

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Dr. Sarah Boysen, :
 :
 Plaintiff, : Case No. C2 06 150
 :
 v. : Judge Marbley
 :
 Karen Holbrook, et al., : Magistrate Judge Abel
 :
 Defendants. :

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION
TO VACATE JUDGMENT AND FOR PRELIMINARY INJUNCTION

Defendants Karen Holbrook, William Yonushonis and Robert McGrath hereby submit this opposition to Plaintiff Sarah Boysen's ("plaintiff's") Motion to Vacate Judgment and for Preliminary Injunction. Because Rule 60(b)(3) does not apply to challenge a TRO ruling, and because all material facts are the same as presented at the TRO hearing, there is no basis in law or fact for plaintiff's Motion, which should be denied.

I. Introduction

On Monday, February 27, 2006, plaintiff filed a Verified Complaint, along with a Motion for a Temporary Restraining Order, seeking to restrain The Ohio State University ("OSU") from closing its chimpanzee research center (the "Chimpanzee Center") and transferring its nine chimpanzees to a primate refuge in San Antonio, Texas. That same day, the Court held a TRO hearing at which the parties had the opportunity, albeit on short notice, to present evidence and arguments. At the close of the arguments, the Court denied plaintiff's Motion for TRO, finding that (1) plaintiff had not established that she was likely to succeed on the merits at a preliminary injunction hearing or at trial, (2) the hardship of a TRO would be greater to OSU than to

plaintiff, (3) the injury to OSU of a TRO would be irreparable and immediate, and (4) the public interest would not be vindicated by a TRO.

As part of its ruling, the Court held that OSU had not breached a 2004 Memorandum of Understanding (the "OSU MOU"), which established a plan for closing the Chimpanzee Center and transporting the chimps to a retirement facility. Specifically, the Court ruled:

Ohio State performed under the contract [the OSU MOU] because there's no dispute that Ohio State contacted Chimp Haven. The information that was provided by Dr. Gifford Weary is uncontroverted. I asked plaintiff specifically if there was evidence to controvert Dr. Weary's statements to the Court, and Dr. Boysen could provide none.

Dr. Weary contacted Chimp Haven, and Chimp Haven balked. Chimp Haven was either unwilling or incapable of performing. In fact it seemed to be a bit of both. Chimp Haven took the position that some of the chimps were not NIH chimps and that it, Chimp Haven, did not know what they would be able to do with the other chimpanzees. So they didn't take the chimpanzees.

When the parties contracted, there was no clause engrafted upon the contract as to what it would do if Chimp Haven decided not to take the chimpanzees, rendering full performance an impossibility under contract law.

Ohio State, however, performed to the extent required by the contract because it did indeed contact Chimp Haven and attempted to move the chimps to that facility as required by the MOU.

Transcript of Proceedings, Doc. No. 8, at 78.

Plaintiff has now filed a motion requesting that the Court vacate its order denying her TRO motion and "preliminarily enjoin defendants to return the chimpanzees to the care of Dr. Boysen and to have her involved in decisions relating to the chimpanzees' future care." Motion to Vacate at 1. According to plaintiff, this drastic action is justified based on an after-the-fact letter and affidavit submitted by Linda Brent, the President of Chimp Haven and a former student of plaintiff's. As explained in detail below, the Court's TRO ruling was appropriate and there is no basis on which to overturn it.

II. Background

Plaintiff is a professor in the OSU Department of Psychology. Verified Compl., at para. 2. For many years she has been involved in research relating to chimpanzees, including at OSU's recently-closed Chimpanzee Center. Id. at 2, 6.

In January, 2004, representatives of OSU's Department of Psychology, College of Social and Behavioral Sciences, Office of Research, and Office of Academic Affairs entered into a Memorandum of Understanding (the "OSU MOU") "with respect to supplemental funding of the Chimpanzee Center and plans for closing the Center in the event that sufficient external funding ceases to be available." See Affidavit of Dr. Gifford Weary ("Weary Aff."), at Exh. 4. If the Center lacked sufficient funds "to operate beyond December, 2004 . . . [t]he move to Chimp Haven will occur no later than December 15, 2004." Id. The OSU MOU provided, among other things, that "[b]eginning in 2005, and in each year thereafter, the Parties will review the financial status of the Center in June and December" and that, if funds "are insufficient to operate the Center for the entire six month period . . . plans for closing the Center will be prepared . . ." Id.

In conjunction with the OSU MOU, OSU also entered into a Memorandum of Understanding with Chimp Haven, Inc. (the "Chimp Haven MOU"), which was executed by plaintiff and Dr. Weary in December 2003, and by Dr. Thomas M. Butler, Chair of the Chimp Haven Board of Directors, on January 7, 2004. Weary Aff. at ¶ 2 and Exh. 2. Chimp Haven, located in Shreveport, Louisiana, is a retirement sanctuary for chimpanzees no longer needed in research, and is partially funded by the federal government through the Chimpanzee Health Improvement, Maintenance and Protection (CHIMP) Act, 42 U.S.C.A. § 287a-3a. See Affidavit of Linda Brent, President and Director of Chimp Haven, Inc., at ¶¶ 1 and 4 (attached to plaintiff's Motion to Vacate as Exhibit A). The Chimp Haven MOU provided, among other

things, that Chimp Haven “agrees to accept nine chimpanzees from The Ohio State University (OSU) . . . at such time in the future when OSU determines the chimpanzees are no longer required for their research program.” Weary Aff. at Exh. 2.

Starting in July 2003, Dr. Boysen submitted several grant applications to, among others, the National Institutes of Mental Health (NIMH), the National Science Foundation (NSF) and at least one private foundation. None of her grant applications were awarded. Dr. Boysen has received no external funding for the Chimpanzee Center since the OSU MOU was executed. It was therefore determined by the beginning of 2005 that the Chimpanzee Center would be closed and the OSU MOU acted upon to close the Center and transfer the chimps. Weary Aff. at ¶ 9.

In January 2005, Dr. Weary tried to communicate with Linda Koebner at Chimp Haven to discuss retirement of the OSU chimpanzees, but Ms. Koebner returned none of her calls and none of her emails. *Id.* at ¶ 11. Around that same time, plaintiff indicated to Dr. Weary and to others at OSU that, in her mind, Chimp Haven was no longer an option and that she was looking for other facilities or options to receive the chimpanzees from OSU. *Id.* at ¶ 10, and Exhs. 6, 7 and 8. Among other things, plaintiff represented that that Chimp Haven “may not be really [sic, ready] to take in any of the NIH chimps earmarked for Chimp Haven until the end of April, 2005,” *id.* at Exh. 6; that “[a]s far as I am concerned, Chimp Haven is not [sic] longer appropriate for them, in that they are not going to be retired,” *id.* at Exh. 8; and that “we are pursuing other contingency plans, in lieu of Chimp Haven[,] as a destination for the chimps.” *Id.* at Exh. 7.

One of the options suggested by Dr. Boysen “in lieu of Chimp Haven” was Great Ape Trust in Des Moines, Iowa. *Id.* at ¶ 12. Dr. Weary researched this option and began a dialogue in early 2005 with Dr. Rob Shumaker, one of the principals at Great Ape Trust. *Id.* at ¶ 12 and

Exh. 9. Discussions progressed to the point that, in late April, 2005, Great Ape Trust requested that OSU sign a proposed MOU. *Id.* Thereafter, plaintiff communicated with Dr. Shumaker and visited Great Ape Trust. *Id.* at ¶ 13 and Exh. 10. Immediately after plaintiff's visit, Great Ape Trust indicated that they were no longer interested in taking the OSU chimpanzees and withdrew the draft MOU. *Id.* at ¶ 14 and Exh. 11.

After the potential arrangement with Great Ape Trust fell through, both plaintiff and others at OSU continued to look for other options to receive the OSU chimpanzees. As of June 6, 2005, plaintiff represented that her action plan was still to contact other "potential sites for moving the chimps," including the Bastrop group, Indiana University, Emory, Georgia State University, Busch Gardens and the Columbus Zoo. She did not include in her plan any mention of Chimp Haven. *Weary Aff.* at ¶ 15 and Exh. 12.

Later in June, 2005, OSU, through Dr. Weary, wrote to Dr. Shumaker to make one final attempt to resurrect negotiations with Great Ape Trust. *Id.* at ¶ 16 and Exh. 13. Dr. Shumaker, after raising questions regarding plaintiff's desire to have continued access to the chimpanzees, which he characterized as "a major issue during the last round of negotiation," communicated that Great Ape Trust could not take OSU's chimps. *Id.*

OSU next made another attempt to renew negotiations with Chimp Haven. On July 15, 2005, several OSU representatives, including Dr. Weary, Dr. William Yonushonis, Director of University Laboratory Animal Resources, and John Biancamano, OSU Office of Legal Affairs, participated in a phone call with Dr. Linda Brent, the director of Chimp Haven, and a former student of plaintiff's. *Weary Aff.* at ¶ 18; see also *id.* at Exh. 1, p. 2. Dr. Weary's contemporaneous notes of this telephone conversation are attached as Exhibit 14 to her affidavit. OSU informed Dr. Brent that OSU was now interested in moving the chimpanzees, and asked

about the application process and timing. Dr. Brent indicated that the issue of ownership of the animals needed to be resolved, as she was aware from communications with Dr. Boysen that Dr. Boysen claimed ownership. Dr. Brent also expressed concerns about timing because Chimp Haven was scheduled to receive a large number of NIH chimps over the next several months and therefore would be unable to consider the OSU chimps at least until sometime after January 2006. She made it clear that Chimp Haven could not take the chimps at that time. She told OSU that the NIH chimps and others on the waiting list were a priority over the OSU chimps. Also, Dr. Brent stated that she had no authority to decide which chimps to take at Chimp Haven and that OSU would need to talk with representatives affiliated with the NIH because Chimp Haven is an NIH sanctuary. Specifically, she told OSU that Dr. Bill Watson and Dr. Ray O'Neill of the National Center for Research Resources ("NCRR"), a component of the NIH, needed to decide on behalf of NIH. Finally, Dr. Brent stated that OSU would need to pay an endowment for any transfer of animals to Chimp Haven. Weary Aff. at ¶ 18 and Exh. 14; see also generally Affidavit of William P. Yonushonis ("Yonushonis Aff."), at ¶ 4.

OSU was surprised and disappointed by Dr. Brent's statements that she could not make the decision to accept the OSU chimps, in part because when the Chimp Haven MOU (Exhibit 2 to Dr. Weary's Affidavit) was executed, it was not disclosed that NIH – rather than Chimp Haven – had the actual authority to make such a decision. Weary Aff. at ¶ 19.

Following the conference call with Dr. Brent, Dr. Yonushonis contacted both Dr. Watson and Dr. O'Neill. They confirmed that Phase 1 at Chimp Haven was fully committed for NIH chimps, and that Phase 2 had not yet been constructed but they expected it to be fully committed with NIH chimps. They also informed Dr. Yonushonis that the chimps already scheduled for Chimp Haven included a large number of chimps infected due to studies on HIV, Hepatitis A, B

and C, and that this situation made the housing arrangements at Chimp Haven more complicated than originally expected, as the infected chimps had to be separated from the non-infected chimps. Yonushonis Aff. at ¶ 5.

Specifically, in a conversation on July 27, 2005, Dr. Watson told Dr. Yonushonis that over 200 NIH chimps were scheduled to be housed at Chimp Haven, exceeding the capacity. In addition, he told Dr. Yonushonis that, due to increased cost of construction, there might not be room for even these designated 200 chimps. Therefore, he told Dr. Yonushonis, Chimp Haven would not be available for the OSU chimps. Id. at ¶ 6.

Dr. Yonushonis spoke again with Dr. Watson on August 10, 2005. In this subsequent conversation, he told Dr. Yonushonis that, for chimp sanctuaries, the NIH gives priority to chimps from NIH primate facilities and chimps owned by NIH. According to Dr. Watson, the NIH originally thought that there would be about 100 chimps entering Chimp Haven and that the ratio of infected to non-infected chimps would be 70:30. However, the number had grown to over 200 chimps, 90% of which were infected. The unexpectedly large number of infected animals complicated housing arrangements because of the need for separation. In short, there were more NIH chimps eligible for the sanctuary program than there was space available for them. Dr. Watson also stated that priority for entering the sanctuary program goes first to NIH-owned chimps. Although the OSU chimps were used on some research under NIH grants, they are not owned by NIH and, so, did not have priority for Chimp Haven. Yonushonis Aff. at ¶ 7.

Based on all the information provided to OSU, it was clear that Chimp Haven was not a possible option to receive OSU's chimps either in the short or longer term. If Chimp Haven and NIH officials had been ready, willing and able to accept OSU's chimps, OSU would have been glad to work with them. Weary Aff. at ¶ 21.

Because Chimp Haven was not a possibility for OSU's chimps, OSU continued to explore other options for retirement of its chimps. To that end, on August 18, 2005, Dr. O'Neill sent to Dr. Yonushonis by email several pages from a Chimp Research Directory intended to assist OSU in locating an alternative facility for the OSU chimps. Yonushonis Aff. at ¶ 8 and Exh. 1. Dr. Yonushonis researched and contacted a number of different facilities, including Bastrop at M.D. Anderson Cancer Center, which he learned was available only for NIH-owned chimps and was not willing to take the OSU chimps, even with an endowment. He then ruled out a number of other facilities, including those that permitted invasive research on chimpanzees, those that had no capacity to take more animals, and those that had only limited experience with chimpanzees or other primates. Id. at ¶ 9.

In September 2005, Dr. Yonushonis began investigating Primarily Primates, Inc., located near San Antonio, Texas. Among other things,¹ he conducted on-line research (www.primarilyprimates.org), personally visited Primarily Primates twice, and obtained information from other experts, including Dr. Thomas Butler, the Chair of the Board of Directors of Chimp Haven.² Id. at ¶ 10. Thereafter, Dr. Yonushonis reported to the OSU committee overseeing the closing of the Chimpanzee Center that Primarily Primates was an excellent animal refuge with many years of experience. Id. at ¶ 17.

After review of the extensive research by Dr. Yonushonis and the receipt of the positive opinion from Dr. Butler, OSU entered into a contract with Primarily Primates. Id. at ¶ 20 and Exhs. 7 and 8. Pursuant to this contract, OSU's expenditures have included \$14,944 for renovation of temporary housing, \$236,483 for construction of two permanent facilities, \$72,000

¹ OSU's extensive research and due diligence in evaluating Primarily Primates are detailed in Dr. Yonushonis's Affidavit.

² Note that Dr. Butler, as Chair of Chimp Haven, had signed the Chimp Haven MOU on January 7, 2004. Weary Aff. at Exh. 2.

as an endowment to provide long-term care for the chimpanzees, and approximately \$15,000 in transportation costs. In addition, OSU has purchased and shipped to Primarily Primates more than \$3,300 in enrichment items for the chimpanzees to enjoy. Yonushonis Aff. at ¶ 22.

While arrangements were in progress with Primarily Primates, an incident occurred that underscored the need to close the Chimpanzee Center and to find an appropriate retirement facility for the animals. In January 2006, one of the OSU chimps (Sarah, age 47) suffered a severe bite wound inflicted by another chimp.³ In the course of attempts to treat Sarah's wound, a student volunteer was grabbed, bitten and seriously injured by Sarah. Id. at ¶ 29.

On February 27, 2006, following this Court's ruling denying plaintiff's request for a TRO, the OSU chimpanzees were transported onto a specially-equipped truck for travel to Primarily Primates. Id. at ¶ 24. Unfortunately, after being transported safely to Texas, one of the chimpanzees, Kermit, died at Primarily Primates. Id. at ¶ 25. According to the pathology report, Kermit suffered from pre-existing myocardial fibrosis and died of a heart attack. Id. at ¶ 26 and Exh. 13. The other eight chimpanzees were all doing well in their new home at Primarily Primates when Dr. Yonushonis visited them in early March, 2006. Id. at ¶ 25 and Exh. 12.

III. Argument

A. Plaintiff's motion to vacate should be denied.

Plaintiff claims that, pursuant to Rule 60(b)(3), this Court's preliminary TRO ruling should be vacated. To support her Motion to Vacate, plaintiff resorts to the desperate and

³The OSU facility was originally designed to house a maximum of six chimps; however, at one time the facility contained eleven chimps, which had to be separated into two social groups. Two of the chimps (Digger and Abby) died in 2003 at OSU – one as a result of complications from diabetes and the other as a result of infection from a bite wound inflicted by another chimp. Yonushonis Aff. at ¶ 27. In recent times, as all of the chimps had matured and grown while still housed in OSU's crowded facilities, incidents of chimp-on-chimp violence had increased. Id. at ¶ 28.

untenable position that Dr. Weary made false statements to this Court about Chimp Haven's inability to accept OSU's chimpanzees, and that, contrary to Dr. Weary's statement, Chimp Haven in fact was willing and able to take the animals. This is simply not true. Dr. Weary's statement was entirely accurate, as demonstrated not only by her own affidavit and that of Dr. Yonushonis, but also by incontrovertible documentary evidence of OSU's diligent attempts to retire the chimps to Chimp Haven – even after plaintiff herself had written off Chimp Haven.

Additionally, plaintiff argues in her Motion to Vacate that “defendants had to be aware prior to the [February 27] hearing ... that Chimp Haven could indeed house the chimpanzees,” because Dr. Linda Brent of Chimp Haven “on February 25, 2006 sent by fax and regular mail a letter to defendants Holbrook, Yonushonis and McGrath, as well as University counsel John Biancamano and Dr. Weary.” Motion to Vacate at p. 3 (emphasis added).⁴ Thereafter, apparently realizing the misstatement in her Motion to Vacate, plaintiff filed a correction to that motion, admitting that the letter was actually not faxed until February 27, 2006, at which time OSU's representatives were in Court for the TRO hearing. See Weary Aff. at ¶ 24 (stating that she was not aware of Dr. Brent's letter prior to the hearing). Further, while plaintiff submitted fax cover pages that purport to indicate that Dr. Brent's letter was faxed to Dr. Karen Holbrook, Dr. Robert McGrath, and the Office of the Board of Trustees of OSU, there is no evidence that the letter was faxed to Dr. Weary (or Dr. Yonushonis or Mr. Biancamano) on February 27, 2006, as claimed in plaintiff's Motion to Vacate. In light of these circumstances, rather than just “correcting” the record, plaintiff should have withdrawn her argument that, at the time of the hearing, defendants were allegedly aware of Dr. Brent's letter and, therefore, were aware that Chimp Haven could allegedly house the chimpanzees.

⁴ As explained below, Dr. Brent's letter does not, contrary to plaintiff's allegation, state that Chimp Haven “could indeed house the chimpanzees.”

For reasons set forth in detail below, this Court's TRO ruling was entirely appropriate, and plaintiff's Motion to Vacate should be denied.

1. Rule 60(b)(3) does not apply to preliminary rulings.

As an initial matter, Federal Rule of Civil Procedure 60(b), the only authority cited by plaintiff, does not provide any basis on which to overturn this Court's TRO ruling. Rule 60(b) was amended in 1948 to limit its application to "final judgments, orders, and proceedings." Fed. R. Civ. P. 60 (emphasis added). The Advisory Committee Notes to the Amendment state, in part, that:

The addition of the qualifying word "final" emphasizes the character of the judgments, orders or proceedings from which Rule 60(b) affords relief; and hence, interlocutory judgments are not brought within the restrictions of the rule

.....

11 Wright, Miller & Kane, Fed. Prac. & Proc. Civ.2d §2852. "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Muwekma Tribe v. Norton*, 206 F.Supp.2d 1, 3 (D. D.C. 2002) citing *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988). In *Glendora v. Malone*, 165 F.R.D. 42 (S.D.N.Y. 1996), the court denied a party's Rule 60(b) motion for relief from the denial of a temporary restraining order, holding:

Rule 60(b) clearly states that "[o]n motion and upon such terms as are just, the court may relieve a party...from a final judgment, order, or proceeding" on any of six enumerated grounds. See Fed. R. Civ. P. 60(b) (emphasis added). The crucial word, for our purposes, is "final." This court's January 23 order denying plaintiff's application for a temporary restraining order and preliminary injunction is certainly not a final order...Therefore, Rule 60(b) is not applicable in this situation.

Id. at 43. See also *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 880 (9th Cir. 2000) ("(A) preliminary injunction is not a 'final judgment, order, or proceeding' that may be addressed by a motion under Rule 60(b)"); *Triumph Hosiery Mills, Inc. v. Triumph Int'l*

Corp., 191 F.Supp. 937, 938 (S.D.N.Y. 1961) (reversed on other grounds) (“Rule 60(b) applies only to final orders. The order denying a preliminary injunction is clearly interlocutory”).

Because this Court’s TRO ruling is not a final judgment, plaintiff’s resort to Rule 60(b) is without avail. Plaintiff’s motion should be dismissed on this ground alone.

2. There is no basis on which to overturn the TRO ruling.

Even assuming that a motion under Rule 60(b) were the appropriate method by which to seek to vacate a TRO ruling, there is no basis for such a drastic measure in this case.

Relief under Rule 60(b)(3) is appropriate only “under extraordinary circumstances.” *Daniels v. Hargett*, Case Nos. 95-6453, 96-6037, 107 F.3d 880 (Table), 1997 WL 107768, *2 (10th Cir. Mar. 12, 1997). See also *Dow Jones & Co., Inc. v. WSJ, Inc.*, Case No. 97-7690, 133 F.3d 906 (Table), 1998 WL 2370, *2 (2nd Cir. Jan. 6, 1998); *Harris v. Cty. of Cook*, Case No. 99-1731, 202 F.3d 273 (Table), 1999 WL 809719, *1 (7th Cir. Oct. 8, 1999); *A&B Shearing & