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*PRACTICE WITHIN THE DISTRICT OF COLUMBIA
 IS LIMITED TO MATTERS AND PROCEDURES
 BEFORE FEDERAL COURTS AND AGENCIES

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February 15, 2011

VIA ELECTRONIC MAIL

Kenneth H. Vail
 Assistant General Counsel
 Marketing Division
 Office of the General Counsel
 U.S. Department of Agriculture
 Washington, D.C. 20250-1400

Re: Feld Entertainment, Inc., License No. 52-C-0137

Dear Mr. Vail:

We are constrained to reply to your letter of January 14, 2011, which was in response to Feld Entertainment, Inc.'s (Feld) appeal of the reports of the inspection conducted by the Animal and Plant Health Inspection Service (APHIS) on November 18, 2010, in Chicago, Illinois. We respectfully disagree with the content of your letter and by copy of this letter to the Deputy Administrator we renew our objections to and our appeal of the November 18, 2010 Inspection Report.

As a threshold matter, we recognize that APHIS normally does not represent and is not responsible for the actions of local Chicago officials. We also acknowledge that it is within APHIS' authority under the Animal Welfare Act (AWA) to cooperate with state or local agencies. Nevertheless, we question the appropriateness and fairness of the obviously well planned and closely coordinated events with those Chicago officials and certain APHIS personnel. Given the totality of the circumstances, what took place in this instance was inappropriate, and consequently, undermined the credibility and impartiality of APHIS matters within AWA jurisdiction. Having deliberately decided to act in concert with the local Chicago officials, APHIS does bear responsibility for its own role and participation in such conduct. As a matter of appropriate management, APHIS should take care to ensure that its investigations are not tainted by matters and individuals which undermine the agency's equal administration of law. The matters and individuals that call the agency's objectivity into question include, among other things, the presence of an animal rights activist who is an outspoken critic of circuses - whose presence APHIS surely knew would be objectionable to Feld - and the fact that USDA personnel had previously met earlier in the week with local political official(s) in Chicago who have been active participants and proponents of legislative initiatives to restrict the presence of elephants in circuses. Given all this, Feld

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continues to assert that it was inappropriate for APHIS to coordinate its inspection with the questionable actions of the local Chicago officials.

Regarding the alleged non-compliance with § 2.126 (a), we dispute the validity of this finding as both factually incorrect and contrary to the agency's regulations.¹ The January 14 letter asserts an interpretation of 9 C.F.R. § 1.1 that was rejected during the regulation's promulgation. As such, this interpretation and its implementation during the November 18, 2010 inspection "exceeded APHIS [Animal Care's] statutory and regulatory authority," as described in our December 31, 2010, letter. "Business hours," for the purposes of 9 C.F.R. Parts 1 and 2, was developed because of the 1985 amendments to the Animal Welfare Act, 7 U.S.C. § 2131, *et seq.* The first proposed definition of "business hours" was published at 52 FED. REG. 10,292 (Mar. 31, 1987), and would have set that as "the hours between 7 a.m. and 7 p.m., Monday through Friday, except for legal Federal holidays, each week of the year." 52 FED. REG. at 10,295, col. 3. That proposal was never finalized. A revised set of definitions was proposed under a different docket two years later. *See* Animal Welfare – Definition of Terms, Docket No. 88-013, 54 FED. REG. 10,822 (Mar. 15, 1989) (proposed rule). That proposal contained a significant discussion of what constitutes "business hours" for the purpose of implementing the Secretary's authority "at all reasonable times, to conduct . . . inspections." 7 U.S.C. § 2146(a). The definition of "business hours" was finalized as proposed at 54 FED. REG. 36,112, 36,120, col. 2 (Aug. 31, 1989).

As documented in the preamble to the proposed rule, nearly 400 comments were received on the definition of business hours. Various definitions were offered by stakeholders. The preamble reads, in pertinent part:

We [USDA] agree that some clarification of the definition is necessary to make clear our intent that *for some reasonable time during the hours from 7 a.m. and 7 p.m. daily*, every facility must make its animal housing facility(ies), animal use areas, and records available for APHIS inspection without an appointment or schedule inspection being required. *The facility would not have to be open during all hours between 7 a.m. and 7 p.m.*, and could be open fewer than 8 hours. For example, if a facility is open from noon until 7 p.m., it must be available for inspection at all times during those hours.

Accordingly, the definition of "business hours" is revised to be "a reasonable number of hours between 7 a.m. and 7 p.m., Monday through Friday, except for statutory Federal holidays, each week of the year; during which inspections by APHIS may be made."

¹ We must respectfully, but firmly, disagree with the APHIS investigation team's reporting that the inspection was not attempted before 7:00 a.m. Indeed, the City of Chicago veterinarian has reported in writing an "arrival time: 6:35 am congregation." You are also referred to footnote 5 in our December 31, 2010 letter noting that no voice mail message was left for our (b) (6)

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54 FED. REG. at 10,825, col. 2 (emphasis supplied). The assertions of APHIS inspectional authorities that "all" hours are business hours was *explicitly rejected* in the administrative record of the rulemaking, and the implementation of the rule by initiating an investigation even before 7:00 a.m. is, at best, regulatory overreach. In promulgating the regulation, the agency clearly discussed and accepted that not all regulated entities would have business hours at 7:00 a.m. We respectfully submit that the November 18 inspection was therefore not "within the agency's statutory authority, consistent with the regulations, and reasonable," as asserted in the January 14 letter.²

The U.S. Department of Agriculture (USDA) is well acquainted with how to treat actual business hours for the purpose of carrying out its various inspectional mandates. For inspected establishments under the jurisdiction of the Food Safety and Inspection Service (FSIS), the inspected establishment must advise FSIS of when actual business hours occur to facilitate inspection. Feld does not object to and, in fact, welcomes, unannounced inspections. However, in light of historical events and the FSIS approach of establishing business hours, we respectfully submit that on a forwardgoing basis, the hours of 8:00 a.m. to 5:00 p.m. would be appropriate given the nature of Feld's business. USDA will then be able to inspect my client on an unannounced basis within those hours. This is not to suggest that there could never be circumstances under which an inspection may occur outside those hours, but only to establish parameters for determining compliance with § 2.126 (a) in the absence of exigent circumstances. No such circumstances were present in Chicago.

With respect to the Inspection Report's description of alleged non-compliance with § 2.40 (b)(2), we must reassert our objection to and appeal of the same as unsupported by the regulations. We disagree with your characterization of the non-compliance as the inspection report indicated otherwise. While APHIS Veterinary Medical Officer Dr. Tracy Thompson's assertion during the inspection that if treatment is "not written down then it did not happen," this is not codified in § 2.40 (b)(2). Rather, that section requires that programs of adequate veterinary care be in place that include "the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries . . ." Feld has an established and bona fide program of veterinary care that is overseen by a team of veterinarians who routinely visit the circus units and examine the animals on site³ well within the regulatory mandate of § 2.40 (b)(2). Therefore, Feld should not be held in non-compliance on the basis of what one of APHIS personnel believes the standard should be for medical records, particularly when the USDA itself has not established any standardized requirements for veterinary recordkeeping, and thus, have not provided stakeholders with sufficient notice for compliance.

² The citation to *Lesser v. Espy*, 34 F.3d 1301 (7th Cir. 1994), is inapposite. Feld does not dispute APHIS authority to inspect; rather, Feld appeals only to the doctrine that the "closely regulated industry" exception to the warrant requirement requires that a "statute's inspection program must perform the two basic functions of a warrant: it must advise the owner of the premises that the search is being conducted pursuant to the law and within a properly defined scope; and it must limit the discretion of the inspecting officers." *Lesser*, 34 F.3d at 1306, citing *New York v. Burger* 482 U.S. 691, 702 (1987). Indeed, as the *Lesser* court itself noted "once an individual begins to receive distinctive treatment without apparent justification (such as more inspections than the regular schedule would indicate) oversight such as that provided by the warrant process may be required to assure that the inspected's Fourth Amendment guarantees are met." *Lesser*, 34 F.3d at 1309, citing *Burger*, 482 U.S. at 700-02.

³ As detailed in our December 31, 2010 letter, Feld's veterinary staff explained its diagnostic practices at length with the APHIS personnel, including how the staff determines when and how prescribed medication is dispensed and whether or not a specific diagnostic procedure is necessary.

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Regarding the elephant Sara, at the time of the inspection, the Feld veterinary staff disputed the assertion that she had been diagnosed with "chronic lameness." As previously stated, the difference of opinion among the veterinary staff was with respect to whether or not the animal was lame at all and not, as incorrectly stated in the inspection report, to the cause of lameness. Indeed, it was the APHIS inspection team who reached this diagnostic conclusion based on its review of select records while disregarding and marginalizing information that was provided by one of Feld's full-time and board-certified attending veterinarians.

