

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) EAJA
Docket No. 12-0645
)
Craig Perry, an individual, d/b/a)
Perry's Exotic Petting Zoo; and)
Perry's Wilderness Ranch & Zoo,)
Inc., an Iowa corporation,)
)
Applicants) **Decision and Order**

PROCEDURAL HISTORY

On January 17, 2012, Craig Perry and Perry's Wilderness Ranch & Zoo, Inc. [hereinafter Applicants], instituted this proceeding under the Equal Access to Justice Act (5 U.S.C. § 504) and Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. §§ 1.180-.203) [hereinafter EAJA Rules of Practice] by filing an Application for Award of Attorney's Fees and Expenses [hereinafter First EAJA Application]. On February 3, 2012, the Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter APHIS], filed a motion to strike the Applicants' First EAJA Application as premature because the adversary adjudication for which the Applicants seek attorney fees and other expenses¹ had not become final and unappealable.²

¹The adversary adjudication for which the Applicants seek attorney fees and other expenses is *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. __ (July 19, 2012).

²Complainant's Motion to Strike Application Filed by Respondents Craig A. Perry and

On February 6, 2012, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] issued an Order Deferring to Judicial Officer whereby the ALJ referred the proceeding to the Office of the Judicial Officer for consideration and decision. On May 23, 2012, I issued a Remand Order stating, as follows:

The EAJA Rules of Practice provide that the Judicial Officer's jurisdiction is triggered when an Equal Access to Justice Act applicant or agency counsel seeks review of an adjudicative officer's initial decision on the fee application (7 C.F.R. § 1.201(a)). As there has been no request for review of an initial decision on the Applicants' EAJA Application, I have no jurisdiction over this Equal Access to Justice Act proceeding and I remand the proceeding to the ALJ for further proceedings in accordance with the Equal Access to Justice Act and the EAJA Rules of Practice.

Remand Order at 2 (footnote omitted).

In re Terranova Enterprises, Inc. (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. __ (July 19, 2012), became final and unappealable on September 17, 2012. On September 27, 2012, the ALJ granted the Applicants' First EAJA Application, awarded attorney fees and other expenses in the amount of \$16,548.83 to Larry J. Thorson, and suggested that the Applicants should have filed a renewed application for attorney fees and other expenses,³ as follows:

I would have welcomed a renewed application for attorneys' fees and costs, particularly considering USDA's objections on the ground that Mr. Thorson's application was pre-maturely filed. I note that in light of the assessment of a civil penalty, Mr. Thorson may have concluded that his application would be denied. However, as discussed infra., the failure to prevail on one allegation

Perry's Wilderness Ranch & Zoo, Inc., for Award of Attorney's Fees and Expenses.

³Miscellaneous Decision and Order Amending the Caption and Granting Attorney Fees and Costs to Larry Thorson, Esq., Counsel for Perry Respondents [hereinafter ALJ's Decision as to the First EAJA Application].

does not totally preclude an award of fees and costs.

ALJ's Decision as to the First EAJA Application at 3 n.2.

On October 11, 2012, the Applicants filed Renewed Application for Award of Attorney's Fees and Expenses [hereinafter Second EAJA Application].⁴ On November 2, 2012, prior to the expiration of APHIS's time for filing an answer in response to the Applicants' Second EAJA Application,⁵ the ALJ dismissed the Second EAJA Application stating, as follows:

By Order issued September 27, 2012, I awarded fees and costs upon the application of Larry Thorson, Esq., counsel for Respondents Craig Perry and Perry's Wilderness Ranch & Zoo, Inc. On October 11, 2012, Mr. Thorson renewed his application for fees, which had been filed earlier in 2012. Since I already issued an Order awarding fees on the earlier application, the later filed renewed application is moot, and therefore, is hereby DISMISSED.

Miscellaneous Decision and Order Dismissing Renewed Application for Attorney's Fees and Costs [hereinafter ALJ's Decision as to the Second EAJA Application] (emphasis in original).

On November 5, 2012, APHIS appealed the ALJ's Decision as to the First EAJA Application.⁶ On November 30, 2012, the Applicants filed a response to APHIS's appeal of the ALJ's Decision as to the First EAJA Application⁷ and appealed the ALJ's Decision as to the

⁴The Second EAJA Application is not merely a renewal of the First EAJA Application. The Applicants request an award of \$17,648 for attorney fees and \$603.83 for other expenses in the First EAJA Application (First EAJA Application at 2). The Applicants request an award of \$18,540 for attorney fees and \$603.83 for other expenses in the Second EAJA Application (Second EAJA Application at 4).

⁵See 7 C.F.R. § 1.195(a).

⁶Agency's Petition for Appeal; and Request to Amend Caption.

