

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 03-0035
)
ZooCats, Inc., a Texas corporation;)
Marcus Cook, a/k/a Marcus)
Cline-Hines Cook, an individual;)
and Melissa Coody, a/k/a Misty)
Coody, an individual, jointly doing)
business as Zoo Dynamics and)
ZooCats Zoological Systems; Six)
Flags Over Texas, Inc., a Delaware)
corporation; and Marian Buehler,)
an individual,) **Decision and Order as to**
) **ZooCats, Inc., Marcus Cook,**
) **and Melissa Coody**
Respondents)

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding by filing a Complaint on September 30, 2003. The Administrator instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations]; and the Rules

of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

On May 8, 2007, the Administrator filed an Amended Complaint alleging that, during the period December 5, 2000, through February 23, 2007, ZooCats, Inc., Marcus Cook, Melissa Coody, Six Flags Over Texas, Inc., and Marian Buehler violated the Animal Welfare Act and the Regulations by the methods they used to exhibit animals to the public and by failing to provide animals with proper care and treatment. ZooCats, Inc., Marcus Cook, Melissa Coody, Six Flags Over Texas, Inc., and Marian Buehler filed answers denying the material allegations of the Amended Complaint. Six Flags Over Texas, Inc., and Marian Buehler agreed to the disposition of the proceeding by consent decision, and on February 5, 2008, Administrative Law Judge Victor W. Palmer [hereinafter ALJ Palmer] issued a “Consent Decision and Order as to Respondents Marian Buehler and Six Flags Over Texas, Inc.” [hereinafter Consent Decision].¹

On January 28, 2008, through February 1, 2008, ALJ Palmer conducted a hearing in Dallas, Texas. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Bryan L. Sample, Dallas, Texas, represented ZooCats, Inc., Mr. Cook, and Ms. Coody [hereinafter Respondents]. On September 24, 2008, after the Administrator and Respondents filed

¹ALJ Palmer erroneously states he issued the Consent Decision on the “5th day of February, 2007” (Consent Decision at 3).

post-hearing briefs, ALJ Palmer issued a Decision and Order in which ALJ Palmer: (1) concluded ZooCats, Inc., is not a “research facility,” as that term is defined in the Animal Welfare Act and the Regulations; (2) concluded Respondents violated the Animal Welfare Act and the Regulations; (3) ordered Respondents to cease and desist from violating the Animal Welfare Act and the Regulations; and (4) revoked ZooCats, Inc.’s Animal Welfare Act license.

On January 5, 2009, Respondents appealed to, and requested oral argument before, the Judicial Officer.² On January 26, 2009, the Administrator filed Complainant’s Response to Petition for Appeal. On April 30, 2009, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful review of the record, I adopt, with minor changes, ALJ Palmer’s September 24, 2008, Decision and Order as the final Decision and Order as to ZooCats, Inc., Marcus Cook, and Melissa Coody.

²“Respondent’s [sic] Notice of Appeal and Brief in Support” [hereinafter Appeal Petition].

DECISION

Findings of Fact

1. ZooCats, Inc., is a Texas non-profit corporation that does business as ZooCats, Zoo Dynamics, and ZooCats Zoological Systems (CX 3 at 2; Tr. 495, 1265-66).³
2. Marcus Cook, Janice Cook, and Melissa Coody were the directors of ZooCats, Inc. (CX 3 at 2, 16; Tr. 1265, 1566-67).
3. Bryan L. Sample, 25 Highland Park Village, Suite 100, Dallas, Texas 75205-2726, is ZooCats, Inc.’s registered agent for service of process (CX 3 at 3).
4. At all times relevant to the instant proceeding, ZooCats, Inc., operated as an “exhibitor,” as that term is defined in the Animal Welfare Act (7 U.S.C. § 2132(h)) and the Regulations (9 C.F.R. § 1.1), and held a class “C” Animal Welfare Act exhibitor license (number 74-C-0426) that is required by the Regulations for all persons showing or displaying animals to the public (CX 3 at 17-23; Tr. 1267-72).
5. ZooCats, Inc., is a moderately-large business exhibiting wild and exotic animals (CX 28 at 2).
6. ZooCats, Inc., was registered as a research facility and held registration number 74-R-0172 (CX 3 at 24, CX 13 at 1-3). However, from approximately April 15, 2004, to the date the Administrator filed the Amended Complaint, ZooCats, Inc., was not

³The Administrator’s exhibits are referred to as “CX _.” Respondents’ exhibits are referred to as “R _.” The transcript is referred to as “Tr. _.”

a school, institution, or organization that uses or intends to use live animals in research, tests, or experiments; ZooCats, Inc., did not purchase or transport live animals to conduct research, tests, or experiments; and ZooCats, Inc., did not receive funds under a grant, award, loan, or contract from a department, agency, or instrumentality of the United States for the purpose of conducting research, tests, or experiments (CX 2 at 27, CX 7; Tr. 506, 775, 792-93, 959-67, 1006).

7. At all times relevant to the instant proceeding, Marcus Cook was the operations director of ZooCats, Inc., and was the primary person involved in ZooCats, Inc.'s day-to-day operations (Tr. 493-95, 1265-66).

8. Janice Cook is Marcus Cook's mother. Janice Cook did not participate in the exhibition of animals by ZooCats, Inc., Marcus Cook, or Melissa Coody (Tr. 1265).

9. Marcus Cook and Melissa Coody contributed substantial funds to ZooCats, Inc. (Tr. 1280).

10. Melissa Coody attends ZooCats, Inc.'s annual board of director meetings (Tr. 1281).

11. Marcus Cook trained Melissa Coody to work with big cats, and, since that training, Melissa Coody has had a history of working with big cats (Tr. 1282-83).

12. On May 23, 2002, ZooCats, Inc., and Marcus Cook exhibited a tiger at a photographer's studio. While the tiger was being posed and photographed, Mr. Cook and

other animal handlers used cattle prods in an attempt to control the tiger. (CX 17 at 1, 3-4, CX 17A; Tr. 15-21, 28-29, 587-89, 615-18.)

13. Respondents exhibited tigers and other animals, during the period June 8, 2002, through July 19, 2002, at Six Flags Over Texas, Inc., Arlington, Texas, where children were allowed to handle, and have their pictures taken with, tiger cubs for a fee. On June 22, 2002, many children were photographed while holding tiger cubs as they bottle-fed milk to the tiger cubs. The children followed instructions from teenage animal handlers employed by Respondents. The purpose of the bottle-feeding was to distract the tiger cubs and keep them calm. Some people, including a child, were scratched by tiger cubs during these exhibitions. (CX 19, CX 19F at 7-19; Tr. 1569.)

