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Appearing as Attorneys for Sidney Jay Yost, an individual
and d/b/a Amazing Animal Productions
and Amazing Animal Productions, Inc.,
a California corporation.

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In Re:

SIDNEY JAY YOST, an individual; and AMAZING ANIMAL PRODUCTIONS, INC., a California corporation

AWA Docket Nos.

12-0294 and 12-0295

BRIEF IN SUPPORT OF APPEAL

Sidney Jay Yost, an individual and d/b/a Amazing Animal Productions and Amazing Animal Productions, Inc., a dissolved California corporation, hereby submits the following Brief in Support of Appeal.

INTRODUCTION

This matter began in March of 2012 when the government's attorneys (hereafter, "the Government") filed a complaint under the Animal Welfare Act against Mr. Yost seeking to revoke his Class C Exhibitor's License and seeking an assessment of hundreds of thousands of dollars in civil penalties.

Prior to the filing of the Government's complaint, Mr. Yost had been savagely attacked for years by certain animal activists groups for the "sin" of lawfully exhibiting (pursuant to his "Class C" USDA Exhibitor's License) chimpanzees in advertising commercials and in movies.

Mr. Yost reached a settlement with certain animal activist groups pursuant to which he retired the chimps to a wildlife sanctuary. He soon began to find new homes for other "exotic" animals he once owned as he restructured his business model to work with animals "less controversial" (*i.e.*, primarily, dogs, cats and horses) and less likely to draw the ire of the animal activist community. But the flames were reignited by the Government's complaint. Urged on by overarching activists willing to lie for their cause, and armed with the Government's statutory authority to impose ridiculous amounts as civil penalties for what in any real world view would be considered minor infractions (which Yost readily corrected and which were not repeated), the Government was clearly out to destroy Mr. Yost once and for all.

The Government's strategy was all too apparent throughout the litigation: *to wit*, bludgeon Mr. Yost to death with a double barreled assault; accuse him of "animal abuse" on the flimsiest of grounds and threaten him with permanent financial ruin if he dared refuse to roll over and accept the noose of "animal abuser" being placed around his neck.

Mr. Yost refused to succumb to the Government's tactics. Throughout the litigation, Mr. Yost made clear he was never going to admit to "animal abuse" because he had never "abused" any animal. People can lie all they want, but Mr. Yost was not going to roll over to the government's strong arm tactics on such a pivotal claim. Certainly Mr. Yost recognized that in the course of a couple of inspections, the inspector had found some relatively minor violations of certain Standards, (*e.g.*, a couple of mouse droppings found on the floor of a 40 foot steel container; and an over turned food bowl on the floor of an animal's hutch), but

those sorts of violations were, in Mr. Yost's view, minor and in almost every instance, were promptly corrected, as the inspector's reports provided for and reflected.

After failing to gain summary judgment on multiple occasions, the Government eventually relented on the "abuse" angle, in part,(by amending the complaint to base the Government's claims on a different statute which, as the ALJ's Decision recognizes, did not include the word "abuse"). However, even thought the question of "abuse" had been removed from the case, the Government continued to nevertheless insist that the Government could still argue "abuse" in the course of asking for and arguing for the maximum civil penalty amount for each "violation", amounting to hundreds of thousands of dollars, as the Government saw it.

As the entire record demonstrates, the Government's case is predicated on certain "incidents" about which much has been said and written in this case. By her 2016 Further Instructions, Judge Clifton appeared anxious to find a way to wrap this matter up with as little additional delay (and additional expense to both sides) as possible; a point on which Yost concurred, but *not* at the expense of a fair proceeding. As explained below, the Government should be *estopped* from asserting any amount for a civil penalty any higher that the particular amount set forth by Yost in his response to Judge Clifton's 2016 Further Instructions.