⁷Applicant's [sic] Response and Resistance to Agency's Petition for Appeal and

Second EAJA Application.⁸ On December 18, 2012, APHIS filed a response to the Applicants' appeal of the ALJ's Decision as to the Second EAJA Application.⁹

On February 22, 2013, I issued a Second Remand Order in which I vacated the ALJ's Decision as to the First EAJA Application and the ALJ's Decision as to the Second EAJA Application and remanded the proceeding to the ALJ to consider the Applicants' Second EAJA Application, concluding as follows:

The adversary adjudication for which the Applicants seek attorney fees and other expenses, *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. __ (July 19, 2012), did not become final and unappealable until September 17, 2012. Therefore, the Applicants' First EAJA Application, which was filed on January 17, 2012, 8 months before *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. __ (July 19, 2012), became final and unappealable, was prematurely filed and is dismissed. The Applicants' Second EAJA Application which was filed on October 11, 2012, 24 days after *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. __ (July 19, 2012), became final and unappealable, was timely filed. Therefore, the ALJ's Decision as to the First EAJA Application in which the ALJ granted the Applicants' premature First EAJA Application is vacated, the ALJ's Decision as to the Second EAJA Application in which the ALJ dismissed the Applicants' timely filed Second EAJA Application is vacated, and the proceeding is remanded to the ALJ to consider the Applicants' Second EAJA Application.

Second Remand Order at 4-5 (footnote omitted).

On February 28, 2013, the ALJ granted the Applicants' Second EAJA Application and

Memorandum of Points and Authorities.

⁸Applicants' Petition for Appeal from Miscellaneous Decision and Order Dismissing Renewed Application for Attorney's Fees and Costs.

⁹Agency Response to Petition for Appeal.

awarded attorney fees and other expenses in the amount of \$16,548.83 to Mr. Thorson.¹⁰

On March 14, 2013, APHIS filed Agency's Petition for Appeal of Decision and Order on Remand [hereinafter Appeal Petition]. On April 19, 2013, the Applicants filed Applicant's [sic] Response and Resistance to Agency's Petition for Appeal and Memorandum of Points. On May 14, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

APHIS contends on appeal that the ALJ did not afford APHIS an opportunity to file an answer in response to the Applicants' Second EAJA Application, as required by 7 C.F.R. § 1.195(a) (Appeal Pet. at 13-15). The record establishes that the ALJ issued the ALJ's Decision as to the Second EAJA Application and the ALJ's Decision on Remand as to the Second EAJA Application prior to the expiration of the time for APHIS's filing an answer in response to the Second EAJA Application. Therefore, I considered remanding this proceeding to the ALJ to provide APHIS an opportunity to file an answer in response to the Applicants' Second EAJA Application. However, given the torturous course of this proceeding, the numerous filings by APHIS and the Applicants in which they clearly articulate their positions in this proceeding, and the ALJ's Decision on Remand as to the Second EAJA Application, I conducted a telephone conference on July 8, 2014, with Mr. Thorson, counsel for the Applicants, and Ms. Colleen A. Carroll, counsel for APHIS, to determine if the parties were willing to forego

¹⁰Decision and Order on Remand Granting Attorney Fees and Costs to Larry Thorson, Esq., Counsel for Perry Respondents [hereinafter ALJ's Decision on Remand as to the Second EAJA Application].

further proceedings before the ALJ.¹¹ Mr. Thorson and Ms. Carroll agreed that I should forego further proceedings before the ALJ and issue a final agency decision.

Based upon a careful consideration of the record, I issue this final decision awarding the Applicants attorney fees and other expenses incurred in connection with *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), ___ Agric. Dec. ___ (July 19, 2012).

DISCUSSION

The Equal Access to Justice Act requires an agency that conducts an adversary adjudication to award fees and other expenses to a prevailing party other than the United States, as follows:

§ 504. Costs and fees of parties

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

5 U.S.C. § 504(a)(1).

A prevailing party must submit an application for fees and other expenses to the agency from which the party seeks fees and other expenses within 30 days after a final disposition of the

¹¹Ms. Sherida Hardy, Legal Assistant, Office of the Judicial Officer, was also on the conference call.

adversary adjudication.¹² The date of a final disposition is defined, as follows:

§ 1.193 Time for filing application.

.....
 (b) For the purposes of this subpart, final disposition means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, become final and unappealable, both within the Department and to the courts.

7 C.F.R. § 1.193(b).

An award of attorney fees and other expenses is appropriate if: (1) the applicant is a prevailing party, other than the United States, in an adversary adjudication; (2) the agency's position in the adversary adjudication was not substantially justified; (3) the applicant has not unduly or unreasonably protracted the adversary adjudication; and (4) the award sought is not rendered unjust due to special circumstances. The ALJ found the Applicants were prevailing parties in an adversary adjudication, APHIS's position in the adversary adjudication was not substantially justified, and no special circumstances rendered the award sought unjust. The ALJ awarded Mr. Thorson attorney fees and other expenses incurred in connection with *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. __ (July 19, 2012), in the amount of \$16,548.83.¹³

While APHIS concedes the Applicants were prevailing parties in a significant and discrete substantive portion of the adversary adjudication in question (Appeal Pet. at 15

¹² 5 U.S.C. § 504(a)(2); 7 C.F.R. § 1.193(a).

¹³ ALJ's Decision on Remand as to the Second EAJA Application.

n.28, 18), APHIS raises 10 issues on appeal and requests that I reverse the ALJ’s Decision on Remand as to the Second EAJA Application.

First, APHIS contends the ALJ erroneously failed to adopt the case caption which I ordered adopted in a Ruling Granting Motion to Amend Case Caption (Appeal Pet. at 12).

On February 1, 2013, I issued an order stating a cursory review of *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry’s Wilderness Ranch & Zoo, Inc.), ___ Agric. Dec. ___ (July 19, 2012), reveals that Mr. Thorson was not a party to that proceeding, but, instead, served as counsel to Mr. Perry and Perry’s Wilderness Ranch & Zoo, Inc., who were parties in that adversary adjudication and granting APHIS’s request to amend the caption of this proceeding to read, as follows:

In re:)	EAJA
	Docket No. 12-0645	
)	
Craig Perry, an individual, d/b/a)	
Perry’s Exotic Petting Zoo; and)	
Perry’s Wilderness Ranch & Zoo,)	
Inc., an Iowa corporation,)	
)	
Applicants)	

Ruling Granting Motion to Amend Caption at 3.

Despite that ruling, the ALJ’s Decision on Remand as to the Second EAJA Application is captioned, as follows:

Docket No. 12-0645

In re:

Application for Attorney’s Fees and Costs
of LARRY THORSON, ESQ., counsel
for Respondents CRAIG PERRY, an individual doing
business as PERRY’S EXOTIC PETTING

ZOO; PERRY'S WILDERNESS RANCH
& ZOO, INC., an Iowa corporation,

Applicant.

I find the ALJ's failure to amend the case caption harmless error. Nonetheless, I amend the case caption to reflect the fact that Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc., are the Applicants in this proceeding.

Second APHIS contends the ALJ erroneously awarded attorney fees and other expenses to Mr. Thorson (Appeal Pet. at 12).

The Equal Access to Justice Act provides that fees and other expenses shall be awarded to a prevailing party, other than the United States, in an adversary adjudication.¹⁴ Similarly, the EAJA Rules of Practice provide the applicant must be a party to the adversary adjudication for which the applicant seeks attorney fees and other expenses under the Equal Access to Justice Act, as follows:

§ 1.184 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under EAJA, the applicant must meet one of the following conditions:

(1) The applicant must be a prevailing party to the adversary adjudication for which it seeks an award; or

(2) The applicant must be a party to an adversary adjudication arising from an agency action to enforce the party's compliance with a statutory or regulatory requirement in which the demand by the agency was substantially in excess of the decision of the adjudicative officer and the demand is unreasonable when compared with such decision under the facts and circumstances of the case.

7 C.F.R. § 1.184(a).

¹⁴5 U.S.C. § 504(a)(1).

The adversary adjudication for which the Applicants in this proceeding seek attorney fees and other expenses under the Equal Access to Justice Act is *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), ___ Agric. Dec. ___ (July 19, 2012). Mr. Thorson was not a party, but, instead, served as counsel to Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc., who were parties in that adversary adjudication. I find the ALJ's award of attorney fees and other expenses to Mr. Thorson, error.¹⁵ Therefore, I award attorney fees and other expenses to Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc., rather than to Mr. Thorson.

Third, APHIS contends the ALJ erroneously failed to conduct further EAJA proceedings as ordered by the Judicial Officer in the Second Remand Order and set forth in the EAJA Rules of Practice. Specifically, APHIS contends the ALJ did not consider the Applicants' Second EAJA Application and the ALJ failed to afford APHIS an opportunity to file an answer in response to the Applicants' Second EAJA Application. (Appeal Pet. at 13-15).

On February 22, 2013, I remanded this proceeding to the ALJ for further proceedings regarding the Applicants' Second EAJA Application in accordance with the Equal Access to Justice Act and the EAJA Rules of Practice.¹⁶ I find APHIS's contention that the ALJ failed to

¹⁵See *Astrue v. Ratliff*, 560 U.S. 586, 591-93 (2010) (holding an Equal Access to Justice Act award is made to a litigant not to the litigant's attorney); *FDL Technologies, Inc. v. United States*, 967 F.2d 1578, 1580 (Fed. Cir. 1992) (stating an award under the Equal Access to Justice Act is made to the prevailing party, not to the prevailing party's attorney); *Panola Land Buying Ass'n v. Clark*, 844 F.2d 1506, 1509, 1511 (11th Cir. 1988) (same).