14. During the period February 10, 2003, through February 14, 2003, Respondents posed a small tiger with groups of children for class photographs that included kindergarten and first grade classes, at Prestonwood Christian Academy, 6801 West Park Boulevard, Plano, Texas. During these photography shoots, children, including kindergartners, were allowed to touch the tiger which was being held by an animal handler who was bottle-feeding the tiger. (CX 24 at 1-47.)

15. On February 21, 2003, Respondents exhibited adult tigers at the Westin Galleria Hotel, Dallas, Texas, and photographed spectators for a fee, while the spectators fed a tiger raw meat that they pressed through the upper, metal bars of its cage to induce the tiger to stand on its hind legs and take the meat from their hands. (CX 24 at 1, 47-56.)

16. On November 4, 2003, a juvenile, 16-to-20-week-old, male lion cub, owned by Respondents, was observed by Dr. Doris Hackworth, an Animal and Plant Health Inspection Service [hereinafter APHIS] veterinary medical officer, being exhibited in the retail area of a pet store at Animal Jungle, 4218 Holland Road, Virginia Beach, Virginia. The lion was in a room with a large viewing window on two sides from which the lion was periodically taken out on a leash by an animal handler who would distract the lion with a toy, while spectators petted the lion. Numerous children surrounded the lion without any kind of crowd control or any physical barrier to prevent the children from coming in contact with the lion. (CX 27; Tr. 48-54.)

17. During the period June 20, 2004, through June 27, 2004, Respondents exhibited two tigers at the Red River Valley Fair in Fargo, North Dakota, and photographed spectators for a fee while the spectators fed one of the tigers raw meat on a stick that they pressed through the metal bars of the tiger's cage to induce the tiger to stand on its hind legs and eat the meat off the stick. The evidence includes a photograph of a young boy standing next to Mr. Cook as the boy pressed raw meat on a stick into the open mouth of a caged tiger. (CX 28, CX 28A; Tr. 918-20.)

18. On February 12, 2005, Respondents exhibited a 15-week-old tiger cub at the Tampa Bay Auto Mall, 3925 Tampa Road, Oldsmar, Florida, where the tiger cub was photographed with spectators. There were no barriers between the tiger and the spectators and the only control in place was that the tiger cub was on a leash held by an

animal handler. A spectator tried to pet the tiger cub's head and the tiger nipped her with its teeth. The Florida Fish and Wildlife officer, who investigated the incident, would have had the tiger tested for rabies if the spectator, who had been bitten, had not signed a waiver. (CX 35; Tr. 137-48, 723-29.)

19. On various occasions during the period December 5, 2000, through February 23, 2007, APHIS inspected facilities in which Respondents exhibited animals or housed animals they exhibited and found instances of noncompliance with the Regulations. Many of Respondents' violations concerned inadequate records or minor infractions that Respondents remedied and were no longer found upon return visits by APHIS inspectors. Respondents' more serious violations of the Regulations are set forth in findings of fact numbers 20 through 32.

20. On July 5, 2002, Respondents did not comply with sanitation and employee standards in that cages containing prairie dogs and a bear contained excessive fecal material and urine, and only one unsupervised employee, untrained in animal husbandry practices, cared for three wolves, two cougars, a bear, and a tiger (CX 17 at 4, CX 19; Tr. 593-95, 756-57).

21. On June 12, 2003, Respondents housed tigers at Respondents' Kaufman, Texas, facility, in primary enclosures that were not adequately drained. The enclosures contained pools of water and five tigers were observed to be soiled, wet, and standing in mud. (CX 25; Tr. 155.)

22. On February 9, 2006, some tigers were housed in enclosures with clay surfaces to which some large rocks had been added for better drainage, but, though it had not rained for a week, all but one of those tigers had dried mud caked to their hair on their legs and abdomens. One tiger had chewed off its hair to rid itself of the caked mud. (CX 36.)

23. On February 23, 2007, the enclosures housing a lion and two tigers had visible signs of drainage problems (CX 38 at 2; Tr. 239).

24. On July 28, 2004, Respondents were found to have been feeding animals every other day, and the appearance of a number of young tigers indicated that their diet was insufficient and required evaluation by a veterinarian (CX 29; Tr. 219-23, 687).

25. On August 30, 2004, though Respondents were now feeding the animals daily, a veterinarian had still not been contacted to evaluate the diet plan for each animal, the amount of food necessary for each animal, and the food supplements necessary for each animal (CX 30; Tr. 226-29).

26. At an inspection of the Kaufman, Texas, facility, on October 22, 2004, an APHIS inspector ascertained that a diet plan for the animals had still not been developed by an attending veterinarian, even though Respondents were previously instructed that the diet plan was required (CX 31; Tr. 234-35).

27. On February 9, 2006, Dr. Laurie Gage, a veterinarian employed by APHIS, with expertise in the care and feeding of lions, tigers, and other big cats, accompanied

Donnovan Fox, an APHIS inspector, to Respondents' Kaufman, Texas, facility. Dr. Gage found tiger cubs with misshapen rear legs indicative of metabolic bone disease caused by a poor diet having been fed either to the tiger cubs or to the cubs' mother. On the basis of the types of food found at the facility and admissions by Mr. Cook and an attendant at the facility, Dr. Gage concluded that Respondents were not following the prescribed dietary recommendations of the attending veterinarian Respondents employed. (CX 36; Tr. 84-126.)

28. On June 12, 2003, Respondents failed to provide veterinary care for two tiger cubs suffering from alopecia (hair loss). Instead, Mr. Cook was erroneously treating the tigers with a medication for ringworm based on his own incorrect, uninformed diagnosis. (CX 25; Tr. 151-54.)

29. On August 27, 2004, an APHIS inspector determined that a veterinarian had last visited Respondents' Kaufman, Texas, facility, on June 30, 2003, contrary to the requirement that Respondents arrange for regularly scheduled visits by a veterinarian (CX 30 at 1).

30. On August 27, 2004, two young tigers and a small lion displayed protruding hip bones, dull coats of hair, and less vigor than other animals at the facility. Respondents had not undertaken to have the cause of their condition evaluated by a veterinarian as instructed by APHIS inspectors at a prior inspection when the condition of these animals was first observed. (CX 30 at 4-8.)

31. On February 9, 2006, Respondents had not obtained veterinary care for a tiger that had re-injured a leg a few days earlier (CX 36 at 6-7; R 6 at 35; Tr. 95-99).