The Civil Penalties Totaling $30,000 Was Excessive, Arbitrary and Capricious and Not Supported by the Evidence

In the summer of 2015, in a telephone conference call with the ALJ and all counsel, the Government announced that it intended to file a motion for a decision on the record. Judge Clifton orally instructed the Government that if it was to file such a motion, that the Government was to set forth in such a filing the Government's view as to what it considered an appropriate civil penalty and justification *as to each incident on which the Government intended to rely to*

support civil penalty claims. The Government never bothered to proceed with such a filing.

With the Government having failed to act on Judge Clifton's oral instructions, Judge Clifton made a formal order, entitled, "2016 Further Instructions". Again, Judge Clifton specifically instructed the Government that as to "imposition of particular amounts of civil penalty," the Judge ordered that the "*particular amounts* of civil penalty" must be "*broken out separately* for the various offenses or types of offenses" before her. [See, 2016 Further Instructions, pg. 2].

On September 13, 2016, the Government submitted its "Response" to Judge Clifton's "Further Instructions". However, once again the government ignored and failed to comply with Judge Clifton's orders and instructions in that the Government has made *no effort whatsoever* to set out the "*particular amounts* of civil penalty" (which were to be "*broken out separately* for the various offenses or types of offenses") for which the Government seeks a civil penalty assessment.

Even though the Government failed to provide a separate breakout of the particular amounts of civil penalty which the Government sought as to each offense, Yost was compelled by the ALJ's 2016 Further Instructions to submit a Supplemental Declaration of his own, a written argument and a "Table" respecting civil penalty assessment amounts in a manner which Yost believes to be in compliance with Judge Clifton's orders and instructions. Yost did as he was ordered to do.

The Table presented in chronological sequence each incident upon which the government still appeared to rely for its case, and as to each incident, the Table provided a summary of the nature of the incident, Yost's position as to the evidence and/or mitigating factors respecting each incident and, Yost's view of what a *maximum* appropriate civil penalty assessment for each "offense" *could* be (since the Government had wholly failed to "break out separately" the *"particular amounts* of civil penalty" which the Government sought).

Many of the incidents in question arise from "violations" noted on Inspection Reports prepared after on-site routine un-announced inspections over a period of many months. However, each inspection report provided additional time for the licensee to "CORRECT" cited items. Yost's declarations assert that *all of the cited item* were corrected promptly and within time, most being corrected while the inspector was still present. Yost's declarations offer additional information respecting the circumstances of the inspections and additional factual matters respecting the cited item which Yost contended should be fully considered by the ALJ.

As to those incidents which did not arise from an adverse Inspection Report, Yost's declarations offered additional information respecting the circumstances of those various incidents and additional factual matters which Yost contended should also be fully considered by the ALJ respecting the cited item.

Yost respectfully requested that the ALJ carefully consider Yost's supplemental declaration and the arguments and Table submitted therewith, all the more so since it appeared that the court was inclined to attempt to create a decision on the record. Yost, who voluntarily terminated (by choosing not to renew) his USDA license, was willing to accept a "license revocation" determination and willing to accept a *generic* "cease and desist" order (since he no longer holds a USDA License and has no need for and no intention to apply again for a license).

Notwithstanding the foregoing, there were still on going questions of major significance for judicial determination. First, there was the on going question of "willfulness" (or not), on Yost's part as such may relate to cited violations (other than the already decided finding arising from the court's rulings on summary judgment respecting the incident on April 4, 2009 in Utica, Illinois). Second, there was the on-going question of "physical abuse" (or not), by Yost as it relates to certain cited violations. Third, there were claims made by the government based on what Yost contents are lies told by former (now disgruntled) students; lies which

Yost disputed. Fourth, there are the factors under AWA Section 2149 to be considered by the Secretary in consideration of an appropriateness of a civil penalty (*to wit*, "the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations").

Rather than acknowledge the court's ruling that a hearing remained necessary to resolve remaining issues of material fact, the Government, by its bloviated "Submission" (in response to Judge Clifton's 2016 Further Instructions), continued to push the court to assume (and "find") "willfulness" on Yost's part on all additional issues, without providing the full evidentiary hearing which the court said would be required to resolve this overarching but disputed allegation.