With respect to the alleged non-compliance with § 3.137 (a)(2), we again note that the medical records indicated *when* the abrasion occurred (during transport) and not *how* it occurred. Feld staff informed APHIS personnel during the inspection that the minor abrasion was more likely caused by another elephant. We expect and hope that the APHIS personnel have photographs and video of their visit as they were filming during their inspection. The existence of photographs, however, is immaterial; the issue here is that when Feld management asked APHIS personnel to identify the alleged protrusion so Feld could immediately make any necessary repairs (despite the January 1 deadline to do so), *the inspection team declined to do so. There is no excuse for agency personnel, who are purportedly charged with the oversight of animal welfare, to refuse this request. Feld has received information that the inspection team remained in Chicago overnight, and in fact, had ample time to assist Feld in identifying how to correct the purported non-compliance.* This refusal by APHIS inspectional personnel to clearly identify a potentially violative condition is arbitrary, capricious, and hardly in keeping with the animals' best interest. Your letter is the first time we have been made aware of the photographs that relate to this alleged non-compliance, and we respectfully request a copy of the same because Feld, after careful examination, was unable to find any such protrusions.

Finally, with regard to the fourth point of the January 14 letter, Feld does not dispute that the Secretary has the statutory authority to conduct unannounced inspections with APHIS personnel of its choosing. The citation to the Secretary's authority in such matters, however, misapprehends Feld's point described in the December 31 appeal letter, *i.e.*, that given the more than decade-long APHIS policy of recognizing that Feld and its personnel have a right to counsel when being interviewed or interrogated by APHIS investigators, this policy should not have been unilaterally abandoned by APHIS in Chicago without notice to Feld. There have been no changes in circumstances on Feld's part that would justify APHIS abandonment of this well-grounded policy in Chicago. With all due respect, APHIS personnel in Chicago repeatedly represented that its activities on November 18 were only an "inspection." Since Feld's appeal, however, USDA appears to be claiming retroactively that Chicago was, and remains, an investigation. We also respectfully, but forcefully insist that Feld be advised when investigators seek access to Feld property, venues, facilities, and personnel, and that APHIS investigators identify themselves, so that this right to counsel may be effectively exercised.

Feld is also aware of a pending request by Investigator _____ to interview or interrogate several Feld personnel who have previously and repeatedly been interviewed by APHIS inspectors. A broad document request has also been made. Those requests are being reviewed and Feld will respond shortly. Communications regarding those requests should be handled through counsel.

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Thank you for your attention to these matters.

Sincerely,

(b) (6)

David L. Durkin
Counsel to Feld Entertainment, Inc.

DLD: lav

cc: Chester A. Gipson, D.V.M. (via electronic mail)
Gregory Parham, D.V.M. (via electronic mail)
Elizabeth J. Goldentyre, D.V.M. (via electronic mail)
Andrea Morgan, D.V.M. (via electronic mail)
Robert Gibbens, D.V.M. (via electronic mail)



United States
Department of
Agriculture

Office of the
General
Counsel

Washington,
D.C.
20250-1400

January 14, 2011

David L. Durkin
Olsson Frank Weeda Terman Bode Matz PC
1400 16th Street, N.W., Suite 400
Washington, D.C. 20036

Re: Feld Entertainment, Inc. (License No. 52-C-0137)

Dear Mr. Durkin:

I write in response to your December 31, 2010, letter on behalf of Feld Entertainment, Inc. ("Feld"), to Dr. Robert Gibbens, Animal and Plant Health Inspection Service (APHIS), to appeal the reports of the inspection conducted by APHIS on November 18, 2010, pursuant to its authority under the Animal Welfare Act (AWA).

First, at the outset, I note that many of Feld's complaints concern the simultaneous inspection conducted by the City of Chicago, Illinois. As I am sure you are aware, the USDA does not represent the City or its personnel, and is not responsible for the City's enforcement of its own laws and ordinances. Please know that the AWA specifically authorizes the Secretary to

"cooperate with the officials of the various States or political subdivisions thereof in carrying out the purposes of this chapter and of any State, local, or municipal legislation or ordinance on the same subject." 7 U.S.C. § 2145(b).¹

As Feld's complaints about the Chicago Police Department and its personnel do not relate to the AWA, and the violations cited by APHIS's inspectors, I do not address them.

Second, regarding Feld's complaint that the November 18, 2010, inspection "exceeded APHIS AC's statutory and regulatory authority," I disagree. The AWA requires the Secretary to "make such investigations or inspections as he deems necessary" to determine whether exhibitors have violated or are violating the AWA or its regulations and standards, and requires exhibitors to give USDA officials access to their premises, animals and records, at all reasonable times, to conduct such inspections. 7 U.S.C. § 2146(a). The regulations promulgated under the AWA require exhibitors, during normal business hours, to allow APHIS officials to enter their place of business, examine records required to be kept, make copies of records, inspect the facilities, property and animals, as necessary to enforce the AWA and the regulations and standards, and document the conditions and areas of noncompliance. 9 C.F.R. § 2.126(a). The regulations define "business hours" as "a reasonable number of hours between 7 a.m. and 7 p.m." 9 C.F.R. § 1.1. Feld is an

¹To that end, APHIS has routinely conducted inspections in conjunction with, and accompanied by, State and local officials.

exhibitor under the AWA, and therefore is required to permit inspection during business hours. Although Feld contends that APHIS first attempted to inspect at 6:30 a.m., APHIS's personnel report that they did not attempt to inspect before 7:00 a.m. What appears to be undisputed, however, is that no inspection was allowed to commence until well after 7 a.m.²

Third, regarding Feld's Fourth Amendment claims that the November 18, 2010, inspection was a "pre-dawn raid" and "a Constitutionally impermissible pretextual administrative search," I disagree both with the factual assertions and the legal assertion. Again, the inspection was within the agency's statutory authority, consistent with the regulations, and reasonable.³ Although Feld's reference to the *Bivens* case is acknowledged, I do not see its relevance to this inspection.

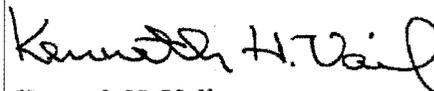
Fourth, I acknowledge Feld's notice that it objects and does not consent to any future unannounced inspection in which an APHIS investigator is present absent Feld's counsel. Please know that the AWA authorizes the Secretary to conduct unannounced investigations and inspections, and it is well settled that it is not up to the exhibitor to determine which APHIS personnel may participate. See *In re Judie Hansen*, 57 Agric. Dec. 1072 (1998), *appeal dismissed sub nom. Hansen v. U.S. Dep't of Agric.*, 221 F.3d 1342 (Table) (8th Cir. 2000).

Fifth, regarding Feld's appeal of the veterinary care citation, it was not, as stated in your letter, based upon "Inadequate Medical Records," but rather, in part, on Feld's own veterinary medical records. According to Feld's records, its veterinarian had previously recommended diagnostics and prescribed analgesics for an elephant, Sara, and Feld did not act on those recommendations (or document any countervailing veterinary recommendations).

Sixth, regarding the primary enclosure citation, photographs reveal the bolts, and Feld's records noted that animals contained in the same enclosure had sustained injuries while housed therein.

In sum, the inspection report will stand as written.

Very truly yours,



Kenneth H. Vail
Assistant General Counsel
Marketing Division

²APHIS conducts three types of AWA inspections: prelicense, attempted, and routine. The November 18, 2010, inspection was a routine inspection.

³Sixteen years ago, the Court of Appeals considered and rejected a similar challenge to the Secretary's authority to conduct such unannounced inspections under the AWA. *Lesser v. Espy*, 34 F.3d 1301 (7th Cir. 1994).

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December 31, 2010

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BY ELECTRONIC MAIL

Robert Gibbens, D.V.M.
 Regional Director
 U.S. Department of Agriculture
 Animal and Plant Health Inspection Service
 Animal Care
 Building B
 Mailstop 3W11
 Fort Collins, CO 80526

Re: Feld Entertainment, Inc. Appeal of November 18, 2010 Chicago "Routine Inspection," and Related Inspection Report issued November 24, 2010 ("Inspection Report")

Dear Dr. Gibbens:

This letter is submitted on behalf of Feld Entertainment, Inc., Customer ID # 7250, to appeal an unprecedented "routine inspection" performed by the newly formed APHIS Animal Care traveling elephant exhibitor inspection team¹ on the Ringling Bros. and Barnum & Bailey Blue Unit in Chicago on November 18, 2010 ("Chicago Inspection"). The bases for this appeal are not only to respectfully submit that certain of the factual descriptions contained in the Inspection Report are erroneous, but also to point out matters that should be addressed immediately by the Animal and Plant Health Inspection Service Animal Care program (APHIS AC) as a matter of good management, uniform and consistent application of both regulation and

¹ APHIS announced the formation of the traveling elephant exhibitor inspection team on September 1, 2010. See http://www.aphis.usda.gov/animal_welfare/downloads/stakeholder/stakeholder_09_01_2010.pdf

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policy, and due process and common decency to which all stakeholders of the United States Department of Agriculture (USDA), including Feld Entertainment, Inc., are entitled.

Specifically, the Chicago Inspection was not "routine," but exceeded APHIS AC's statutory and regulatory authority in regard to application of rule and reasonable accommodation of the stakeholder. As Feld Entertainment has since learned in the aftermath of events, the USDA inspectors arrived at 6:30 a.m., accompanied by a known animal rights activist (b) (6) a Chicago police sergeant, and a three local officials: the Executive Director of the Chicago Commission on Animal Care and Control, the city veterinarian who had performed and approved the city permitting inspection three days prior, and a belligerent attorney from the Chicago Police Department. Feld Entertainment, Inc. now believes that this was no coincidence: this group was coordinated with the full acquiescence, if not cooperation, of the USDA in advance, and it then proceeded literally to awaken people (both Ringling and Chicago United Center employees) who were in various states of rising for the morning, eating breakfast, and beginning to ready themselves for the 8:00 a.m. dayshift with the elephants. This behavior was rapidly followed with at least one threat of arrest by the Chicago personnel, one threat of non-compliance by the USDA for delayed access (which they subsequently cited anyway), and one threat by the Chicago attorney that any videotaping of the inspection by Ringling employees was illegal at the same time that APHIS AC was using still and video cameras. After a break, there was an interrogation of Ringling veterinary staff which included questions, statements, and responses by APHIS AC that to any reasonable observer would indicate a complete lack of respect and trust of the veterinary staff's professional qualifications and judgments. This was the manner in which the Chicago "routine inspection" began at 6:30 a.m. and it did not end until more than ten hours later when APHIS AC departed in the late afternoon.

The crux of the problem with the Chicago Inspection is this: Elephant ownership and exhibition of them is lawful -- yet Ringling employees were treated by Chicago personnel and the USDA traveling elephant exhibit team as if it were criminal. There is no place for such undue bias and political agendas from government employees who wield the broad inspectional powers. With all due respect, the USDA traveling elephant exhibit team attempted to inspect the Blue Unit in Chicago in a manner that was unreasonable, as detailed below, and therefore exceeded their statutory authority. They then cited the Blue Unit approximately a-week later for 3 separate issues that will each be addressed in turn: (1) lack of veterinary care and records; (2) failure to provide access to APHIS during business hours; and (3) injurious protrusions in the primary enclosures.

The citations for inadequate veterinary care and inadequate veterinary records could only be based upon purported enforcement of regulatory requirements that have not been promulgated or policy changes that have not been communicated to the stakeholders most affected. As such, the citations are arbitrary, capricious, and in excess of statutory authority. Moreover, Feld

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Entertainment must respectfully disagree with the erroneous characterizations of factual situations described in the inspection reports. Finally, while we appreciate that the Animal Care Resource Guide, Exhibitor Inspection Guide envisions further discussions with the primary inspectors towards resolution of matters raised in the inspection reports, we must respectfully but candidly inform you that the traveling elephant exhibitors team left but did not provide an inspection report at the end of the inspection. There were no exigent circumstances that warranted this. Instead, Feld Entertainment, Inc. was sent the Inspection Report via e mail nearly a week later on November 24, 2010.² Although the Exhibitor Inspection Guide contemplates that the inspected establishment would have an opportunity to discuss matters in the inspection report, the traveling elephant exhibitor team's demeanor was such that discussions of the matters for which Feld Entertainment was cited were not productive. Indeed, Feld Entertainment personnel repeatedly asked the USDA inspectors during the "exit interview" for guidance as to how to resolve the matters that the inspectors claimed were non-compliances and were rebuffed rather than answered.

Please be advised that Feld Entertainment considers the events of the Chicago Inspection to have been motivated by improper harassment and bias against elephant exhibitors rather than any legitimate enforcement duty or concern for animal welfare. What remains unclear to Feld Entertainment is whether this hostility is harbored by only a select few APHIS AC personnel or whether it accurately represents the views of the agency itself. In any event, Feld Entertainment is prepared to and shall vigorously defend itself. Feld Entertainment reserves the right to refer the information contained in this appeal letter and other supporting materials to the U.S. Department of Agriculture's Office of the Inspector General (USDA OIG) for its investigation and review. Feld Entertainment further reserves the right to supplement or amend this letter as the facts related to the Chicago Inspection continue to be discovered while this submission is made in order to proceed as expeditiously as possible with appeal. We would, of course, welcome the opportunity to meet and discuss this letter and the inspections in questions.

Conduct of the November 18 Inspection

Because of the seriousness of the allegations contained in the November 18, 2010, Inspection Report, and the marked difference between it and the two inspections performed just weeks earlier by the APHIS AC traveling elephant exhibitor inspection team on the Blue Unit in Denver (October 8) and in Cleveland (October 20), counsel for Feld Entertainment immediately began investigating the circumstances related to the inspections. The October 8 Denver inspection report began with the notation "No non-compliant items identified during this

² This raises additional questions regarding whether the coordination efforts between the respective Chicago and USDA inspection personnel continued on after their departures from the Chicago Inspection and, if so, whether it influenced the contents of the Inspection Report.

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inspection.” The October 20 Cleveland inspection report similarly began “No non-compliant items noted this inspection.” The October 8 Denver inspection report also noted that records were collected for evaluation, but no further finding was subsequently issued on those records. Nor was Feld Entertainment subsequently contacted by APHIS about them. The November 18 inspection was focused on precisely the same animals, the same records, and interviews with substantially the same Feld Entertainment personnel as the prior two inspections.

Counsel for Feld Entertainment has interviewed its own personnel involved in or who otherwise witnessed the Chicago Inspection. The recollections of these persons are remarkably consistent as to the conduct and demeanor of the inspection personnel, and provide a picture of federal and local inspectors exceeding their ambit, threatening Feld Entertainment personnel with arrest or charging these personnel with felonies, and exhibiting what was, frankly, unprofessional and disrespectful behavior towards professionals at Feld Entertainment. APHIS AC personnel completely acquiesced to the conduct of Chicago city officials. This incident raises the specter of a Constitutionally impermissible pretextual administrative search and should be closely examined in the Department, either by your office or the Office of the Inspector General, to ensure that such Department officials do not harass or intimidate regulated entities and individuals while purporting to be exercising their official authority.

What this internal review has revealed is disturbing. At approximately 6:40 a.m. on Thursday, November 18, (b) (6) the Blue Unit Elephant (b) (6) was alerted by a security guard of Chicago’s United Center that USDA and local animal control officials were seeking admission to the arena. (b) (6) arrived at a security gate at approximately 6:45 a.m. The security guard at that location indicated that no one had approached him. Apparently, (b) (6) had gone to a different gate. He returned to the tent where the elephants were housed. Before 7:30 a.m. he was again alerted by United Center security to return to a security gate. Arriving there he remembers seeing a large group of people. One individual, who was later identified as (b) (6) (b) (6) Chicago Police Department, did not identify herself but instead demanded (b) (6) identify himself and demanded immediate admission to the elephant tent. (b) (6) responded that he needed to contact his superiors. (b) (6) instructed an accompanying Chicago Police Officer, later identified as (b) (6) to arrest (b) (6) for “denying” the party access to the elephant tent. When (b) (6) attempted to speak to the USDA personnel in the party, whom (b) (6) recognized, as a USDA official (later identified as Tracy Thompson, D.V.M. a Veterinary Medical Officer in the Western Region,) Dr. Thompson stated that “we can’t get involved.”

The joint federal-local inspection team was comprised of the following:

- Denise Sofranko, D.V.M., Veterinary Medical Officer, APHIS AC
- Tami Howard, D.V.M., Animal Welfare Inspector, APHIS AC

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- **b6,b7b6,b7c** Animal Welfare Inspector, APHIS Investigative and Enforcement Services (IES)
- Tracy Thompson, D.V.M., Veterinary Medical Officer, APHIS AC
- **b6,b7cb6,b7c**, Chicago Police Department
- Cherie Travis, Executive Director, Chicago Commission on Animal Care and Control
- [First name unknown] **b6,b7c** D.V.M., Chicago Commission on Animal Care and Control
- **b6,b7c**, Chicago Police Department

Disturbingly an individual with no apparent official position accompanied the party: **(b) (6)** an animal behavioral consultant and animal rights activist.³ **(b) (6)** public activities against Feld Entertainment include her testimony November 4, 2010 at a local public council hearing in Fulton County, Georgia regarding elephants. Her political agenda regarding animals in circuses is no secret, and we respectfully submit, well known within APHIS AC. One Feld Entertainment employee recalled that **(b) (6)** asserted that she was a representative of the City of Chicago, but she offered no identification or business card. We presume that Dr. Sofranko was aware of **(b) (6)** presence, insofar as they have appeared together on public panels regarding animal care issues where **(b) (6)** routinely renounces circuses and elephants in captivity. She was admitted to the facility not merely by error on the part of the on-site Feld Entertainment personnel, but by subterfuge on the part of at least some members of the joint federal-local inspection team and at least the acquiescence of the rest.

By this time, however, the Assistant **(b) (6)** for the Blue Unit, Lance O'Connor, had been summoned from his trailer and was also present at the gate. The demeanor of both Dr. Thompson and **b6,b7c** was reported as belligerent, and both made statements expressing their displeasure that they had been at the United Center since 6:30 a.m. **(b) (6)** apologized. He attempted to collect identification and credentials from the group present. He had to return to the office trailer to get a pen and paper. Dr. Thompson remained belligerent and asked **(b) (6)** what they were waiting for, and he answered that he was waiting for the **(b) (6)** for the Blue Unit, who sleeps offsite at the circus train, to arrive. **(b) (6)** was then threatened by Dr. Thompson with a non-compliance citation if they did not start immediately.⁴ After both threats, the gate was opened even though critical Ringling personnel such as the **(b) (6)** and the attending veterinarian who should have an opportunity to attend an inspection were not yet on site because of the joint federal-local inspection team's

³ Certain witnesses also recalled that there was another unidentified member of the party. If there was another person in the joint federal-local inspection team, they did not identify themselves or their authority to inspect the facility. Outside of the gate certain witnesses also reported seeing persons with large cameras in the party that were not admitted into the tent. Feld Entertainment has no further information regarding their identities

⁴ As discussed further on, despite the access granted at an extraordinarily early hour and without any notice of the inspection, Feld Entertainment was nevertheless cited for failure to provide access.

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demand for immediate access at that early hour.⁵ The combined federal-local inspection team arrived at the elephant tent within five-to-six minutes after this initial discussion.

We also understand that there were also two other Chicago police officers present, who had arrived at United Center after being summoned by arena personnel when they became alarmed at a large party demanding access to the arena at 6:30 in the morning. [b6,b7c] apparently had contacted the United Center's building manager at 7:15 a.m. at his home awakening him also. [b6,b7c] demanded to be permitted access to the United Center and was informed at that time that there were no animals inside the United Center, but rather the animals were in a compound immediately adjacent to the arena. Dr. Sofranko, who is well acquainted with Feld Entertainment's operations and has previously inspected Feld Entertainment in Chicago, would have known that the animals would not be inside the performance venue at 6:30 a.m. It is not known why Dr. Sofranko did not direct [b6,b7c] attention to this fact.

Feld Entertainment was given many inconsistent reasons for the purpose of the inspection. Dr. Thompson stated to [b] (6) that the purpose of the inspection was to follow up on their Denver inspection. Another Feld Entertainment employee was told that the USDA was present for the purpose of observing the daily routine of the elephants and their handlers. At other points during the inspection, various Feld Entertainment personnel inquired about the reason for the inspection, given that the Blue Unit had been inspected twice by APHIS AC within the previous 40 days. They were told, alternately, by Dr. Howard, both that she could not disclose any reason for the inspection and that the inspection was an investigation of a complaint, the subject matter of which she declined to reveal.⁶ Dr. Thompson indicated that the Chicago inspection was to enable APHIS AC to finalize an unspecified "assessment" so that APHIS AC could respond to the many complaints it receives about Feld Entertainment. She declined to elaborate. Dr. Sofranko, on the other hand, offered at one point that APHIS AC was there merely "to support the city."⁷ When asked why the Blue Unit was being inspected again since the two APHIS AC inspections in October, Dr. Sofranko stated that they "can come any time they want."

Equally troubling is the USDA's position that "business hours" are limitless. [b] (6) was advised by the joint federal-local inspection team that the inspectors arrived at 6:30 a.m. because

⁵ The Inspection Report states that "APHIS officials called the Ringling [b] (6) at 7:23 AM but only reached a voice mail message. A detailed message was left explaining our need for access to conduct an inspection of the animals." Feld Entertainment denies that any voice message was left by APHIS personnel for the Blue Unit [b] (6) [b] (6) on the morning of the Chicago Inspection.

⁶ During the October 20, Cleveland inspection, one APHIS AC investigator offered that the inspection was being undertaken so closely after the October 8 Denver inspection because of a complaint of lameness in the elephants.

⁷ It is unclear what grant of authority Dr. Sofranko is relying on to take a team of federal inspectors out to provide "support" for personnel conducting a municipal inspection.

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that is when USDA asserted the day starts for Ringling.⁸ However, the night shift had not even ended. The day crew, which had not yet arrived, starts its shift at 8:00 a.m. At several points during the approximately 4 hours of morning inspection at the venue, various Feld Entertainment personnel also inquired about the attempt to begin the inspection at 6:30 a.m. There were informed by various members of the joint federal-local inspection team that inspections could take place at any time of the inspectors' choosing. When Dr. Sofranko was asked whether 6:30 a.m. was outside of normal business hours, she replied "Anytime is business hours" and indicated that Feld Entertainment would be cited for refusal to permit inspection. This was after USDA has been granted access without the presence of Feld Entertainment, Inc.'s (b) (6) the attending veterinarian, or its local attorney. The last point is particularly disconcerting as Feld Entertainment, Inc. later realized that an investigator, (b)(6)b6,b7c with APHIS Investigative and Enforcement Services (IES) attended the Chicago Inspection. Mr. b6,b7c also apparently attended the Denver inspection but was not disclosed at the time as an IES investigator.⁹

Feld Entertainment, Inc. has the right to fair notice and to have the presence of counsel of its choice if an investigator, as opposed to an inspector, is going to be present on Feld Entertainment property. This fundamental right is well-settled and recognized by the agency, and the recent deviation from this by the unannounced presence of (b)(6)b6,b7c without notice to and the presence of Feld Entertainment, Inc.'s choice of counsel is unacceptable. The results of the Chicago Inspection – even if they were supportable (a position Feld Entertainment rejects) should be thrown out on this basis alone. Please be advised that Feld Entertainment, Inc. hereby objects and does not consent to any further unannounced investigators on its property or contact with the company without the presence of the company's USDA counsel.

In addition to the two recent USDA inspections in Denver and Cleveland that Ringling passed without issue, the Chicago Commission on Animal Care and Control also had inspected the Blue Unit three days earlier on Monday, November 15, as part of the permitting process for animal exhibitions within the City of Chicago. That permit was issued without objection. Notably, b6,b7c the veterinarian for the City of Chicago who appeared at the Chicago Inspection was also present on Monday, November 15, when the license issued. The abrupt

⁸ The USDA apparently bases its position on a statement (b) (6) made to them during the Denver inspection regarding his daily schedule when he gets a cup of coffee and checks on the elephants. Feld Entertainment must reject this; the mere presence of Ringling personnel does not constitute "business hours." The USDA's position regarding this is unreasonable and incorrect – as evidenced by the employees who were awakened by the inspectors' early arrival and the day crew whose shift does not start until 8 a.m.

⁹ There is no identification of (b)(6) b6,b7c on the Denver inspection report, but Feld Entertainment personnel believe after seeing him again in Chicago that they recognized him to have been present in Denver.

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reversals by both the City of Chicago and the USDA during the Chicago Inspection underscore the arbitrary and capricious nature of this incident.