32. On February 23, 2007, a tiger requiring veterinary evaluation due to its excessive hair loss and weight loss was observed by an APHIS inspector who determined from the records maintained by Respondents at the Kaufman, Texas, facility, that the tiger had last been seen by a veterinarian on July 6, 2006 (R 6 at 6).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Respondents are “exhibitors,” as that term is defined in section 2(h) of the Animal Welfare Act (7 U.S.C. § 2132(h)) and section 1.1 of the Regulations (9 C.F.R. § 1.1).
3. ZooCats, Inc., presently registered as a research facility holding registration 74-R-0172, is not a “research facility,” as that term is defined in section 2(e) of the Animal Welfare Act (7 U.S.C. § 2132(e)) and section 1.1 of the Regulations (9 C.F.R. § 1.1).
4. On May 23, 2002, ZooCats, Inc., and Marcus Cook failed to handle a tiger as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort. Specifically, Mr. Cook and other animal handlers used cattle prods to control

a tiger during a photography shoot, in willful violation of section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1) (2004)).⁴

5. On May 23, 2002, ZooCats, Inc., and Marcus Cook used physical abuse to train, work, or otherwise handle a tiger. Specifically, Mr. Cook and other animal handlers used cattle prods to control a tiger during a photography shoot, in willful violation of section 2.131(a)(2)(i) of the Regulations (9 C.F.R. § 2.131(a)(2)(i) (2004)).

6. During the period June 8, 2002, through July 19, 2002, Respondents failed, during public exhibition, to handle tigers so there was minimal risk of harm to the animals and the public, with sufficient distance and/or barriers between the animals and the general viewing public, so as to assure the safety of the animals and the public. Specifically, on multiple occasions, during the period June 8, 2002, through July 19, 2002, Respondents, at Six Flags Over Texas, Inc., Arlington, Texas, during public exhibition, exhibited tigers without any distance or barriers between the tigers and the public, in willful violation of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1) (2004)).

7. On June 22, 2002, at Six Flags Over Texas, Inc., Arlington, Texas, Respondents failed to handle tiger cubs as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress,

⁴Effective August 13, 2004, 9 C.F.R. § 2.131(a), (b), (c), and (d) were redesignated 9 C.F.R. § 2.131(b), (c), (d), and (e) respectively. (See 69 Fed. Reg. 42,089-42,102 (July 14, 2004).)

physical harm, or unnecessary discomfort, in willful violation of section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1) (2004)). Specifically, Respondents allowed children to hold and bottle-feed the tiger cubs, causing the tiger cubs trauma and behavioral stress, resulting in the tiger cubs scratching a number of people.

8. During the period February 10, 2003, through February 14, 2003, Respondents failed, during public exhibition, to handle a tiger so there was minimal risk of harm to the tiger and the public, with sufficient distance and/or barriers between the tiger and the general viewing public, so as to assure the safety of the tiger and the public. Specifically, Respondents, at Prestonwood Christian Academy, 6801 West Park Boulevard, Plano, Texas, posed a small tiger with groups of children for class photographs and, during these photography shoots, children were allowed to touch the tiger, in willful violation of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1) (2004)).

9. On February 21, 2003, Respondents failed, during public exhibition, to handle a tiger so there was minimal risk of harm to the tiger and the public, with sufficient distance and/or barriers between the tiger and the general viewing public, so as to assure the safety of the tiger and the public. Specifically, Respondents, at the Westin Galleria Hotel, Dallas, Texas, photographed spectators for a fee, while the spectators fed a tiger meat that the spectators pressed through the upper, metal bars of the tiger's cage to

induce the tiger to stand on its hind legs and take the meat from their hands, in willful violation of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1) (2004)).

10. On November 4, 2003, Respondents failed, during public exhibition, to handle a lion so there was minimal risk of harm to the lion and the public, with sufficient distance and/or barriers between the lion and the general viewing public, so as to assure the safety of the lion and the public. Specifically, Respondents, in the retail area of a pet store, Animal Jungle, 4218 Holland Road, Virginia Beach, Virginia, exhibited a male lion cub to the public without any crowd control or physical barrier to prevent the public from coming in contact with the lion, in willful violation of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1) (2004)).

11. During the period June 20, 2004, through June 27, 2004, Respondents failed, during public exhibition, to handle tigers so there was minimal risk of harm to the tigers and the public, with sufficient distance and/or barriers between the tigers and the general viewing public, so as to assure the safety of the tigers and the public. Specifically, Respondents, exhibited two tigers at the Red River Valley Fair in Fargo, North Dakota, and photographed spectators for a fee while they fed one of the tigers raw meat on a stick that the spectators pressed through the metal bars of the tiger's cage to induce the tiger to stand on its hind legs and eat the meat off the stick, in willful violation of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1) (2004)).

12. On February 12, 2005, Respondents failed, during public exhibition, to handle a tiger so there was minimal risk of harm to the tiger and the public, with sufficient distance and/or barriers between the tiger and the general viewing public, so as to assure the safety of the tiger and the public. Specifically, Respondents exhibited a 15-week-old tiger cub at the Tampa Bay Auto Mall, 3925 Tampa Road, Oldsmar, Florida, where the tiger cub was photographed with spectators without barriers between the tiger and the spectators and the only control in place was that the tiger cub was on a leash held by an animal handler, in willful violation of section 2.131(c)(1) of the Regulations (9 C.F.R. § 2.131(c)(1)).

13. On February 12, 2005, at the Tampa Bay Auto Mall, 3925 Tampa Road, Oldsmar, Florida, Respondents failed to handle tiger cubs as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort, in willful violation of section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)). Specifically, Respondents allowed spectators to pet the tiger cubs and a spectator who tried to pet a tiger cub caused the tiger cub trauma and behavioral stress, resulting in the tiger cub's nipping the spectator with its teeth.

14. On July 5, 2002, Respondents failed to remove excreta from primary enclosures as often as necessary to prevent the contamination of animals contained in the enclosures, in willful violation of section 3.131(a) of the Regulations (9 C.F.R. §

3.131(a)). Specifically, cages located at Six Flags Over Texas, Inc., Arlington, Texas, containing prairie dogs and a bear contained excessive fecal material and urine.

15. On July 5, 2002, Respondents utilized an insufficient number of adequately trained employees to maintain a professionally acceptable level of husbandry practices, in willful violation of section 3.132 of the Regulations (9 C.F.R. § 3.132). Specifically, Respondents employed only one unsupervised employee, untrained in animal husbandry practices, to care for three wolves, two cougars, a bear, and a tiger.

16. On June 12, 2003, Respondents failed to provide a suitable method to rapidly eliminate excess water from enclosures housing tigers, in willful violation of section 3.127(c) of the Regulations (9 C.F.R. § 3.127(c)). Specifically, Respondents housed tigers at the Respondents' Kaufman, Texas, facility, in primary enclosures that were not adequately drained; the enclosures contained pools of water and five tigers were soiled, wet, and standing in mud.

17. On February 9, 2006, Respondents failed to provide a suitable method to rapidly eliminate excess water from enclosures housing animals, in willful violation of section 3.127(c) of the Regulations (9 C.F.R. § 3.127(c)). Specifically, Respondents housed tigers in enclosures with clay surfaces to which some large rocks had been added for better drainage, but, though it had not rained for a week, all but one of those tigers had dried mud caked to their hair on their legs and abdomens and one tiger had chewed off its hair to rid itself of the caked mud.

18. On February 23, 2007, Respondents failed to provide a suitable method to rapidly eliminate excess water from an enclosure housing animals, in willful violation of section 3.127(c) of the Regulations (9 C.F.R. § 3.127(c)). Specifically, Respondents housed a lion and two tigers in an enclosure with visible signs of drainage problems.

19. On July 28, 2004, Respondents failed to provide food that is wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain the good health of animals. Specifically, Respondents failed to provide minimally-adequate nutrition to a number of young tiger cubs, in willful violation of section 3.129(a) of the Regulations (9 C.F.R. § 3.129(a)).

20. On and about July 28, 2004, Respondents failed to feed animals at least once a day, in willful violation of section 3.129(a) of the Regulations (9 C.F.R. § 3.129(a)). Specifically, Respondents fed animals every other day rather than once a day.

21. On August 30, 2004, Respondents failed to have an attending veterinarian evaluate the diet plan for each animal, the amount of food necessary for each animal, and the food supplements necessary for each animal, in willful violation of section 2.40(a) of the Regulations (9 C.F.R. § 2.40(a)).

22. On October 22, 2004, Respondents failed to have an attending veterinarian evaluate the diet plan for each animal, the amount of food necessary for each animal, and the food supplements necessary for each animal, in willful violation of section 2.40(a) of the Regulations (9 C.F.R. § 2.40(a)).

23. On February 9, 2006, Respondents failed to follow the prescribed dietary recommendations of Respondents' attending veterinarian, in willful violation of section 3.129(a) of the Regulations (9 C.F.R. § 3.129(a)).

24. On June 12, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries. Specifically, Respondents failed to provide veterinary care for two tiger cubs suffering from alopecia (hair loss), in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

25. On August 27, 2004, Respondents failed to have formal arrangements for regularly scheduled visits to their premises by a veterinarian, in willful violation of section 2.40(a)(1) of the Regulations (9 C.F.R. § 2.40(a)(1)).

26. On August 27, 2004, Respondents failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries. Specifically, Respondents failed to provide veterinary care for two young tigers and the smallest lion that all displayed protruding hip bones, dull coats of hair, and less vigor than other animals at the facility, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

27. On February 9, 2006, Respondents failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to

prevent, control, diagnose, and treat diseases and injuries. Specifically, Respondents failed to provide veterinary care for a tiger that had re-injured a leg, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

28. On February 23, 2007, Respondents failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries. Specifically, Respondents failed to provide veterinary care for a tiger suffering from excessive hair loss and weight loss, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

Discussion

In 1984, Mr. Cook began his training as an animal handler when he was 19 years old. Mr. Cook worked for a company in South Texas, L&W Exotics, which was an exhibitor/breeder of lions, tigers, leopards, cougars, servals, bobcats, and lynx. Mr. Cook continued working for the company on weekends through 1992 or 1993 and handled its animals at promotions for corporations conducting television photography shoots and conventions. In 1989, Mr. Cook purchased a black leopard that he still owns. In the early 1990's, Mr. Cook became an animal control officer for Colony, Texas, and held that position for several years.

In 1994 or 1995, Mr. Cook obtained an Animal Welfare Act license to exhibit animals and, with his parents, purchased property in Kaufman County, Texas, for an animal facility. Mr. Cook then started to exhibit animals to school children and to

conduct photography shoots with film studios. As an animal exhibitor, Mr. Cook has operated under various firm names. Before operating as ZooCats, Inc., he operated as Leopard One Zoological Center and published an “Operations Policy” that forbade any contact between animals and the public (CX 11 at 8), and also stated:

The Center does not approve of the use of exotic animals in off-site circumstances for the following reason[]:

.....

2) it is our belief that naturalistic habitats are created for the educational benefit of exhibiting exotic animals to the public. When an animal is removed from that naturalistic habitat, that educational benefit is lost and cannot be replaced.

CX 11 at 17-18.

On June 18, 2001, Mr. Cook filed a complaint with APHIS against another animal exhibitor for photographing children for a fee with baby tigers. He made the complaint on the letterhead of the “American Association of Zoological Facilities,” which he signed as its president, stating:

This organization was providing baby Tigers, on display, for a fee, and allowing small children to have there [sic] photo taken with these animals. As you know, this type of activity is a very dangerous one, as evidenced by past attacks and injuries to these small children placed in such close proximity to these cats. Once this was reported to us, we found several sections of violations and non-compliant issues we wish to report.

Our main concerns were that these children were allowed so close to these cats, which had no control or restraint devices on them, (the cats), no physical barrier or trained barrier or trained personal [sic] between the

animal and the child, and the children were allowed unrestricted access to the cat(s) while on the photo stage.

CX 42 at 1. Attached to the complaint was the affidavit of the member of the American Association of Zoological Facilities who reported the event, Ms. Coody (CX 42 at 3).

In 2002, despite his protestations against exotic animals being exhibited at off-site locations with contact between the animals and children, Mr. Cook started doing just that. That year he accepted an arrangement with Six Flags Over Texas, Inc., for ZooCats, Inc., to exhibit animals at the Six Flags Over Texas site from June 8, 2002, to July 19, 2002. As part of the animal exhibition, Mr. Cook employed teenage animal handlers who posed and photographed children holding tiger cubs that the children bottle-fed. One child was scratched by one of the cubs. In 2003, at the Prestonwood Christian Academy, Mr. Cook posed groups of children for class photographs with a small tiger that the children were allowed to touch while the only control over the tiger was an animal handler holding a bottle of milk. Also, in 2003, for a fee, Mr. Cook photographed spectators feeding his adult tigers by pressing raw meat into their cages. That year Mr. Cook also lent a male lion cub to a pet store in Virginia Beach, Virginia, that anyone, including children, could pet, as the lion was walked about on a leash. In 2004, again for a fee, Mr. Cook photographed spectators feeding raw meat through the bars of a cage to one of his tigers while it was standing on its hind legs. In 2005, Mr. Cook exhibited a 15-week-old tiger cub at an auto mall in Tampa, Florida, where a spectator was nipped when she petted the tiger while its handler walked the tiger on a leash through the spectators.

Section 2.131(c)(1) and (d)(3) of the Regulations governing the handling of animals specifically prohibits these practices, as follows:

§ 2.131 Handling of animals.

....

(c)(1) During public exhibition, any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of animals and the public.

....

(d)

(3) During public exhibition, dangerous animals such as lions, tigers, wolves, bears, or elephants must be under the direct control and supervision of a knowledgeable and experienced animal handler.

9 C.F.R. § 2.131(c)(1), (d)(3).

Just as there are numerous cases of humans being terrorized or injured by animals when there is insufficient distance or barriers between them,⁵ there are cases demonstrating that the safety of the animals, which the Animal Welfare Act was enacted to protect, is also compromised.⁶

In addition to the lack of precaution taken by Respondents to protect the public and the animals from harm, Respondents also often failed to feed their animals properly or provide them with veterinary and other requisite care.

⁵Complainant's Post-Hearing Brief at 21, n.60, lists 13 cases in which close contact with animals resulted in humans being injured or terrorized, including two final decisions by the Secretary of Agriculture: *In re Reginald Dwight Parr*, 59 Agric. Dec. 601 (2000) (tigers), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001); *In re William Joseph Vergis*, 55 Agric. Dec. 148 (1996) (tiger).

⁶Complainant's Post-Hearing Brief at 21, n.61, lists cases in which close contact with the public resulted in animals being treated violently and sometimes killed.

The entry of a cease and desist order by itself would probably not deter future violations by Respondents. Nor, in my opinion, would the imposition of civil penalties, even in combination with a cease and desist order, be sufficient. I conclude revocation of ZooCats, Inc.'s Animal Welfare Act exhibitor license, together with a cease and desist order, as authorized by 7 U.S.C. § 2149(a) and (b), is necessary to ensure Respondents' compliance with the Animal Welfare Act and the Regulations in the future, to deter others from violating the Animal Welfare Act and the Regulations, and to fulfill the remedial purposes of the Animal Welfare Act.

Respondents have repeatedly endangered the lives of the viewing public, as well as the lives of their animals. Mr. Cook has a history of deceiving law enforcement agencies.⁷ To allow Mr. Cook or Ms. Coody to have an Animal Welfare Act exhibitor license in either of their names, or through a corporation or other entity, would subject both the animals they would exhibit and the public, to an unacceptable level of risk of harm. The Animal Welfare Act license under which Respondents operate is, therefore, revoked.

⁷The evidence shows instances of Respondents' customers being scratched by tiger cubs at the Six Flags Over Texas exhibition in 2002, yet, on February 15, 2005, Mr. Cook told a Florida law enforcement officer that "in his fifteen years of experience with adult and juvenile tigers this is the first time he has ever had a customer injured." (CX 35 at 15.)

Respondents' Request for Oral Argument

Respondents' request for oral argument, which the Judicial Officer may grant, refuse, or limit,⁸ is refused because the issues have been fully briefed by the parties and oral argument would serve no useful purpose.

Respondents' Appeal Petition

Respondents raise six issues in their Appeal Petition. First, Respondents assert the Administrator failed to file the Amended Complaint and a list of exhibits and witnesses within the time ordered by Administrative Law Judge Peter M. Davenport [hereinafter ALJ Davenport];⁹ consequently, the Amended Complaint, the testimony of witnesses on the witness list, and exhibits on the exhibit list, must be stricken (Appeal Pet. at 2-3).

On March 13, 2007, ALJ Davenport issued an order requiring that any motion to amend the Complaint must be filed on or before April 13, 2007, and that the Administrator file a list of exhibits and anticipated witnesses and send Respondents copies of the exhibits, a list of the exhibits, and a list of anticipated witnesses, no later than April 26, 2007.¹⁰ The Administrator did not comply with ALJ Davenport's March 13, 2007, Order. Instead, the Administrator filed an Amended Complaint on May 8, 2007. The Hearing Clerk served Respondents with the Amended Complaint on

⁸7 C.F.R. § 1.145(d).

⁹The instant proceeding had been assigned to ALJ Davenport, but, due to ALJ Davenport's imminent deployment to Iraq, the case was reassigned to ALJ Palmer.

¹⁰ALJ Davenport's Order of March 13, 2007.

May 31, 2007.¹¹ On June 5, 2007, Respondents filed “ZooCats, Inc., Marcus Cook and Melissa Coody’s First Amended Original Answer,” and the hearing commenced on January 28, 2008, 7 months 28 days after the Hearing Clerk served Respondents with the Amended Complaint.

Respondents raise the issue of the timeliness of the Administrator’s Amended Complaint for the first time on appeal to the Judicial Officer, more than 1 year 7 months after the Hearing Clerk served Respondents with the Amended Complaint. It is well-settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer.¹² Therefore, I find Respondents’ arguments regarding the timeliness of the Administrator’s Amended Complaint come too late for me to consider. Moreover, under the circumstances in the instant proceeding, I find Respondents were not prejudiced by the timing of the Administrator’s filing of the Amended Complaint.

The Administrator’s failure to comply with ALJ Davenport’s March 13, 2007, Order regarding exhibits and lists of exhibits and anticipated witnesses is somewhat more circuitous. On April 13, 2007, the Administrator requested that ALJ Davenport’s

¹¹United States Postal Service Domestic Return Receipt for article number 7004 2510 0003 7198 0346.

¹²*In re Jerome Schmidt* (Order Denying Pet. to Reconsider), 66 Agric. Dec. 596, 599 (2007); *In re Bodie S. Knapp*, 64 Agric. Dec. 253, 289 (2005); *In re William J. Reinhart* (Order Denying William J. Reinhart’s Pet. for Recons.), 60 Agric. Dec. 241, 257 (2001); *In re Marysville Enterprises, Inc.* (Decision as to Marysville Enterprises, Inc., and James L. Breeding), 59 Agric. Dec. 299, 329 (2000); *In re Mary Meyers* (Order Denying Pet. for Recons.), 58 Agric. Dec. 861, 866 (1999); *In re Anna Mae Noell* (Order Denying the Chimp Farm, Inc.’s Motion to Vacate), 58 Agric. Dec. 855, 859-60 (1999).

March 13, 2007, Order be continued without date.¹³ On May 8, 2007, ALJ Palmer issued an Order stating ALJ Davenport's March 13, 2007, Order "shall in general continue to apply"[;] however, ALJ Palmer also set forth a schedule for the Administrator's exchange of exhibits, the Administrator's list of the exhibits, and the Administrator's list of anticipated witnesses, as follows:

November 9, 2007. On or before this date, Complainant's counsel shall send a copy of all supplemental exhibits that complainant intends to introduce at the hearing, together with a list of the exhibits, and a list of any additional anticipated witnesses containing a summary of the testimony that each witness is expected to give.

ALJ Palmer's Order of May 8, 2007. The Administrator did not comply with ALJ Palmer's May 8, 2007, Order, but, instead, sent copies of his exhibits and a list of exhibits to Respondents on December 11, 2007, and sent a list of anticipated witnesses to Respondents on December 19, 2007 (Complainant's Response to Pet. for Appeal at 7). On December 19, 2007, the Administrator requested an extension to December 19, 2007, to provide Respondents with copies of exhibits, a list of exhibits, and a list of anticipated witnesses (Complainant's Request to Extend Time to Exchange Exhibits and Witness List). On December 20, 2007, ALJ Palmer granted the Administrator's request for an extension of time, stating:

In respect to complainant's late filing of lists of witnesses and exhibits, the late filings shall be allowed. However, if respondents are

¹³Complainant's Response to March 13, 2007, Order and Request to Amend Deadlines.

caused insurmountable difficulties in being ready for the hearing because of the late filings, they are to request another telephone conference by contacting my secretary Tribble Greaves at (202) 720-8423 or by e-mail at Tribble.Greaves@usda.gov.

Amended Notice of Hearing Location and Summary of Telephone Conference at 1-2.

The record contains no indication that Respondents requested a telephone conference based upon difficulties in preparing for hearing, and the hearing commenced on January 28, 2008, as scheduled by ALJ Palmer. Under these circumstance, I find the Administrator's time for providing copies of exhibits, a list of exhibits, and a list of anticipated witnesses was extended by ALJ Palmer and the Administrator timely provided copies of exhibits, a list of exhibits, and a list of anticipated witnesses to Respondents. Moreover, I do not find Respondents were prejudiced by the timing of the Administrator's provision of the copies of exhibits, list of exhibits, and list of anticipated witnesses to Respondents. Therefore, I reject Respondents' request that I strike the exhibits on the Administrator's December 11, 2007, list of exhibits and the testimony of witnesses on the Administrator's December 19, 2007, list of anticipated witnesses.

Second, Respondents argue ALJ Palmer's conclusion that ZooCats, Inc., is not a "research facility," as defined in the Animal Welfare Act (7 U.S.C. § 2132(e)) and the Regulations (9 C.F.R. § 1.1), is error. Respondents assert ZooCats, Inc., is an organization that intends to conduct research and has for several years been purchasing animals in commerce to conduct research; therefore, ZooCats, Inc., qualifies as a

“research facility,” as that term is defined in the Animal Welfare Act. (Appeal Pet. at 3-5).

The term research facility is defined in section 2(e) of the Animal Welfare Act, as follows:

§ 2132 Definitions.

....

(e) The term “research facility” means any school (except an elementary or secondary school), institution, or organization, or person that uses or intends to use live animals in research, tests, or experiments, and that (1) purchases or transports such animals in commerce, or (2) receives funds under a grant, award, loan, or contract from a department, agency, or instrumentality of the United States for the purpose of carrying out research, tests, or experiments: *Provided*, That the Secretary may exempt, by regulation, any such school, institution, organization, or person that does not use or intend to use live dogs or cats, except those schools, institutions, organizations, or persons, which use substantial numbers (as determined by the Secretary) of live animals the principal function of which schools, institutions, organizations, or persons, is biomedical research or testing, when in the judgment of the Secretary, any such exemption does not vitiate the purpose of this chapter.

7 U.S.C. § 2132(e). See also 9 C.F.R § 1.1.

I find nothing in the record supporting Respondents’ assertion that ZooCats, Inc., intends to conduct research and has for several years been purchasing animals in commerce to conduct research. To the contrary, the history of ZooCats, Inc.’s registration as a research facility establishes that ZooCats, Inc., is not a research facility.

ZooCats, Inc., originally registered as a research facility in March 2001 (CX 13 at 1). In February 2003, APHIS wrote ZooCats, Inc., stating that, according to APHIS records, ZooCats, Inc., was not using any regulated animals for research and no longer

satisfied the criteria for registration as a research facility under the Animal Welfare Act. APHIS requested that ZooCats, Inc., respond with a letter either requesting termination of registration as a research facility or explaining why APHIS should not terminate registration of ZooCats, Inc., as a research facility. (CX 13 at 4.)

ZooCats, Inc., responded stating its “research program has undergone some major changes at the end of 2002” and referring to “planned programs of research” and future “studies” (CX 13 at 5-6). APHIS sent a reply continuing ZooCats, Inc.’s registration as a research facility, as follows:

Thank you for your letter of March 17, 2003, responding to our request for information concerning animal use at your institution. No evidence was presented in that letter that *bona fide* research has been conducted at ZooCats Zoological Systems. However, you have expressed the intent to conduct animal research in the near term. For this reason, your registration will be continued in force at the present time.

CX 13 at 7.

On April 15, 2004, Dr. Earnest Johnson, an APHIS veterinary medical officer, inspected ZooCats, Inc., and prepared an inspection report containing his observations regarding the lack of evidence of ZooCats, Inc.’s research activities, as follows:

With respect to activities involving animals, the IACUC, as an agent of the research facility shall review at least every six months, the research facility’s program for humane care and use of animals. Mr. Cook indicated that he does not have any research protocol nor minutes of IACUC meeting to be reviewed. He stated that he has not performed any research involving the covered animals yet but has plans to begin next month. He stated that his attorney has his records. It was explained to Mr. Cook that he should always keep a copies [sic] of records at his facility for any APHIS official during routine inspection. Mr. Cook did have paperwork on his research

operation titled “Guidelines for ethical conduct in the care and use of animals.”

. . . .

With respect to activities involving animals, the IACUC, as an agent of the research facility shall inspect at least every six months all of the research facility’s animal facilities, including animal study areas. No semiannual facility inspection records were available upon request during the routine inspection. Mr. Cook stated that his attorney has his records.

CX 7 at 1. During Dr. Johnson’s April 15, 2004, inspection, ZooCats, Inc., produced no records indicating it had ever engaged in animal research, testing, or experimentation.

Mr. Cook disputed Dr. Johnson’s inspection report, but testified he was not able to produce records of research, testing, or experimentation during the April 15, 2004, inspection, or any other inspection, of ZooCats, Inc. (Tr. 1579-83).

The Regulations require that research facilities appoint an Institutional Animal Care and Use Committee that is qualified through experience and expertise of its members to assess the research facility’s animal program, facilities, and procedures (9 C.F.R. § 2.31(a)). The Institutional Animal Care and Use Committee is required every 6 months to review the research facility’s program for humane care and use of animals, inspect all of the research facility’s animal facilities, and prepare reports of its evaluations (9 C.F.R. § 2.31(c)(1)-(3)). The record contains no indication that an Institutional Animal Care and Use Committee for ZooCats, Inc., had ever been appointed. The Regulations require that research facilities maintain records for at least 3 years and that those records be available for inspection and copying by APHIS officials during business hours

(9 C.F.R. §§ 2.35(a), (f), .38(b)). ZooCats, Inc., failed to maintain any of the requisite records.

Moreover, I find no credible evidence that ZooCats, Inc., intended to conduct research. The absence of evidence of any research, testing, or experimentation since March 2001, when ZooCats, Inc., was first registered as a research facility, refutes Respondents' assertion that ZooCats, Inc., intends to conduct research. Therefore, I reject Respondents' contention that ALJ Palmer's conclusion that ZooCats, Inc., is not a "research facility," as defined in the Animal Welfare Act (7 U.S.C. § 2132(e)) and the Regulations (9 C.F.R. § 1.1), is error.

Third, Respondents argue ALJ Palmer's revocation of ZooCats, Inc.'s Animal Welfare Act license, is error (Appeal Pet. at 5-15).

Section 19(a) of the Animal Welfare Act (7 U.S.C. § 2149(a)) authorizes the Secretary of Agriculture to revoke an exhibitor's Animal Welfare Act license, if, after notice and opportunity for hearing, the Secretary determines the exhibitor has violated or is violating any provision of the Animal Welfare Act or the Regulations. I conclude Respondents committed numerous willful violations of the Animal Welfare Act and the Regulations; thus, revocation of ZooCats, Inc.'s Animal Welfare Act license is warranted in law.

Many of Respondents' violations affected the health and well-being of Respondents' animals and some of Respondents' violations resulted in harm to persons

viewing Respondents' animals. Respondents' violations were not isolated incidents, but extended over a significant period of time, December 5, 2000, through February 23, 2007, indicating a pattern of conduct. Therefore, based upon the number of violations, the seriousness of the violations, and the extended period of time over which the violations occurred, I find revocation of ZooCats, Inc.'s Animal Welfare Act license is also justified by the facts.

Moreover, revocation of ZooCats, Inc.'s Animal Welfare Act license comports with the United States Department of Agriculture's sanction policy, which states, as follows:

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

In re S.S. Farms Linn County, Inc. (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991). The administrative officials who are responsible for administering the Animal Welfare Act have recommended revocation of ZooCats, Inc.'s Animal Welfare Act license or, in the alternative, assessment of a civil penalty of \$100,000 (Tr. 951-54, 991-93; Complainant's Post-Hearing Brief at 48). I conclude revocation of ZooCats, Inc.'s Animal Welfare Act license is warranted in law, justified by the facts, and in accord with the United States Department of Agriculture's

sanction policy; therefore, I reject Respondents' contention that ALJ Palmer's revocation of ZooCats, Inc.'s Animal Welfare Act license, is error.

Fourth, Respondents contend ALJ Palmer erroneously found that on February 9, 2006, Respondents did not provide veterinary care for a tiger that had re-injured a leg a few days prior to February 9, 2006. Respondents cite the testimony of Dr. Laurie Gage, an APHIS veterinary medical officer, as support for their contention that ALJ Palmer erred. (Appeal Pet. at 15.)

On February 9, 2006, Dr. Laurie Gage and Inspector Fox inspected ZooCats, Inc.'s Kaufman, Texas, facility and each prepared a report of the inspection. Both Dr. Gage and Inspector Fox reported observing an immobile 7-month-old, white tiger cub acting in a manner indicating it was in pain. Melissa Coody informed Dr. Gage and Inspector Fox that the tiger cub had previously suffered a broken leg, had apparently re-injured the leg 2 or 3 days prior to the February 9, 2006, inspection, and had received no veterinary care since the re-injury. (CX 36 at 6-7; R 6 at 35.) I conclude ALJ Palmer's finding that on February 9, 2006, Respondents failed to provide veterinary care to this tiger (ALJ Palmer's Decision and Order at 8) is amply supported by the evidence, and I reject Respondents' contention that ALJ Palmer erred. Moreover, I find Dr. Gage's testimony does not support Respondents' contention that ALJ Palmer erred. To the contrary, Dr. Gage's testimony lends further support to ALJ Palmer's finding, as follows:

[BY MS. CARROLL:]

Q. Okay. Looking at the next photograph, is that the same cub?

[BY DR. GAGE:]

A. That is the cub that was laying against the railroad tie that we saw.

Q. Okay. Did you observe any problem with its legs?

A. Its legs were misshapen. It refused to move, even though its sibling came over to play. And it appeared to wince, it would wince its face as if it, it seemed to be suffering to me.

Q. And did you investigate what the problem was with that animal?

A. We asked the woman showing us around, how long the cub had been in this condition? And she wasn't sure, but she said --

Q. You're talking about the lying down animal?

A. The little one lying down. How long has it been laying down, how long has it been suffering?

Q. And what did she say?

A. She thought maybe two or three days.

Q. And did anyone at that facility offer an explanation of the cub, the animal's condition?

A. She told me it had a broken leg. And it had been laying there.

Q. And, according to her, had any veterinary care been obtained for that animal?

A. She said it had not been seen by a Veterinarian recently.

Fifth, Respondents contend ALJ Palmer erroneously found that on February 23, 2007, Respondents failed to provide veterinary care for a tiger with hair loss.

Respondents assert “[t]here was absolutely no testimony, evidence, exhibits, or otherwise presented on this issue.” (Appeal Pet. at 15.)

On February 23, 2007, Inspector Fox inspected ZooCats, Inc.’s Kaufman, Texas, facility and prepared a report of his observations during the inspection. Inspector Fox reported observing a tiger named Apollo which had a great amount of hair coat loss, skin irritation, and weight loss. Inspector Fox stated in his report that Apollo needed to be seen for evaluation and treatment of these conditions, but, according to ZooCats, Inc.’s records, Apollo had not been seen by a veterinarian since July 6, 2006. (CX 38 at 1; R 6 at 6.) ALJ Palmer’s finding regarding Respondents’ February 23, 2007, failure to provide veterinary care to Apollo is consistent with Inspector Fox’s report of his observations (CX 38 at 1; R 6 at 6); therefore, I reject Respondents’ contention that ALJ Palmer’s finding is not supported by any evidence.

Sixth, Respondents argue, because 18 U.S.C. § 2511 permits recording of telephone conversations so long as one party involved in the conversation is aware of the recording, ALJ Palmer erroneously excluded a recording (R 13) of a telephone conversation between Mr. Cook and Dr. Daniel Jones of APHIS (Appeal Pet. at 16).

Respondents never laid a proper foundation for the admission of the tape of the conversation. Mr. Cook never testified as to when the tape was made, who made the tape,

or how the tape was made. Mr. Cook merely offered a description of a telephone conversation he had with Dr. Daniel Jones in March 2007 (Tr. 1468-70) and did not offer evidence that R 13 contained a recording of that conversation. Based upon the lack of foundation, R 13 would be given no weight; therefore, I find ALJ Palmer's exclusion of R 13 harmless error.