In all respects, Yost has denied and continues to deny any "willful" *intent* to do any harm and denies any "willful" *intent* to violate any statute or regulation.

Yost has acknowledged from the beginning of this matter that the April 4, 2009 incident at the Grand Bear Lodge was a serious matter and the record reflects that Yost has at all times conducted himself accordingly. The incident resulted in a civil lawsuit against Yost and Grand Bear Lodge Company, the hosting venue owner and operator. As the court had been informed, the civil action was settled and the civil suit dismissed.

The evidence indicates, and the Decision found, that the April 4, 2009 incident regarding physical contact between the child and the dog/wolf hybrid and the child's resulting injury came about as a result of confluence of several events. First, the child's parent failed to heed warnings to stay in their seats during the performance. Second, Grand Bear Lodge personnel failed to post an attendant near the curtain to prevent people from coming near the curtain area during the performance as they had agreed to do and as they had been doing during other performances. Third, Grand Bear Lodge personnel had failed to construct the stage side areas correctly with plywood barriers as had been agreed upon. None of this is to suggest that it was not the ultimate responsibility of Yost to have had the

foresight to have seen that the multiple barriers that were in place (*e.g.*, the curtains, the experienced handler (Matt), the chain lead used by Matt) may, under the circumstances as arose, have not been sufficient to have prevented harm to a child whose parents failed to keep themselves and their child in their seats during a performance.

Given that the Government wholly failed and refused to comply with Judge Clifton's orders and instructions - in that the government has made *no effort whatsoever* to set out the "*particular amounts* of civil penalty" which was to be "broken out *separately* for the various offenses or types of offenses" for which the Government sought a civil penalty amount - the government should be *estopped* from asserting any amount for a civil penalty any higher that the particular amount set forth by Yost in the accompanying "Table" he presented in compliance with the ALJ's 2016 Further Instructions. By his filing, Yost was the only one who complied with the court's 2016 Further Instructions. Yost's "separately broken out" proposed civil penalty amounts must therefore serve as the *ceiling* for any civil penalty assessments. A "ceiling" is *not a springboard* for the government to ratchet up its claims. Yet, that is what the ALJ's Decision has given the Government, despite the governments' total failure to comply with the ALJ's orders in this regard.

Yost did as instructed; but the Government did not.

Instead, the government ignored the ALJ's instructions and instead gave a "lump sum" number of $30,000, coupled with a recitation of how the government could "ratchet up" the number to even still higher amounts totaling many hundreds of thousands of dollars.

Rather than conduct a hearing with live witnesses, evidence, cross examination and oral argument, the ALJ drew from Yost the blood which the Government wanted and then magnified it to reach the government's "lump sum" number, while ignoring the Government's failure to comply with the ALJ's order.

After Yost complied with the ALJ's 2016 Further Instructions, the ALJ declared that she believed she had a sufficient record to deal with the two remaining "lynch pin" issues (the elimination of the "Abuse" claim and the amount of the civil penalty to assess as to certain violations in question).

While Mr. Yost is mindful (and appreciative) of the ALJ's many efforts to urge the parties to find common ground. Those efforts by the ALJ bore fruit in many respects. Mr. Yost is also appreciative of the ALJ's recognition in her Decision and Order that a charge of "abuse" was *removed from the case* when the government amended its complaint, nevertheless, Mr. Yost takes issue with the ALJ Decision and Order adopting the government's $30,000 "lump sum" number, particularly since the government failed and refused to comply with the ALJ's earlier orders to set forth *specific amounts for specific violations and to justify each such amount in light of the evidence which the Government intended to proffer as to each violation*. Mr. Yost complied, but the Government did not. Instead, the Government lobbed the "lump sum" number of $30,000 back at the ALJ and that number ended up being adopted in the Decision by the ALJ.

The ALJ adopted the lump sum number in the ALJ's Decision and Order without providing Mr. Yost the opportunity to testify or his counsel the opportunity to cross examine government witnesses and challenge government exhibits or argue against the adoption of a "lump sum" number without a detailed finding on a violation by violation basis and based on actual evidence, not merely because the government wanted a "lump sum" amount assessed.

None of this is to suggest that Mr. Yost is not willing to accept the civil penalty assessed ($7,500.00) by the ALJ on account of the Grand Bear Lodge incident on April 4, 2009 nor the administrative "revocation" of his former license. He accepts those outcomes, and he ELECTS NOT APPEAL FROM THAT PART OF THE ALJ'S DECISION. However, because several issues, discussed below, remain of considerable interest to him professionally and to other trainers in the

industry, and because the other civil assessment penalty amounts are arbitrary and capricious, he rejects and hereby appeals certain other aspects of the Decision and Order, as summarized in the Appeal and below.

On January 8, 2018, Yost respectfully requested that the ALJ make certain corrections to The Decision and Order served on counsel for Yost on December 19, 2017. As of the present time, there has been no indication that the ALJ intends to make the corrections as requested by Yost.

Accordingly, Yost appeals from those parts of the Decision and Order identified in his Request for Corrections and as described below.

The Failure to Clearly Draw the Distinction between "Intentional" Conduct and "Careless" Conduct

In Yosts' Requests for Correction, as to paragraph 11 on page 5 of "The ALJ's Decision" (under the subsection headed "Mixed Findings of Fact and Conclusions"), Yost requested that the second sentence be revised to read:

> The Respondents had a small business; the violations which occurred on April 4, 2009 (see paragraph 20 below) that resulted in injury to a 2-year old child and euthanization of Nova the dog/wolf hybrid were grave; I presume the Respondents acted in good faith, but I find they were *careless* in their disregard of statutory requirements; and I have not taken into account any history of previous violations, if any there be." (Emphasis added).

Similarly, as to paragraph 20 on page 14 of "The ALJ's Decision" (re the incident on April 4, 2009 at the Grand Bear Lodge), Respondent suggested and requested only the addition of the following sentence at the end of the paragraph:

> "I further conclude that the violations were done with a *careless disregard of statutory requirement and were not intentional.*" (Emphasis added).

Yost made these requests for corrections because of the way the Decision and

Order, as issued, appears to leave unclear which prong of the ALJ's interpretation of the term "willful" was considered by the ALJ as applicable to the facts in this case. In this regard, the Decision at paragraph 9 finds that "willfulness", as the ALJ finds in this case, could mean two different things. On the one hand, the Decision recites authority for the proposition that "(a) willful act is an act in which the violator intentionally does an act which is prohibited, irrespective of evil motive ...". But the Decision goes on to recite authority for what appears to be an equally plausible meaning, as applied to the facts in this case. Specifically, the Decision goes on to recite that "willfull" acts also could mean that one has acted "with careless disregard of statutory requirements."

Yost raises the issue (and requested the correction) because of his history of dealing with animal activist groups leads him to expect that such groups (who have often seized on any opportunity, including the opportunity to take matters that come to their attention out of context and selectively twist the trust), will do so again, unless the Decision is corrected as requested. Here, the Decision and Order, as it presently stands, *appears to* focus on a finding of "careless disregard" which Yost concedes for purposes of this argument, as opposed to something "intentionally done". While Decision finds either prong sufficient to satisfy the ALJ's determination of "wilfulness", the failure to clearly differentiate between something done "intentionally" as opposed to "carelessly" will only lead to more mischief from those in the animal activists world.

Yost submits that the "careless" prong is appropriate (and not the "intentional" prong) given other findings and conclusions *in the Decision*[1].

[1] Specifically, in paragraph 15 at the top of page 8 the Decision recites that the ALJ's "description of this violation is that the Respondents failed to handle animals (including, among other things, exotic felids, wolves, and nonhuman primates) *as carefully as possible* ...". (Emphasis added.)

Accordingly, the Decision and Order should be corrected as requested to emphasize the applicability of the "careless" prong and *not* the "intentional" prong. Fundamental fairness would require nothing less.