The presence of the large joint federal-local inspection team necessarily disrupted the daily routine (that the USDA asserted, at least once, to be the reason for their attendance) including Ringling's morning floor cleaning, preparation for the morning show, elephant exercise time, and lunch for Ringling personnel which was either delayed or interfered with completely.¹⁰

The joint federal-local inspection team was equipped with still and video cameras, which were used throughout the inspection. Feld Entertainment personnel, following standard practice for regulatory inspections, also attempted to photograph and videotape the work of the joint federal-local inspection team. At one point, [b6,b7c] asserted that Feld Entertainment personnel would be committing a felony by capturing any conversation of the joint federal-local inspection team.¹¹ She threatened to have Feld Entertainment personnel arrested. Despite the fact that the joint federal-local inspection continued to employ its videotaping equipment, [b] [b](6) Ringling veterinary technician, discontinued videotaping. After Feld Entertainment's local counsel [b] (6) [b] (6) e, arrived, he disputed the assertion with [b6,b7c]

It is the consistent impression of the Feld Entertainment personnel interviewed that Dr. Thompson was aggressive to the point of belligerence, and was attempting to intimidate persons to whom she spoke. Reports indicate that, at times, she leaned in toward Ringling personnel when speaking to them, which was perceived as aggressive, and the tone of her voice was described as intimidating. It is also the consistent impression of Feld Entertainment personnel who attempted to engage Dr. Howard even in innocuous conversation that she brusquely refused to do so. To this day, the personnel report feeling targeted by the USDA and still do not know why the Chicago Inspection occurred or how the manner in which it was carried out could possibly be considered reasonable or necessary.

At some point after the inspection was initiated, [b] (6) [b] (6) of Feld Entertainment arrived and recognized [b] (6) [b] (6). When she disclosed this to her co-workers, [b] (6) [b] (6) asked Blue Unit [b] (6) [b] (6) [b] (6) (who had by then arrived from his off-site sleeping quarters) to ask [b] (6) [b] (6) if she was either employed or paid by the city. She

¹⁰ APHIS AC personnel departed mid-afternoon for their lunch and then returned to conduct their "exit interview."

¹¹ This assertion was in apparent reliance on an Illinois statute, under which an eavesdropping device cannot be used to record or overhear a conversation without the consent of all parties to the conversation. 720 Ill. Compiled Stat. Ann. 5/14-1, -2.

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responded "No" to both questions. It was at this point that (b) (6) was excluded from the elephant tent.

(b)(6) announced that City officials wished to observe other animals as well as the elephants. (b)(6) responded that the joint federal-local inspection team and accompanying Feld Entertainment personnel needed to stay together. This response was premised on the fact that different Feld Entertainment personnel were needed to respond to the numerous inquiries made by the inspection team, and that dividing up these personnel would make the process of responding to inquiries more difficult. It was also for the safety of the joint federal-local inspection team. Feld Entertainment personnel indicated that the City officials were moving around the animals and creating unnecessary safety risks for themselves.

When Travis entered the elephant tent, she began yelling that the elephants' tails were "broken" and that people should be arrested. (b)(6) and Travis both queried (b)(6) (b)(6), as to why the elephants' tails were "broken." They are, in fact, not broken but rather have their appearance from birth. (b)(6) and Travis responded with incredulity. At no time did any Feld Entertainment personnel witness any USDA inspectors attempt to calm down these two City officials or explain to them why their misperceptions were wrong – despite the representation from Dr. Sofranko that USDA was present to assist the City. Drs. Thompson and Sofranko inquired about scars on elephant Rudy, to which Feld Entertainment personnel responded that the injury occurred some years ago in Puerto Rico, a fact with which they should have been aware since USDA inspectors had seen Rudy countless times since then. They further inquired about an abrasion over one of elephant Asha's eyes. It was explained to them that Asha and Rudy "play rough" and that Rudy had cause the abrasion. This same abrasion was pointed out and explained to the APHIS traveling elephant exhibitor inspection team in Cleveland only a few weeks earlier.

Immediately prior to the Ringling morning show, the local officials wanted to see and were escorted to the exotics barn. The tigers were in transport cages for the show. Dr. (b)(6) stated that she thought Claudia, one of the tigers, was limping, and requested veterinary records on the cat. She was informed that there were no records regarding a limp because there was no limp, and that lameness was probably not best diagnosed in a transport cage. (b)(6) insisted the Dr. (b)(6) examine Claudia, to which Dr. (b)(6) responded that the cat would have to be examined later because lameness could not be diagnosed in a transport cage. However, Dr. (b)(6) later contradicted her own assertion by insisting that she had observed lameness in Claudia while the cat was in the transport cage.

After the morning show, Dr. Thompson requested that the elephants be individually taken out of the tent and walked so that they could observe their mobility. (b) (6) demurred, explaining that elephants Rudy and Asha were "herdbound," i.e., not yet socialized sufficiently to be

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removed from the sight of the other members of the herd, and because he no longer had a sufficient number of handlers to take them out of the tent safely – due to the prolonged presence of inspectors and the consequent disruption to the daily schedule that they caused. The feet and ears of all of the elephants were inspected and photographed and/or videotaped. Dr. Thompson and others expressed concern about a reddened cuticle on elephant Juliette's left front foot, in location D4. Dr. Thompson also asked what veterinary care was being provided to elephant Bonnie. She was informed that Bonnie was somewhat pigeon toed and was not appropriately diagnosed as "lame." This elephant has been inspected a multitude of times by many USDA inspectors, including some members of the APHIS Team, and Bonnie's pigeon toed disposition is known, open and obvious.

Dr. Thompson asked about Feld Entertainment's breeding practices and responded to answers by rolling her eyes in disbelief. Those practices are based upon the elephant being healthy and reproductively mature. The topic itself, however, is utterly foreign to an inspection of a traveling elephant exhibition and the animal welfare purpose supposedly underlying any USDA inspection. The USDA inspectors continued to then measure primary enclosures such as the tent, paddocks, and pens, the circus train, and other conveyances. When asked why they were taking these measurements, the abrupt answer was that "they just want to know what they are."

Interrogation of Veterinary Staff by APHIS AC

This portion of this appeal goes into considerable detail because the tone of the questioning of veterinary staff was harsh and argumentative and further portrayed strongly an unfair and unprofessional skepticism regarding all answers provided by staff. It should be noted that Dr. Thompson had been present for the extensive inspection in Denver. Dr. Howard was present for the "complaint" inspection in Cleveland.

The federal contingent of the inspection team sought and received access to the veterinary wagon. Dr. Thompson went through all of the drug cabinets and checked for expiration dates. All products were within expiry. They asked what was in the refrigerator, and when veterinary staff stated that they did not think anything were present, there were, in fact several vials recently acquired, and unexpired vaccines.

At this point, the questioning became much more pointed and accusatory. Dr. Thompson demanded to know where the supply of etogesic (an animal analgesic and anti inflammatory drug administered primarily for joint pain) was located. Dr. Thompson noted the presence of a single bottle and that "two weeks ago there was a lot of etogesic here, and now there's not, and are you giving it to [elephant] Sara?" When veterinary staff stated that Sara was not being given etogesic, Dr. Thompson interjected "Where is it then?" There are several possible explanations for this, including that the product may have expired and been removed from stock. Moreover,

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etogesic is not a controlled substance, and there is nothing nefarious about its use. Again, the tone of this entire portion of the November Inspection far exceeded appropriate behavior for inspectors who merely seek information; it was accusatory, harassing and completely unprofessional.

Veterinary staff was then asked in considerable detail how prescriptions were issued for the elephants and how staff made sure the elephants are being given the medication. Staff further offered that for the elephants, one of the veterinary staff was regularly travelling on each Feld Entertainment unit and could observe directly if the elephants improved or not. Staff also offered that treatment sheets could be used for elephants. Clearly unsatisfied with the responses, including that the elephants are regularly observed by the company's veterinary team and other elephant care staff, and therefore could observe directly whether an elephant's treatment was effective, Dr. Thompson asserted that if treatment was not written down then it did not happen. Further inquiry was made as to how drugs are ordered, and what drug inventories are kept.

APHIS AC asked about radiographs. Staff responded that Feld Entertainment had a digital radiograph machine, which was sent out to the unit as needed. They asked where the films are. Staff responded that most were still stored electronically on the radiograph machine, and that others were at the Ringling Bros. Center for Elephant Conservation (CEC). They asked if staff were doing regular foot films because, in their characterization -- which Feld Entertainment disputes -- many of our elephants had numerous and chronic foot problems. Staff responded that in fact no elephant is currently lame and that the inspection team should be aware of that because all of the elephants had been observed earlier in the day in the barn. In addition, Feld Entertainment veterinary staff opined that the problem with foot films is that few people read them correctly, and because one cannot sufficiently image orthogonal views, interpretation is further confused. Staff further offered that there was little benefit to taking numerous meaningless films of normal elephants and exposing everyone to a lot of radiation. Staff cited Ed Ramsay's presentation at the annual American Association of Zoo Veterinarians conference this year and other peer-reviewed papers on normal foot films. According to those present, instead of accepting this as an exchange of information amongst professional colleagues, as one would expect, all of the APHIS AC personnel present reacted to this detailed explanation including citation to appropriate scientific authority by rolling their eyes. This line of questioning and behavior is particularly inexplicable when one considers, for example, that the very question as to why more foot radiographs are not taken suggests a fundamental lack of understanding regarding basic elephant physiology and treatment on the part of Drs. Thompson and Howard.