¹⁶Second Remand Order at 6.

consider the Applicants' Second EAJA Application mere speculation. However, I agree with APHIS's contention that the ALJ issued the ALJ's Decision as to the Second EAJA Application and the ALJ's Decision on Remand as to the Second EAJA Application before APHIS filed an answer in response to the Second EAJA Application and before the expiration of the time for filing an answer in response to the Second EAJA Application. Generally, I would remand this proceeding to the ALJ to provide APHIS an opportunity to file an answer in response to the Applicants' Second EAJA Application, as provided in 7 C.F.R. § 1.195(a); however, pursuant to the agreement of the parties during the July 8, 2014, telephone conference described in this Decision and Order, *supra*, I do not remand this proceeding to the ALJ.

Fourth, APHIS contends the ALJ erroneously failed to reject the Applicants' Second EAJA Application based upon the Applicants' failure to identify the APHIS position that the Applicants allege was not substantially justified, as required by 7 C.F.R. § 1.190(a) (Appeal Pet. at 16).

The EAJA Rules of Practice require that an applicant identify the United States Department of Agriculture position which the applicant alleges was not substantially justified or show that the United States Department of Agriculture demand was excessive and unreasonable, as follows:

§ 1.190 Contents of application.

(a) An application for an award of fees and expenses under EAJA shall identify the applicant and the proceeding for which an award is sought. Unless the applicant is an individual, the application shall state the number of employees of the applicant and describe briefly the type and purpose of its organization or business. The application shall also:

(1) Show that the applicant has prevailed and identify the position of the Department that the applicant alleges was not substantially justified and shall briefly state the basis for such allegation; or

(2) Show that the demand by the Department in the proceeding was substantially in excess of, and was unreasonable when compared with, the decision in the proceeding.

7 C.F.R. § 1.190(a).

The Applicants identify the APHIS position which they allege was not substantially justified, as follows:

3. The position of the USDA was not substantially justified in bringing Mr. Perry and/or Perry's Wilderness Ranch & Zoo, Inc. d/b/a Perry's Exotic Petting Zoo into this matter.

Second EAJA Application ¶ 3 at 2. The Applicants' identification of the APHIS position which the Applicants allege was not substantially justified is marked by perplexing brevity, and I find no brief statement of the basis for the Applicants' allegation in the Applicants' Second EAJA Application. However, the Applicants incorporate into the Second EAJA Application all of the arguments in *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. ____ (July 19, 2012), as follows:

1. This Court is familiar with the relevant facts and proceedings. To the extent that facts, law, procedural developments, trial transcript, exhibits, arguments, or circumstances other than those specifically cited in this application may be relevant, the Perry Respondents incorporate these by reference and ask the Court to note the same.

Second EAJA Application ¶ 1 at 1.

The Applicants' arguments in *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. ____ (July 19, 2012), clearly identify the APHIS position which the Applicants allege was not substantially justified and clearly provide the basis for the Applicants' allegation. Therefore, I find the Applicants complied with the requirements of 7 C.F.R. § 1.190(a) by incorporating the arguments presented in the underlying adversary adjudication into the Applicants' Second EAJA Application.

Fifth, APHIS contends the ALJ erroneously failed to reject the Applicants' Second EAJA Application because the Applicants failed to provide a net worth exhibit, as required by 7 C.F.R. § 1.191(a) (Appeal Pet. at 16-17).

The EAJA Rules of Practice require an applicant for fees and expenses to provide an exhibit showing the net worth of the applicant, as follows:

§ 1.191 Net worth exhibit.

(a) An applicant, except a qualified tax-exempt organization or cooperative association, must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in § 1.184 of this part) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this subpart. The adjudicative officer may require an applicant to file additional information to determine its eligibility for an award.

7 C.F.R. § 1.191(a).

The Applicants state Mr. Perry's net worth did not exceed \$2,000,000 and Perry's Wilderness Ranch & Zoo, Inc.'s net worth did not exceed \$7,000,000 at the time APHIS initiated *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. __ (July 19, 2012).¹⁷ In support of these assertions, the Applicants submitted Mr. Perry's affidavit¹⁸ in which Mr. Perry attests that, at the time APHIS initiated the adversary adjudication in question, his net worth was well under \$2,000,000; Perry's Wilderness Ranch & Zoo, Inc., had a net worth well under \$7,000,000; and Mr. Perry was Perry's Wilderness Ranch & Zoo, Inc.'s only employee.

The ALJ could have required the Applicants to file additional information to determine

¹⁷Second EAJA Application ¶ 6 at 2-3.