ALJ Palmer's Cease and Desist Order

ALJ Palmer ordered Respondents to "cease and desist from publicly exhibiting lions and tigers or other dangerous animals that are not under the direct control and supervision of a knowledgeable, experienced handler who must be at least twenty-one years of age." (ALJ Palmer's Decision and Order at 16.) Section 2.131(d)(3) of the Regulations requires only that dangerous animals must be under the direct control and supervision of a knowledgeable and experienced animal handler, as follows:

§ 2.131 Handling of animals.

....

(d)

(3) During public exhibition, dangerous animals such as lions, tigers, wolves, bears, or elephants must be under the direct control and supervision of a knowledgeable and experienced animal handler.

9 C.F.R. § 2.131(d)(3). While the Regulations require that a person must be 18 years of age or older to obtain an Animal Welfare Act license,¹⁴ the Regulations impose no minimum age requirement for animal handlers. Nonetheless, ALJ Palmer states 9 C.F.R.

¹⁴9 C.F.R. § 2.1(a)(1).

§ 2.131(d)(3) “is not met when the trainer is a teenager regardless of how much natural talent the teenager might appear to possess.” (ALJ Palmer’s Decision and Order at 15.)

ALJ Palmer may in fact be correct that, during public exhibition, dangerous animals should be under the direct control and supervision of an animal handler, who is at least 21 years old; however, I do not find the record supports such a conclusion.¹⁵

In light of the dearth of evidence in the record establishing that an animal handler must be at least 21 years of age, I do not adopt ALJ Palmer’s order requiring Respondents to cease and desist from publicly exhibiting animals that are not under the control and supervision of an animal handler who is at least 21 years of age. However, the Administrator may wish to review the Regulations to determine if a rulemaking proceeding should be initiated proposing the amendment of 9 C.F.R. § 2.131(d)(3) to add a minimum, and perhaps a maximum, age requirement for animal handlers.

Similarly, the ALJ ordered Respondents to adopt measures that would “completely preclude any member of the public from touching or coming in contact with any part of the animal. To fully effectuate this provision, special attention shall be given to the safety of children to eliminate any contact between them and the animals, their teeth, claws, fur or feces.” (ALJ Palmer’s Decision and Order at 16.) ALJ Palmer states the requirement

¹⁵Moreover, even ALJ Palmer’s reasoning (that persons 13 through 19 years of age, by virtue of their youth, cannot be knowledgeable and experienced animal handlers) does not support a conclusion that dangerous animals should be under the direct control and supervision of a person who is at least 21 years old. Instead, applying ALJ Palmer’s reasoning, such a person should be at least 20 years of age.

of 9 C.F.R. § 2.131(c)(1) “that there be sufficient distance and/or barriers between an animal and the public is not met when members of the public are allowed to hold or come close to a dangerous animal’s teeth and claws, or, in the case of children, are so close that they also become susceptible to the transmission of diseases or parasites.” (ALJ Palmer’s Decision and Order at 15.) Again, ALJ Palmer may in fact be correct that, during public exhibition, no member of the public should be allowed to touch, or come close to, animals; however, I do not find the record supports such a conclusion. To the contrary, the Administrator’s witnesses indicated that, under certain circumstances, public contact with animals is allowed (Tr. 532-35, 972-84). Moreover, section 2.131(c)(3), (c)(4), (d)(2), and (d)(4) of the Regulations places conditions on public contact with animals, but presumes some public contact with animals, as follows:

§ 2.131 Handling of animals.

....

(c)

(3) Young or immature animals shall not be exposed to rough or excessive *public handling* or be exhibited for periods of time which would be detrimental to their health or well-being.

(4) Drugs, such as tranquilizers, shall not be used to facilitate, allow, or provide for *public handling* of the animals.

(d)

(2) A responsible, knowledgeable, and readily identifiable employee or attendant must be present at all times during periods of *public contact*.

....

(4) If *public feeding* of animals is allowed, the food must be provided by the animal facility and shall be appropriate to the type of animal and its nutritional needs and diet.

9 C.F.R. § 2.131(c)(3)-(c)(4), (d)(2), (d)(4) (emphasis added). Therefore, I am reluctant to adopt ALJ Palmer's absolute prohibition on all public contact with animals. Again, the Administrator may wish to review the Regulations to determine if a rulemaking proceeding should be initiated proposing the amendment of 9 C.F.R. § 2.131 to prohibit contact between members of the public and certain animals or to require members of the public to be kept a sufficient distance from animals to ensure that no disease or parasite could be transmitted from members of the public to the animals or from the animals to members of the public.

For the foregoing reasons, the following Order is issued.

ORDER

1. ZooCats, Inc., Marcus Cook, and Melissa Coody, their agents, employees, successors, and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and, in particular, shall cease and desist from:

- (a) failing to handle animals as expeditiously and carefully as possible in a manner that does not cause the animals trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort;
- (b) using physical abuse to train, work, or otherwise handle animals;

(c) failing, during public exhibition, to handle animals so there is minimal risk of harm to the animals and the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animals and the public;

(d) failing to remove excreta from primary enclosures as often as necessary to prevent the contamination of animals contained in the enclosures;

(e) utilizing an insufficient number of adequately-trained employees to maintain a professionally acceptable level of husbandry practices;

(f) failing to provide a suitable method to rapidly eliminate excess water from enclosures housing animals;

(g) failing to provide food that is wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain the good health of animals;

(h) failing to feed animals at least once a day, except as dictated by hibernation, veterinary treatment, normal fasts, or other professionally accepted practices;

(i) failing to have an attending veterinarian evaluate the diet plan for each animal, the amount of food necessary for each animal, and the food supplements necessary for each animal;

(j) failing to follow the prescribed dietary recommendations of Respondents' attending veterinarian;

(k) failing to establish and maintain a program of adequate veterinary care that includes the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries; and

(l) failing to have formal arrangements for regularly scheduled veterinary visits to Respondents' premises.

Paragraph 1 of this Order shall become effective 1 day after service of this Order on Respondents.

2. Animal Welfare Act license number 74-C-0426 issued to ZooCats, Inc., is permanently revoked.

Paragraph 2 of this Order shall become effective 60 days after service of this Order on ZooCats, Inc.

RIGHT TO JUDICIAL REVIEW

ZooCats, Inc., Marcus Cook, and Melissa Coody have the right to seek judicial review of the Order in this Decision and Order as to ZooCats, Inc., Marcus Cook, and Melissa Coody in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. ZooCats, Inc., Marcus Cook, and Melissa Coody must seek

judicial review within 60 days after entry of the Order in this Decision and Order as to ZooCats, Inc., Marcus Cook, and Melissa Coody.¹⁶ The date of entry of the Order in this Decision and Order as to ZooCats, Inc., Marcus Cook, and Melissa Coody is July 27, 2009.

Done at Washington, DC

July 27, 2009

William G. Jenson
Judicial Officer

¹⁶7 U.S.C. § 2149(c).