that included the use of appropriate methods to prevent and diagnose disease; and specifically, although two of the elephants in respondents' custody (Jewel and Tina) had documented, chronic, and visible weight loss, respondents had failed to have the elephants weighed and failed to have their attending veterinarian (or any other qualified veterinarian) examine the elephants, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

5. On June 7, 2009, at Shriner's Circus, Love's Park, Illinois, respondents had failed to maintain a program of adequate veterinary care that included the use of appropriate methods to prevent and diagnose disease; and specifically, although two of the elephants in respondents' custody (Jewel and Tina) had documented, chronic, and visible weight loss, respondents had failed to have the elephants weighed and failed to have their attending veterinarian (or any other qualified veterinarian) examine the elephants, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

6. From July 10, 2009, through August 13, 2009, at Livingston, Texas, respondents failed to provide adequate veterinary care to the animals in their custody, and failed to maintain a program of adequate veterinary care that included the use of appropriate methods to control and treat disease; and specifically, although Jewel had been diagnosed as having overgrown lower molars that prevented her from properly masticating food, and respondents were advised to have Jewel's dental problems corrected at the earliest opportunity, respondents failed and refused to follow that recommendation, and on August 11, 2009, respondent Davenport informed APHIS officials that he did not intend to have any dental procedure performed on Jewel, to correct her diagnosed dental problem, in willful violation of sections 2.40(a) and 2.40(b)(2) of the Regulations (9 C.F.R. §§ 2.40(a), 2.40(b)(2)).

7. On August 11, 2009, at Livingston, Texas, APHIS officials inspected respondents' animals and records, determined that respondents had failed to maintain a program of adequate veterinary care that included the use of appropriate methods to prevent and diagnose disease and a mechanism of direct and frequent communication with respondents' veterinarian, and specifically, although respondents had been advised by their veterinary consultant to provide him with both

results of blood tests, and the current weights of the three animals (Jewel, Tina and Boo), respondents had failed to provide both blood test results and weights, in willful violation of sections 2.40(b)(2) and 2.40(b)(3) of the Regulations (9 C.F.R. §§ 2.40(b)(2), 2.40(b)(3)).

C. Access

1. On August 15, 2009, respondents failed and refused to allow APHIS officials to enter their place of business, during normal business hours, and specifically, respondents blocked the entrance of their facility and refused to provide APHIS with access to respondents' animals and facilities, in willful violation of section 2146(a) of the Act (7 U.S.C. § 2146(a)) and section 2.126 of the Regulations (9 C.F.R. § 2.126).

2. On August 20, 2009, respondents failed and refused to allow APHIS officials to enter their place of business, during normal business hours, and specifically, respondents blocked the entrance of their facility and refused to allow APHIS officials to enter the premises to remove Jewel for several hours, in willful violation of section 2146(a) of the Act (7 U.S.C. § 2146(a)) and section 2.126 of the Regulations (9 C.F.R. § 2.126).

D. Handling

1. On March 17, 2008, at Phoenix Marketplace, Phoenix, Arizona, respondents, during public exhibition, failed to handle animals (Jewel, Tina and Boo) so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, in willful violation of section 2.131(c)(1) of the Regulations (9 C.F.R. § 2.131(c)(1)).

2. On March 7, 2009, at Indiana Coliseum, Indianapolis, Indiana, respondents failed to handle elephants (Jewel, Tina and Boo) as carefully as possible in a manner that does not cause

behavioral stress, physical harm, or unnecessary discomfort, and specifically, respondents offered elephant rides to the public using three adult elephants in a small, enclosed area (one of the three circus rings) wherein one of the elephants (Boo) fell injuring her left front leg and causing the platform that respondents used to load customers onto elephants to collapse, injuring approximately thirteen people, in willful violation of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)).

3. On March 7, 2009, at Indiana Coliseum, Indianapolis, Indiana, respondents, during public exhibition, failed to handle animals (Jewel, Tina and Boo) so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, in willful violation of section 2.131(c)(1) of the Regulations (9 C.F.R. § 2.131(c)(1)).

4. On April 4, 2009, at Shrine Circus, Greenville, South Carolina, respondents failed to handle two elephants (Jewel and Boo) as carefully as possible in a manner that does not cause behavioral stress, physical harm, or unnecessary discomfort, and specifically, respondents, while offering elephant rides to the public using one elephant (Tina), left two other elephants unattended in an outdoor area that would permit access to the animals by any passerby, in willful violation of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)).

D. Failure to Comply With Standards

1. On November 22, 2008, at Shea Stadium, Queens, New York, respondents willfully violated section 2.100(a) of the Regulations by failing to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals (9 C.F.R. §§ 3.125-3.142), as follows:

a. Respondents failed to store supplies of food in a manner that adequately protected them from deterioration, and specifically, allowed condensation to drip into food containers (9 C.F.R. § 3.125(c)).

b. Respondents failed to ensure that housing facilities for animals were sufficiently regulated by heating to protect three elephants from extreme temperatures, and respondents allowed ambient temperatures to fall below temperatures compatible with the health and comfort of the elephants (9 C.F.R. § 3.126(a)).


c. Respondents failed to keep premises clean, and specifically, the lighting fixture in respondents' food storage area was mildewed and bore accumulated dirt (9 C.F.R. § 3.131(c)).

2. On August 11, 2008, and August 15, 2009, at Livingston, Texas, respondents willfully violated section 2.100(a) of the Regulations by failing to meet the Standards (9 C.F.R. §§ 3.125-3.142), and specifically, respondents failed to provide to elephants food of sufficient quantity and nutritive value, and appropriate for the animals' age, species, condition, size and type, and ability to masticate (9 C.F.R. § 3.129(a)).

WHEREFORE, it is hereby ordered that for the purpose of determining whether the respondents have in fact willfully violated the Act and the regulations issued under the Act, this complaint shall be served upon the respondents. The respondents shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 et seq.). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

The Animal and Plant Health Inspection Service requests that unless the respondents fail to file an answer within the time allowed therefor, or file an answer admitting all the material allegations of this complaint, this proceeding be set for expedited oral hearing in conformity with the Rules of Practice governing proceedings under the Act; and that such order or orders be issued as are authorized by the Act and warranted under the circumstances, including an order that respondents cease and desist from violating the Act and the regulations and standards issued thereunder; assessing civil penalties against respondents in accordance with section 19 of the Act (7 U.S.C. § 2149), and revoking AWA license 74-C-0762.

Done at Washington, D.C.
this 25th day of September 2009


Acting Administrator
Animal and Plant Health Inspection Service

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