Dr. Thompson returned to the topic of elephant Sara, asking "Do you think something happened to her, because she has had a lot of lameness." When veterinary staff present disagreed with that characterization, Dr. Thompson cited a veterinary record by another Feld

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Entertainment veterinarian that indicated "something" had happened to Sara early in life. She also commented that some films of Sara's radiographs suggested skeletal damage. Veterinary staff present disagreed with that assessment. Dr. Thompson insisted that because the characterization was contained in veterinary records, it was beyond contradiction.

Dr. Thompson continued her inquiry regarding how the veterinary staff knows what each other are doing. Staff present responded medical records are shared. There are organized conference calls once or twice a week and other, informal consultations, in addition to working on the same traveling unit at times. Dr. Thompson asked, "Well, if you didn't agree with Sara's diagnosis, why didn't you write something up." Staff responded by underscoring their respect for their colleagues and noting that among five staff and consulting veterinarians, there is more than 65 years of elephant experience. In addition, four of those five are board certified.¹²

Dr. Thompson also asked about Feld Entertainment's computerized veterinary records program. Dr. Thompson concurred with veterinary staff that available commercial programs had disadvantages. The inspectors also asked if there were any computerized veterinary records that were not replicated in hard copy files. Veterinary staff responded that all computerized veterinary records were also reproduced in hard copy files. Staff was asked how many records were maintained on the unit, and staff responded that one year's worth were per advice of Elizabeth Goldentyre, D.V.M, Eastern Regional Director, APHIS AC. Dr. Thompson asked who decides how medical records are handled. When staff responded that it was a corporate decision, according to those present, she winced and said, "You're the vet. Why does corporate make that decision?" Staff elaborated that the veterinarians write all the medical records, but corporate buys the programs and manages the software and computers.

Dr. Thompson asked about records of abrasions. Staff responded that such records were maintained in no small part because those are the issues that are the subject of complaints to APHIS AC by the public and subsequent investigation by APHIS AC. Dr. Thompson then attempted to correlate the amount of records on relatively minor issues and the relative small number of records regarding major veterinary issues, specifically colic. When staff indicated that it was unaware of any colics on the unit, and that the majority of serious colics in elephants are due to infectious disease, Dr. Thompson interrupted to assert that in 2009 elephant Kelly Ann had a colic. When veterinary staff present expressed no recollection of the incident, Dr. Thompson stated dismissively, "I don't think it was you that reported it." Dr. Thompson continued "You have to admit though, it looks kind of weird that there are a million reports of abrasions, and very little on real problems. It looks like your not doing anything about them."

¹² Feld Entertainment, Inc. does not believe that any of the USDA inspectors are board certified, and that with the exception of Dr. Thompson who worked at a zoo for 3 years, none of them have any real experience raising or actually treating elephants.

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Veterinary staff asserted that they travelled with the unit regularly, and are always looking at the animals. Veterinary staff also said that Ringling had very healthy animals. Staff was asked if outside veterinarians were used and Dr. Thompson asked how those records are handled. Staff responded that outside veterinarians are asked to write records as soon as possible. The APHIS AC inspectors had just photographed a medical record (b) (6), D.V.M., an outside veterinarian.

Staff was asked about exercise routines. Elephants are exercised in the arena or outside if possible at least 30 minutes daily. The inspectors pounced on this, and asked about specific days where the elephants had not been exercised. Staff attempted to explain that exercising was done as much as possible, but exceptions occurred for a number of reasons. The elephants were scheduled on November 18, the day of the inspection to be exercised between 2:30 and 3:00 p.m. At this point it was 3:15, and Dr. Sofranko asked, "Well why aren't they in there exercising now?" Staff responded that the elephants were being held in the event that the inspectors wanted to view them again. Staff also pointed out that the elephant handlers had spent the past two hours walking the elephants at the request of the joint federal-local inspection team. Dr. Sofranko responded to this by saying, "We don't care about that, we care about the elephants, they should be exercising." Dr. Sofranko and Thompson both stated that Feld Entertainment's normal routines were not to be altered by their visit. This was the first point at which any person on the joint federal-local inspection team addressed any impact of their visit on normal operations, faulted Feld Entertainment for the consequences of the inspectors' conduct, and came only after most of the entire morning inspecting the elephants, including walking them, videotaping and photographing the elephants and the equipment used with them, and inspecting primary enclosures and conveyances.

Veterinary staff was then asked about enrichment. Dr. Thompson asked who gets to decide what form of enrichment the elephants have. Staff responded enrichment items were chosen that do not break and which could not get eaten and cause an obstruction. Staff particularly commended certain handlers who have been around elephants all their lives and choose appropriate enrichment. When veterinary staff offered the observation that the elephants had appropriate toys like tires and browse, Dr. Thompson interrupted to ask "what about bamboo?" She continued, "You heard me, bamboo!" Staff offered that bamboo was a very appropriate browse, was very safe, and that elephants in range countries chew bamboo. Dr. Thompson argued that there were "a lot of problems" with bamboo. Staff acknowledged that there are occasionally some abrasions, but elephants are big animals and can withstand the rigors of foraging on rough browse. Veterinary staff present have reported that Dr. Thompson then sneered and cited an incident in which one elephant got a piece of bamboo stuck in her cheek. This incident is documented in Feld Entertainment's veterinary records. Veterinary staff acknowledged the incident but noted that the issue was relatively minor and the elephant received appropriate care.

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The inspector inquired about elephant Barack.¹³ As one of a handful of survivors of Elephants Endotheliotropic Herpes Virus (EEHV), the medical records on him are extensive. Most are housed at the CEC. Recent ones were located in the veterinary wagon on the Blue Unit, but veterinary staff had copies of them on a laptop computer and could show the inspectors if they wished. Dr. Thompson said she did not need to see them, as long as the regional inspector had reviewed them. She was informed that Greg Gaj, D.V.M., reviewed them.

Veterinary staff was then asked to provide a timeline on elephant Barack's EEHV. Staff recounted the following: Barack had become depressed and lethargic in Jacksonville while on the show. The inspectors asked where Barack was when he was diagnosed, and they were told that he was still on the show. Veterinary staff jumped on the situation very quickly. Fortunately, Feld Entertainment had a broad range of familiarity with the disease in both the veterinary staff and the elephant care staff. Before the diagnosis was confirmed by testing, Barack was started on Famvir (an antiherpes virus drug), fluids and anti-inflammatories, and returned the CEC as soon as possible. APHIS inspectors then wanted to know when he got "really sick".¹⁴ Staff attempted to explain about different forms of EEHV, *e.g.*, peracute, acute, and subacute, and how very sick elephants may not look sick. Staff noted that Feld Entertainment has 2 of the 8 survivors of this terrible disease in the United States, and are very proud of that fact. The inspectors continued their inquiry as to how it was determined that it was safe to bring him back. Staff responded that Barack was carefully observed, that his blood work was monitored, and that extensive consultations were made with Baylor University and the laboratory at the National Zoo. Dr. Thompson asked "Aren't you worried he'd get sick again if you brought him back?" Staff responded that if we thought he would get sick again, we would not have brought him back.

The inspectors again asked how staff knew that elephants were being appropriately treated with drugs. The inspectors also questioned whether staff was really sure that they elephants were healthy. This posing of this question only underscored the contempt with which veterinary staff was treated during this questioning. Staff responded by summarizing the inspection that had taken place that morning, the breadth and depth of experience of veterinary staff, including their board certifications in zoological animal medicine and other professional qualifications, the staff's participation in professional publications and conferences, and the extensive on-site coverage of veterinary staff during tours. This interrogation last over one-and-one-half hours.

¹³ Barack is one of eight elephant calves to survive the 60 known cases of EEHV-confirmed viremia in the United States. Feld Entertainment has contributed considerable sums to fund an EEHV lab at the Smithsonian National Zoo in Washington, DC.

¹⁴ This is another question that suggests a lack of knowledge or elephant expertise.

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The Citations Contained in the Inspection Report Are Not Supportable

Citation for Allegedly Inadequate Medical Records

The first citation, for alleged violation of 9 C.F.R. § 2.40(b)(2), contains the statement that "To date, the licensee's veterinarians have different opinions about the causes of Sara's lameness and have not made a clear assessment about the cause of Sara's condition or how to prevent, control, and treat it." As is clear from the interrogation of veterinary staff, there is not a difference of opinion about "the causes of Sara's lameness," there is legitimate disagreement among attending veterinarians *whether* elephant Sara is lame or not. Despite APHIS AC's broad range of experience and highly qualified veterinarians on the agency's staff, the agency cannot be substituting its veterinary judgment for that of attending veterinarians who observe and care for a herd of elephants on a daily basis.