The Assessment of a Civil Penalty Regarding a "Tonight Show" Taping is Arbitrary, Capricious and Contrary the Actual Language of the Applicable Regulation

There is no dispute that as to the "Tonight Show Taping" there was no harm nor threat of any harm to the animal or to the viewing public (*i.e.*, the studio audience). In this light, Yost contends that a civil penalty amount cannot legitimately be assessed because the "distance" – particularly in combination with the use of a chain collar, a chain leash, a large steel grab ring and three burly men in perfect control of a young 125 pound tiger -- was successfully sufficient to "assure" during the taping event that no harm of any kind came to the animal or the "general viewing public". The point is, the use of the actual words used in the regulation (*i.e.*, "distance *and/or* barriers") must be properly quoted and recognized, which the Decision *does not do*. Rather, the Decision and Order *incorrectly* recite that the "Regulation specifies distance and barriers, which were absent." *But that is not what the Regulation actually says*. A correct recitation of the actual language of the Regulation would have recognized that the conjunction was not just the word "and", but is actually the words "and/or".

Yost contends that when properly quoted and properly recognized, the words "and/or" can only be interpreted to mean that the license handler(s) have the *discretion*, under the actual wording of the regulation, to determine, in their professional experience, the nature and extent of the distance ***or*** barriers are to be used, given all the relevant facts and circumstances. If the Department wanted to insist that a licensed handler must use ***both*** distance ***and*** barriers when exhibiting animals subject to USDA requirements, then the Department could have proposed a regulation that would say that. But the Department never did so and the words used

in the Regulation do not say so. Instead, the Regulation uses the words "and" and "or" separated by a slash ("/"). A fair reading of that combination of words and punctuation, and one understood by the industry, is that the handler has the discretion as to how to exhibit the animal given all the facts and circumstances. In other words, the handler has the discretion to decide whether "distance" alone, or "distance" with restraints, is sufficient or whether, under the particular circumstances of the exhibition of the animal, the added assurance of some sort of "barrier" should be employed. Neither the Government nor the ALJ) should be allowed to overlook the *actual* language of the Regulation and the difference and the distinction inherit in the use of the phrase "and/or". While the issue may no longer be directly material for Mr. Yost going forward as he is no longer engages in business as would be required of a licensed handler – having voluntarily decided not to continue to seek to renew his license -- the issue remains of considerable interest to licensed handlers, to TV and movie interests, and, to the general viewing public. A Decision which misquotes the applicable Regulation and in so doing deprives a licensed handler of the discretion inherent in the actual language of the Regulation should not be allowed to stand and certainly should not stand so as to prop up a civil penalty assessment against Mr. Yost.

Here, as the Decision makes clear, as to the Tonight Show Taping event, no harm came to the animal nor to the public and the means and methods of controlling the young animal were in every way satisfactory so as to (and did in fact) "assure the safety of animals and the public".

Had Mr. Yost been allowed to testify and call other witnesses, it would have been clear that the practice in the animal business and in the TV and entertainment business has long been (and continues to be) that TV hosts frequently have licensed animal handlers bring young animals onto the set before a live studio audience without undue barriers (*e.g.*, glass, bars, fences). All without any harm to the animal or the viewing public, in order to provide an interesting, informative and yet

safe opportunity for the viewing public to better see, know and understand some of the many animal species which make up this wonderful world.

Mr. Yost should not be punished with a civil penalty for doing something which the actual words of the regulation, in a fair reading, allow, given all the facts and circumstances.

The Imposition of a $3,000.00 Civil Penalty Respecting the Teaching and Use of a Trainer's Cane in Emergency Situations Is Arbitrary and Capricious

In paragraph 16 on pages 8 - 11 of "The ALJ's Decision" (re the imposition of a $3,000.00 civil penalty for what the ALJ concluded were "too many situations where the use of a wooden case and the threat of the use of it were too commonplace."), Respondents requested the following consideration. In this regard, Respondents contends that the "conclusion", as phrased, is not warranted by the facts and that the penalty amount is therefore, and in any event, excessive. The only evidence (and finding, according to the decision of the ALJ) of "*actual use*" of a wooden cane upon an animal, was a *single* "emergency strike" used by Yost in a clear emergency situation where a student was in jeopardy. (See, para. 52, "Respondents Stipulations as to Facts", and see, generally, pages 9 - 10, and specifically, page 10, incorporating this stipulation into The ALJ's Decision).