¹⁸Affidavit of Craig Perry in Support of Award of Attorney's Fees, dated October 9, 2012.

their eligibility for an award. Instead, the ALJ found Mr. Perry's affidavit sufficient to determine the Applicants' eligibility for an Equal Access to Justice Act award, as follows:

. . . . I credit the affidavits [sic] accompanying the application that attest that Respondent Craig Perry's net worth did not exceed two million dollars at the time of the adjudication and that the business Respondents [sic] did not have a net worth in excess of seven million dollars.

ALJ's Decision on Remand as to the Second EAJA Application at 3. The Applicants correctly note APHIS does not contradict the statements in Mr. Perry's affidavit but merely contend the Applicants failed to attach a net worth exhibit to the Second EAJA Application.¹⁹

Based upon the ALJ's finding that Mr. Perry's affidavit is credible, the fact that Mr. Perry's affidavit is uncontroverted, the already protracted history of this proceeding, and the agreement of the parties, during the July 8, 2014, telephone conference described in this Decision and Order, *supra*, to forego further proceedings before the ALJ, I decline to remand this proceeding to the ALJ to require the Applicants to file additional information regarding the net worth of the Applicants. Moreover, I find no basis on which to disturb the ALJ's determination that, at the time APHIS initiated *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. ____ (July 19, 2012), Mr. Perry's net worth did not exceed \$2,000,000, and Perry's Wilderness Ranch & Zoo, Inc.'s net worth did not exceed \$7,000,000.

Sixth, APHIS contends the ALJ erroneously failed to reject the Applicants' Second EAJA Application because the Applicants' Second EAJA Application was not accompanied by

¹⁹ Applicant's [sic] Response and Resistance to Agency's Petition for Appeal and Memorandum of Points at 4.

full documentation of the fees and expenses, as required by 7 C.F.R. § 1.192(a)-(c) (Appeal Pet. at 17).

The EAJA Rules of Practice require documentation of fees and expenses, as follows:

§ 1.192 Documentation of fees and expenses.

(a) The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project, or similar matter, for which an award is sought.

(b) The documentation shall include an affidavit from any attorney, agent, or expert witness representing or appearing on behalf of the party, stating the actual time expended and the rate at which fees and other expenses were computed and describing the specific services performed.

(1) The affidavit shall state the services performed. In order to establish the hourly rate, the affidavit shall state the hourly rate which is billed and paid by the majority of clients during the relevant time periods.

(2) If no hourly rate is paid by the majority of clients because, for instance, the attorney or agent represents most clients on a contingency basis, the attorney or agent shall provide information about two attorneys or agents with similar experience, who perform similar work, stating their hourly rate.

(c) The documentation also shall include a description of any expenses for which reimbursement is sought and a statement of the amounts paid and payable by the applicant or by any other person or entity for the services provided.

7 C.F.R. § 1.192(a)-(c).

The Applicants attached to the Second EAJA Application a full documentation of the fees and expenses for which the Equal Access to Justice Act award is sought. The documentation states the actual time expended and the hourly rate at which Mr. Thorson computed attorney fees and describes the specific services performed by Mr. Thorson and the other expenses. In support of this documentation, the Applicants submitted Mr. Thorson's

affidavit²⁰ in which Mr. Thorson attests to accuracy of the documentation of the fees and expenses and the hourly rate at which he computed attorney fees in *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. ____ (July 19, 2012). Therefore, I find the Applicants' Second EAJA Application was accompanied by full documentation of the fees and expenses, as required by 7 C.F.R. § 1.192(a)-(c).

Seventh, APHIS contends the ALJ erroneously found APHIS's position in *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. ____ (July 19, 2012), was not substantially justified (Appeal Pet. at 17-21).

The EAJA Rules of Practice provide that a prevailing party may receive an award, unless the position of the United States Department of Agriculture was substantially justified, as follows:

§ 1.185 Standards for awards.

(a) Prevailing party. (1) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the Department was substantially justified. The position of the Department includes, in addition to the position taken by the Department in the adversary adjudication, the action or failure to act by the Department upon which the adversary adjudication is based. The burden of proof that an award should not be made to an eligible prevailing applicant because the position of the Department was substantially justified is on the agency.

7 C.F.R. § 1.185(a).

APHIS bears the burden of proving that its position in *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. ____

²⁰Affidavit of Larry J. Thorson, dated October 10, 2012.

(July 19, 2012), was substantially justified. In order to meet its burden of proof, APHIS must show that its position had a reasonable basis in both law and fact.²¹ APHIS's failure to prevail in the underlying adversary adjudication does not create a presumption that APHIS's position was not substantially justified.²²

The alleged violations of the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act], on which Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc., prevailed in the adversary adjudication concerned the care of elephants exhibited at the Iowa State Fair by Terranova Enterprises, Inc., and Douglas Keith Terranova [hereinafter

²¹ See *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (holding a substantially justified position is one that would satisfy a reasonable person and must have a reasonable basis in law and fact); *Harmon v. United States*, 101 F.3d 574, 586-87 (8th Cir. 1996) (holding a substantially justified position is one that is clearly reasonable, well founded in law and fact, and solid); *Frey v. CFTC*, 931 F.2d 1171, 1174 (7th Cir. 1991) (stating the standard for "substantial justification," within the meaning of the Equal Access to Justice Act, is one of simple reasonableness; to avoid an award of fees the agency must prove that the proceeding had a reasonable basis in law and fact); *Derickson Co. v. NLRB*, 774 F.2d 229, 232 (8th Cir. 1985) (holding the test of substantial justification is a practical one, namely, whether the agency's position was reasonable both in law and fact); *Iowa Express Distribution, Inc. v. NLRB*, 739 F.2d 1305, 1308 (8th Cir.) (stating the test of whether the position of the United States is substantially justified is essentially one of reasonableness in law and fact), *cert. denied*, 469 U.S. 1088 (1984).

²² *Scarborough v. Principi*, 541 U.S. 401, 415 (2004) (stating "substantially justified" is not to be read to raise a presumption that the government's position was not substantially justified simply because it lost the case); *Harmon v. United States*, 101 F.3d 574, 586-87 (8th Cir. 1996) (holding a substantially justified position is one that is clearly reasonable, even if it is not correct); *S & H Riggers & Erectors, Inc. v. OSHRC*, 672 F.2d 426, 430 (5th Cir. 1982) (stating the burden of showing substantial justification for a case the government lost is not insurmountable).

Terranova Respondents] in August 2008. APHIS took the position in the adversary adjudication that Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc., jointly exhibited the elephants with the Terranova Respondents and were, therefore, jointly liable with the Terranova Respondents for violations of the Animal Welfare Act.

I have long held, when two or more persons exhibit animals jointly, they all can be liable for violations of the Animal Welfare Act that arise out of that exhibition and it is not necessary that their relationship meet the requirements for a partnership or joint venture.²³ Therefore, I conclude APHIS's position in *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. __ (July 19, 2012), had a reasonable basis in law.

The Administrator introduced very little evidence that Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc., jointly engaged in the exhibition of elephants with the Terranova Respondents at the Iowa State Fair. In contrast, Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc., clearly established that the Terranova Respondents owned and cared for the elephants

²³*In re Gus White III*, 49 Agric. Dec. 123, 154 (1990) (stating, when two persons act together in the exhibition of animals, it is not necessary that their relationship meet all of the technical requirements of a partnership or joint venture in order to hold that both are exhibitors and jointly and severally liable for the violations); *In re Hank Post*, 47 Agric. Dec. 542, 547 (1988) (stating whether or not the shared duties of three persons constituted a joint venture is not the critical issue; the controlling consideration is that each person exercised control and authority over the way the animal was handled when exhibited and any one of them could have prevented the mishandling). *Cf. In re Micheal McCall*, 52 Agric. Dec. 986, 998 (1993) (stating the distinction between two kennels was so blurred as to make them, in reality, a single operation for which both individual kennel owners were jointly responsible).

in question; Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc.'s employees and volunteers were prohibited from entering the Terranova Respondents' elephant area; and Mr. Perry and Perry's Ranch & Zoo, Inc., had no control or authority over the care of the Terranova Respondents' elephants. When I examine the administrative record as a whole, I find APHIS did not have a reasonable basis in fact for its position regarding Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc.'s alleged joint exhibition of the Terranova Respondents' elephants at the Iowa State Fair.

In order to prove that its position in *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. ____ (July 19, 2012), was substantially justified, APHIS must show that its position had a reasonable basis in both law and fact. As APHIS failed to prove that it had a reasonable basis in fact, I conclude APHIS's position in the adversary adjudication in question was not substantially justified.

Eighth, APHIS contends the ALJ erroneously failed to reduce the award of attorney fees to the Applicants because the request for attorney fees includes services that appear unrelated to Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc.'s defense in the adversary adjudication (Appeal Pet. at 22). APHIS identifies two entries and portions of two other entries in the documentation of fees attached to the Applicants' Second EAJA Application that APHIS contends describe services that appear unrelated to Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc.'s defense (Appeal Pet. at 24 n.62).²⁴ In addition, APHIS contends none of the

²⁴The services described in the four entries which APHIS contends include services that appear unrelated to Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc.'s defense, are for 2.5 hours of attorney services. Mr. Thorson billed the Applicants \$400 for these services.

attorney fees for Mr. Thorson's communications with counsel for the Key Respondents²⁵ in *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. ____ (July 19, 2012), could be related to Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc.'s defense (Appeal Pet. at 25).

The Applicants state all the attorney fees appearing on the documentation attached to the Second EAJA Application "were actually incurred by" Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc., in connection with *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. ____ (July 19, 2012).²⁶ In addition, the Applicants submitted Mr. Thorson's affidavit²⁷ in which Mr. Thorson attests to the accuracy of the documentation of fees attached to the Second EAJA Application. I give more weight to the Applicants' statements and Mr. Thorson's affidavit than I give to APHIS's contention that four entries on the documentation of fees appear unrelated to Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc.'s defense, and APHIS's contention that Mr. Thorson's communications with counsel for the Key Respondents could not be related to Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc.'s defense. Therefore, I reject APHIS's contention that the ALJ erroneously failed to reduce

²⁵Eugene "Trey" Key, III, and Key Equipment Co., Inc., d/b/a Culpepper & Merriweather Circus, were respondents in *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. ____ (July 19, 2012). I infer APHIS's reference to the "Key Respondents" is a reference to Mr. Key and Key Equipment Co., Inc.

²⁶Second EAJA Application ¶ 7 at 3.

²⁷See note 20.

the award of attorney fees to the Applicants based upon the contested entries on the documentation of fees attached to the Second EAJA Application.

Ninth, APHIS contends the ALJ erroneously failed to reduce the award of fees and other expenses to the Applicants because the Key Respondents unreasonably protracted *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. ____ (July 19, 2012), by advancing a challenge to the Secretary of Agriculture's confiscation authority in the wrong forum (Appeal Pet. at 22).

The EAJA Rules of Practice provide that an award to a prevailing party will be reduced or denied if an applicant has unduly or unreasonably protracted the proceeding, as follows:

§ 1.185 Standards for awards.

(a) Prevailing Party. (1)

(2) An award to a prevailing applicant will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

7 C.F.R. § 1.185(a)(2).

The EAJA Rules of Practice clearly provide for a reduction or denial of an award if a prevailing applicant has unduly or unreasonably protracted the adversary adjudication. The Key Respondents are not applicants in this proceeding; Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc., are the Applicants in this proceeding. Therefore, even if I were to find that the Key Respondents unduly or unreasonably protracted *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. __ (July 19, 2012), I would not reduce or deny the award of fees and other expenses to the Applicants.

Tenth, APHIS contends the ALJ erroneously calculated the amount of the award. Specifically, APHIS contends the ALJ awarded Mr. Thorson attorney fees at the rate of \$150 an hour, which exceeds the maximum hourly rate that can be awarded in this proceeding. (Appeal Pet. at 22-26).

The ALJ awarded Mr. Thorson attorney fees at the rate of \$150 per hour, as follows:

In addition, I must reduce Mr. Thorson's hourly rate for service. Although Mr. Thorson's rate is objectively reasonable, an award of fees under EAJA is limited to an hourly rate of \$150.00, pursuant to 7 C.F.R. § 1.186 (March 3, 2011). Accordingly, a total of \$16,548.83 (\$150.00 x 106.30 hours + 603.83) is hereby awarded to Larry Thorson, Esq.

ALJ's Decision on Remand as to the Second EAJA Application at 3-4.

The EAJA Rules of Practice currently provide that no award for the fee of an attorney may exceed \$150 per hour, as follows:

§ 1.186 Allowable fees and expenses.

....

(b) In proceedings commenced on or after the effective date of this paragraph, no award for the fee of an attorney or agent under the rules in this subpart may exceed \$150 per hour. No award to compensate an expert witness may exceed the highest rate at which the Department pays expert witnesses, which is set out at § 1.150 of this part. However, an award also may include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or witness ordinarily charges clients separately for such expenses.

7 C.F.R. § 1.186(b). The final rule amending 7 C.F.R. § 1.186(b) to provide a maximum hourly attorney fees rate of \$150 became effective March 3, 2011.²⁸ The final rule explicitly states the maximum hourly attorney fees rate of \$150 only applies to proceedings initiated on and after the effective date of the final rule, as follows:

SUMMARY: The U.S. Department of Agriculture (USDA) is amending its regulations implementing the Equal Access to Justice Act (EAJA) by raising the maximum hourly attorney fees rate from \$125.00 to \$150.00 for covered proceedings initiated on and after the effective date of this final rule.

DATES: This final rule is effective March 3, 2011.

....

SUPPLEMENTARY INFORMATION: On July 30, 2010, USDA published a proposed rule (75 FR 44928, July 30, 2010) to amend its regulations implementing the Equal Access to Justice Act (EAJA), 5 U.S.C. 504, to raise the maximum hourly attorney fees rate set forth in 7 CFR 1.186 from \$125.00 to \$150.00 for proceedings initiated on and after the effective date of the publication of this final rule.

76 Fed. Reg. 11,667 (Mar. 3, 2011).

Kevin Shea, Acting Administrator, APHIS, initiated the adversary adjudication for which the Applicants seek attorney fees and other expenses, on July 23, 2009.²⁹ Therefore, the

²⁸76 Fed. Reg. 11,667 (Mar. 3, 2011).

²⁹*In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness

maximum hourly attorney fees rate of \$150 set forth in current 7 C.F.R. § 1.186(b) is not applicable to this proceeding, and I find the ALJ erroneously awarded attorney fees at the rate of \$150 an hour. Instead, I find the maximum hourly attorney fees rate of \$125 is applicable to this proceeding.³⁰

The Applicants seek a total award of \$19,143.83 for 123.6 hours of attorney services and \$603.83 for other expenses.³¹ I agree with the Applicants that they are eligible for an award for 123.6 hours for attorney services and \$603.83 for other expenses; however, I apply the maximum hourly attorney fees rate of \$125 which is applicable to the adversary adjudication for which the Applicants seek fees and other expenses. Accordingly, I award the Applicants \$16,053.83 for fees and other expenses incurred by the Applicants in connection with *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. __ (July 19, 2012).

Findings of Fact and Conclusions of Law

1. The Secretary of Agriculture has jurisdiction over this matter.
2. Craig Perry is an individual whose business address is in Iowa.
3. Perry's Wilderness Ranch & Zoo, Inc., is an Iowa corporation.
4. On July 23, 2009, Kevin Shea, Acting Administrator, APHIS, instituted an adversary adjudication, *In re Terranova Enterprises, Inc.*, AWA Docket No. 09-0155, against

Ranch & Zoo, Inc.), __ Agric. Dec. __, slip op. at 1 (July 19, 2012).

³⁰7 C.F.R. § 1.186(b) (2010).

³¹Second EAJA Application ¶¶ 7-10 at 3.

Mr. Perry and Perry's Wilderness Ranch & Zoo, Inc.³²

5. At the time APHIS initiated *In re Terranova Enterprises, Inc.*, AWA Docket No. 09-0155, Mr. Perry had a net worth of less than \$2,000,000.

6. At the time APHIS initiated *In re Terranova Enterprises, Inc.*, AWA Docket No. 09-0155, Perry's Wilderness Ranch & Zoo, Inc., had a net worth of less than \$7,000,000 and had fewer than 500 employees.

7. *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. ____ (July 19, 2012), became final and unappealable on September 17, 2012.

8. The Applicants' Second EAJA Application, which was filed on October 11, 2012, 24 days after *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. ____ (July 19, 2012), became final and unappealable, was timely filed.

9. The Applicants were prevailing parties in a significant and discrete substantive portion of *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. ____ (July 19, 2012).

10. APHIS's position in *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. ____ (July 19, 2012), was not substantially justified.

³²*In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. ____, slip op. at 1 (July 19, 2012).

11. The Applicants did not unduly or unreasonably protract *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. __ (July 19, 2012).

12. There are no special circumstances that would make the award of fees or other expenses to the Applicants unjust.

13. The Applicants meet all conditions of eligibility for an award of fees and other expenses under the Equal Access to Justice Act.

14. The Applicants incurred attorney fees and other expenses in connection with *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. __ (July 19, 2012), to which they are entitled to an award under the Equal Access to Justice Act totaling \$16,053.83.

For the foregoing reasons, the following Order is issued.

ORDER

The Applicants are awarded \$16,053.83 for attorney fees and other expenses incurred in connection with *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. __ (July 19, 2012).³³

RIGHT TO JUDICIAL REVIEW

The Applicants have the right to seek judicial review of the award of attorney fees and

³³The process by which the Applicants may obtain payment of the award in this Order is set forth in 7 C.F.R. § 1.203.

other expenses in this Decision and Order.³⁴ Any appeal of the award of attorney fees and other expenses must be to the courts of the United States having jurisdiction to review the merits of *In re Terranova Enterprises, Inc.* (Decision as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.), ___ Agric. Dec. ___ (July 19, 2012).³⁵ The Applicants must seek judicial review within 30 days after the determination of the award of attorney fees and other expenses in this Decision and Order.³⁶ The date of the determination of the award of attorney fees and other expenses in this Decision and Order is July 17, 2014.

Done at Washington, DC

July 17, 2014

William G. Jenson
Judicial Officer

³⁴7 C.F.R. § 1.202.

³⁵5 U.S.C. § 504(c)(2).

³⁶5 U.S.C. § 504(c)(2). *See also Holzbau v. United States*, 866 F.2d 427, 429-30 (Fed. Cir. 1989) (stating the 30-day time for appeal runs from issuance of the determination or decision, not from the date the party receives a copy of the determination or decision); *Sonicraft, Inc. v. NLRB*, 814 F.2d 385, 386-87 (7th Cir. 1987) (stating the deadline runs from the determination itself).