The citation that "there is no indication that Sara has received recommended diagnostics to determine the cause(s) of her lameness and prescribed analgesics" is equally misplaced. Documentation of administration of analgesics in addition to documentation of the prescription of analgesics is not required by any current regulation or standard of veterinary care.

Citation for an alleged violation of this regulation is especially inappropriate because USDA has proposed, but failed to promulgate a final rule that would require this level of documentation. A proposed rule, Animal Welfare; Medical Records, was published nearly eight years ago. 68 FED. REG. 17,752 (April 11, 2003). The proposal would "add new §§ 2.33(b)(6) and 2.40(b)(6) to the regulations to include the maintenance of legible medical records as an additional element of the program of adequate veterinary care required by the regulations." *Id.* at col. 2. That new section 2.33(b)(6) detailed the elements of those records, including records regarding "the identification of the medication used, the date given, dosage, route of administration, frequency, and duration of treatment." *Proposed* 9 C.F.R. § 2.66(b)(6)(iii), 68 FED. REG. at 17,754, col. 3. This regulatory requirement has not been finally promulgated and the Department cannot enforce a regulation that does not exist.

Moreover, Dr. Thompson appeared to be applying an inappropriate standard for veterinary records. While in human setting, the standard of recording any procedures performed and medicines dispensed is wholly appropriate, albeit of fairly recent vintage in the history of human medicine. In a veterinary setting, however, especially one dealing with routine care of animals, exhaustive written documentation of dispensing of veterinary drugs is *not* the standard in the United States. Dr. Thompson's view of the alleged inadequacy of veterinary records is especially untenable in light of her response to Feld Entertainment veterinary staff's offer to develop and maintain any particular recommended form of records. Dr. Thompson responded

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that “you teach vet students, so you should know what a vet record looks like” and “you’ll have to figure out what to do.” The notion that a regulator can insist that a particular situation is violative of law because it is “inadequate” and then decline to provide any guidance whatsoever on what constitutes adequacy leaves enforcement open to being arbitrary and capricious.

The citation was for alleged violation of the following existing regulation:

Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include: The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries . . .

9 C.F.R. § 2.40(b)(2). The citation continues that the records indicate “a lack of adequate diagnostics.” This is wholly inappropriate when there is actual professional disagreement regarding a given diagnosis, which necessarily dictates whether there should be any treatment plan or follow up treatment at all.

Finally, this citation violates APHIS AC policy contained in the Animal Care Resource Guide, Exhibitor Inspection Guide, specifically guidances 14.2, 14.3, 14.4, 15.3, and 17.4. Each of those guidances describes required records. The primary Guidance, 14.2, provides, in pertinent part:

Health records are not specifically required by the AWA regulations, except for marine mammals. Therefore, a lack of health records or inadequacy of the health records may not be cited as a stand-alone violation, except for marine mammals.

The citation of inadequate veterinary care for a sick animal may include a reference to the lack or inadequacy of health records, if appropriate.

(emphasis in original). The other guidances similarly embody this same policy, some in very similar language. It is wholly inappropriate to cite Feld Entertainment for “inadequate veterinary care for a sick animal” where there is legitimate professional disagreement over whether the animal noted, elephant Sara, is lame at all.

Citation for Alleged Denial of Access and Inspection of Records and Property

Feld Entertainment readily acknowledges that APHIS AC has the statutory right to access and inspect records and property. Under the Animal Welfare Act (AWA), USDA “shall, *at all*

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reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept” 7 U.S.C. §2146(a). Feld Entertainment readily acknowledges that it is in a pervasively regulated industry. The United States Supreme Court has long held regulatory inspections “may proceed without a warrant *where specifically authorized by statute.*” *United States v. Biswell*, 406 U.S. 311, 317 (1972) (emphasis supplied). The administrative inspection scheme “must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspection officers.” *New York v. Burger*, 482 U.S. 691, 703 (1971).

The specific authorization for APHIS AC inspection is restricted to “all reasonable times.” The assertion by members of the joint federal-local inspection team, especially that of Dr. Sofranko, that “Anytime is business hours,” is wholly unsupported and would grant the type of unfettered discretion disapproved of by the *Burger* court, above. Based upon interviews with Feld Entertainment personnel involved in both the October 8 Denver inspection and the November 18 Chicago Inspection, it appears that APHIS AC officials took an out-of-context comment from one Feld Entertainment employee that he generally rose from bed around 6:30 a.m. and looked in on the elephants before returning to his trailer to prepare for the day as an open invitation to demand access at any time. The inspection report mischaracterizes this as “licensee’s animal husbandry activities typically begin between 6:30 and 7:00 AM.”

This is wholly unsupported by precedent under any federal regulatory scheme. It would be the same as to say that the presence of a night watchman at a facility that was otherwise not operating was “open for business” and that a warrantless regulatory inspection was therefore held at a reasonable time. It would be the same as to say that a tavern keeper living above his establishment, who walks downstairs to get a cup of coffee and the morning paper outside the front door is operating a barroom at sunup. This is not the case and any federal inspectional authority, especially a person with the breadth and depth of experience of Dr. Sofranko, should have known better.

Nevertheless, the joint federal-local inspection team did obtain access to the facilities before even the morning crew had arrived. Several Feld Entertainment employees who would, in the ordinary course, be involved in inspections had to be roused from their beds to meet the unreasonable and unauthorized demands of the joint federal-local inspection team.

Federal officials who clearly and intentionally violate the rights of individuals may be held personally liable for those violations. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Feld Entertainment hereby gives notice that it will preserve all available rights and assert lawful claims as necessary.

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Accordingly, based upon the above, Feld Entertainment respectfully requests that the foregoing non-compliance be reversed.

Citation For Alleged Failure To Maintain Primary Enclosure Free From Any Protrusions That Could Be Injurious to The Live Animals Contained Therein

The citation reads, in pertinent part:

On July 19, 2010 the licensee documents that Asian elephant Asha was injured sustaining abrasions over her right eye. Notes state that the animal scraped her forehead on trailer ride from the train to the building. On October 19, 2010 the licensee documents that Asian elephant Rudy had an abrasion over the right eyebrow noted during unloading from the transport vehicle.

The citation goes on to assert that the APHIS AC inspectors examined the trailer that the two noted elephants have been transported in and that "numerous burnished bolts" were present in the primary enclosure of the trailer. Feld Entertainment, Inc. is forced to conclude that this is false. During the exit interview, (b) (6) asked the APHIS AC inspectors to show him where in the trailer there were any sharp edges and, if there were, he stated he would fix them by the next day. The APHIS AC inspectors, however, specifically declined to note the location of these "numerous" bolts and subsequent inspection of the trailer has not identified any such protruding material. Subsequent inspection of the trailer did not reveal any such protrusions. It is also contrary to any purported concern regarding the welfare of the elephants – the Blue Unit had three more transports with that trailer before finishing its 2010 tour. If there was really any protrusion in the trailer, then the USDA personnel should have been both able and willing to identify it for Feld Entertainment so that any repairs or corrections could be made. The APHIS AC officials chose not to do so, suggesting that there were, in fact, no such protrusions – which the USDA cited based upon *its interpretation of medical records*.

The medical record, however, does not identify the cause of Asha's forehead scrape. The medical record for Rudy notes only *when* the abrasion was noted, not how it was received. Several Feld Entertainment employees noted to the joint federal-local inspection team that the two elephants mention in this citation "played rough" and sometimes caused minor abrasions to each other.

We respectfully assert that in the absence of any evidence beyond the statement in medical records that the citation is to be reversed.

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The Presence of a Private Citizen with the Joint Federal-Local Inspection Team Undermines the Impartiality and Fairness of the Inspection

The presence of a private citizen, (b) (6) with federal and local investigators operating under separate statutory authorities, during the initial stages of the inspection calls into very serious question the motivations and conduct of the joint federal-local inspection team. The manner in which (b) (6) who is personally known by Dr. Sofranko, obtained access under to Feld Entertainment's premises under the guise of federal statutory authority and/or local ordinance is completely unexplained. On November 4, 2010, just two weeks prior to the Chicago Inspection, (b) (6) (b) (6) was testifying in a Fulton County (Atlanta), Georgia legislative hearing in support of a proposed ordinance to outlaw circuses. There is no conceivable reason for a private citizen to be engaged in a regulatory inspection of another private entity, particularly when one is openly hostile to traveling circuses. Given the deep-seated disagreements among some segments of American society on questions regarding the rights of animals, the federal government should not be a participant in the furtherance of any given special interest group's agenda.

The Conduct of the Joint Federal-Local Inspection and the Demeanor of the Investigators Evinces a Pretextual Administrative Search in Violation of the Animal Welfare Act and the Fourth Amendment

Feld Entertainment is forced to conclude that the November 18 Chicago Inspection was a pretextual administrative search that unsuccessfully sought evidence of wrongdoing on the part of the Blue Unit. It was wholly unreasonable and contrary to the limited grant of inspectional authority under the AWA to use a pre-dawn raid to try to find AWA violations. Having unsuccessfully found actual objectionable conditions, APHIS AC officials carrying out the raid were forced to cite Feld for (1) denial of access and inspection when the request for access was unreasonable, in excess of statutory authority under the Act and contrary to the Fourth Amendment to the United States Constitution; (2) failure to comply with a regulatory requirement regarding medical records where that purported requirement does not exist and is contrary to standard veterinary recordkeeping; and (3) use a logical fallacy, *post hoc ergo propter hoc*, to cite Feld Entertainment on account of two properly recorded and treated abrasions on two elephants which are known to suffer such scrapes on account of their own playfulness.

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We respectfully request that the November 18, 2010 Inspection Report be withdrawn in its entirety. We further respectfully request that all future inspections be carried out in a reasonable and impartial manner only by duly designated federal officials, and in compliance with the Animal Welfare Act and other applicable law.

Sincerely,

(b) (6)

David L. Durkin

OFW:

cc: Chester A. Gipson, D.V.M. (via electronic mail)
Gregory Parham, D.V.M. (via electronic mail)
Elizabeth J. Goldentyre, D.V.M. (via electronic mail)
Andrea Morgan, D.V.M. (via electronic mail)



Inspection Report

FELD ENTERTAINMENT INC

Customer ID: **7250**

Certificate: **52-C-0137**

Site: BLU

BLUE UNIT VARIOUS TRAVELLING LOCATIONS

RINGLING BROS/BARNUM & BAILEY

8607 WESTWOOD CENTER DRIVE

Type: ROUTINE INSPECTION

Date: Nov-18-2010

VIENNA, VA 22182

2.40 (b) (2)

ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE (DEALERS AND EXHIBITORS).

<<Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include: The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries,>>

During a prior inspection performed on 10/08/10, APHIS requested copies of medical records for the elephants. The records show a lack of adequate diagnostics, treatment plans, and follow-up treatments necessary to provide adequate veterinary care.

In particular, the licensee's records show that Sara (a 9 yr old Asian elephant) has had chronic lameness since early 2009, and that the licensee has not conducted adequate diagnostics, developed an adequate treatment plan, or ensured that the elephant received prescribed treatments. Radiographs were taken in April 2009, but no treatment was prescribed at that time. Although the attending veterinarians subsequently recommended various diagnostics and, intermittently, prescribed analgesics (including on performance days) in response to reports of lameness or "stiffness", there is no indication that Sara has received recommended diagnostics to determine the cause(s) of her lameness and prescribed analgesics. To date, the licensee's veterinarians have different opinions about the causes of Sara's lameness and have not made a clear assessment about the cause of Sara's condition or how to prevent, control, and treat it.

The licensee shall conduct the tests necessary to diagnose health problems and develop methods to prevent, control, and treat them.

The licensee shall maintain thorough and complete documentation regarding diagnostics, treatment plans and treatments for the regulated species.

2.126 (a)

ACCESS AND INSPECTION OF RECORDS AND PROPERTY.

<< (a) Each exhibitor shall, during business hours, allow APHIS officials: (1) To enter its place of business; (4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; >>

Prepared By:

TRACY A THOMPSON, D.V.M. USDA, APHIS, Animal Care

Date:

Title: SUPERVISORY ANIMAL CARE Inspector 5044

Nov-22-2010

Received By:

Title:

b6, b7c

Date:

Nov-23-2010



Inspection Report

APHIS understood that the licensee's animal husbandry activities typically begin between 6:30 and 7:00 AM and sought to inspect the animals first thing in the morning to assess health issues. APHIS officials arrived at the United Center in Chicago, IL, to inspect the licensee's facilities and animals. No persons were observed near the licensee's trailers and tents so APHIS contacted security personnel for the United Center at 7:00 AM for access to conduct the inspection. The Security Supervisor contacted the General Manager for the United Center by telephone and he asked to speak with APHIS officials at 7:20 AM. The United Center General Manager stated that the animals were not housed in the building and that we would need to go to the area Ringling occupied on the grounds and locate a representative of the circus. He provided a contact number for the Ringling Bros Blue Unit General Manager. APHIS officials called the Ringling General Manager at 7:23 AM but only reached a voice mail message. A detailed message was left explaining our need for access to conduct an inspection of the animals. APHIS officials followed the United Center General Manager's directions and moved the government vehicle off of the grounds and attempted to locate a circus representative. APHIS officials went to the gate as directed and spoke with 3 circus representatives who had previously accompanied APHIS officials during inspections of the licensee's animals and facilities (Assistant General Manager, Animal Superintendent, Senior Elephant Handler) at approximately 7:50 AM who denied access to perform an inspection at that time. The Senior Elephant Handler stated that United Center security had previously informed him of APHIS' arrival but that he was instructed (by upper Ringling management) not to allow access for inspection until the Ringling General Manager and Attending Veterinarian arrived. APHIS officials were not allowed to inspect the licensee's facilities and animals until approximately 8:15 AM.

APHIS officials were unable to inspect the licensee's facilities and animals during the critical time period because the licensee denied access to APHIS officials and delayed inspection for approximately 1 hour and 15 minutes.

Correction: Licensee must allow APHIS officials to enter its place of business and inspect the facilities, property, and animals upon request during business hours. The licensee is responsible for making the arrangements necessary to provide such access, regardless of location.

3.137 (a) (2)

PRIMARY ENCLOSURES USED TO TRANSPORT LIVE ANIMALS.

<< Primary enclosures, such as compartments, transport cages, cartons, or crates, used to transport live animals shall be constructed in such a manner that the interior of the enclosure shall be free from any protrusions that could be injurious to the live animals contained therein;>>

On July 19, 2010 the licensee documents that Asian elephant Asha was injured sustaining abrasions over her right eye. Notes state that the animal scraped her forehead on trailer ride from the train to the building. On October 19, 2010 the licensee documents that Asian elephant Rudy had an abrasion over the right eyebrow noted during unloading from the transport vehicle.

The licensee stated that it routinely uses the same trailer to transport Rudy, Asha, Bonnie, and Barack. During this inspection, APHIS examined the transport trailer used to transport these elephants from the licensee's train to the performance venue. It had numerous burnished bolts in an elevated compartment which serves as a compartment or primary enclosure for the animals. Several of these bolts have sharp edges on their sides which could cause injury to these animals during transport.

Prepared By:

TRACY A THOMPSON, D.V.M. USDA, APHIS, Animal Care

Date:

Title: SUPERVISORY ANIMAL CARE Inspector 5044

Nov-22-2010

Received By:

b6,b7c

Date:

Title:

Nov-23-2010



Inspection Report

Compartments used to transport live animals shall be free of any sharp edges that could injure the live animals contained therein, namely elephants.

Correct by January 1, 2011.

The inspection was conducted by Dr Tracy Thompson, AC VMO and Dr Tami Howard, AC VMO at the United Center and the train yard at North Ave and Narraganset in Chicago, IL . The inspection was conducted with the General Manager, Animal Superintendent, Senior Handler, Attending Veterinarian, Veterinary Technician, Assistant General Manager, Government Relations, an attorney for Feld Entertainment, 4 Junior Handlers, representatives of Chicago Police Department, representatives of the Commission on Animal Care and Control, and Dr. Denise Sofranko, AC Field Specialist for Elephants and [REDACTED], IES Investigator.

The exit briefing was conducted with the General Manager, Feld Entertainment attorney, and the Attending Veterinarian on site on November 18, 2010.

Inspection report was sent to licensee via email, certified mail, and first class mail.

10 Asian Elephants inspected: Karen (41 yrs), Nichole (34 yrs), Juliette (18 yrs), Bonnie (16 yrs), Kelly Ann (14 yrs), Sara (9 yrs), Rudy (8 yrs), Asha (8 yrs), Irvin (5 yrs), and Barack (23 months).

Prepared By:

TRACY A THOMPSON, D.V.M. USDA, APHIS, Animal Care
Title: SUPERVISORY ANIMAL CARE Inspector 5044

Date:
Nov-22-2010

Received By:

[REDACTED]
Title: [REDACTED]

Date:
Nov-23-2010