Moreover, the only evidence of "threatened use" of a wooden cane in connection with a threatening situation occurred when Yost had fallen during a training session and another trainer had placed himself between the oncoming animal and Yost, giving a loud and forceful "NO" voice command and raising his arms with a cane in one had and waiving the cane in front of the animal as a "display" of potential force. No *contact* by the cane to the animal occurred in this instance. In response to the trainer's conduct, display and voice command, the animal responded by coming to a full stop, and assumed a normal and non threatening posture and disposition. (See para. 51, "Respondents Stipulations as to

Facts", and see, pages 9 - 10, and specifically, page 10, incorporating this stipulation into The ALJ's Decision). Accordingly and in light of these focused findings of fact, which cannot reasonably be considered "too commonplace", Respondents requested the following correction:

> Replace the last two sentences of the paragraph on page 11 with the following sentences:
>
> "From Respondents' Stipulations As to Facts, paragraphs 43 through 52, I conclude that the use of a wooden cane (whether for training of students, as described in paragraph 43-52, whether actually applied with force to an animal in an emergency situation, as described in paragraph 52, or whether in the course of a "display of force" without any actual contact, as described in paragraph 51, nevertheless, constitutes a "Handling" violation. I further conclude that a $1,000.00 civil penalty suffices for this noncompliance."

On this appeal, and on these facts as found by the AJJ, Yost contends that the facts cannot reasonably be considered "too commonplace" to constitute an "handling violation" nor can they support an assessment of a civil assessment *of any amount*. In this case, the only evidence respecting the "actual use" of a cane was in a clear emergency situation and in teaching of the proper use of a cane were in preparing for and executing the proper and reasonable use of a cane as a protective device *in emergency situations*. To find a "handling violation" so as to support an assessment of a civil assessment *of any amount* on these facts is arbitrary and capricious; no penalty should be assessed for teaching students how to protect themselves and others with a wooden cane in emergency situations.

Respectfully submitted: LAW OFFICES OF JAMES D. WHITE

Date: January 16, 2018 By: _____

James D. White, Esq, Attorney for Respondents Yost and AAP, Inc.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address currently is PO Box 367, 113 Quarter Horse Drive, Bellevue, Idaho, 83313:

On Jan. 16, 2018, I served the foregoing document described as **BRIEF IN SUPPORT OF APPEAL**

on interested parties in this action:

/xx/ by placing / XX / the original AND four copies thereof enclosed in sealed envelopes addressed as follows:

HEARING CLERK, OALJ
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and by sending said envelope to the Hearing Clerk by Federal Express for Overnight Delivery with all charges prepaid.

/xx/ and by sending a copy by email to colleen.carroll@usda.gov and to Marilyn.Kennedy@dm.usda.gov for the attention of ALJ Clifton.

Executed on January 16, 2018, at Laguna, California.

/xx/ I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

JAMES D. WHITE

CERTIFICATE OF SERVICE

Sidney Jay Yost, Respondent
Docket: 12-0294
Amazing Animal Productions Inc., Respondent
Docket: 12-0295

Having personal knowledge of the foregoing, I declare under penalty of perjury that the information herein is true and correct and this is to certify that a copy of BRIEF IN SUPPORT OF APPEAL has been furnished and was served upon the following parties on January 17, 2018 by the following:

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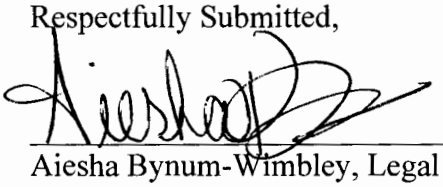
Respectfully Submitted,



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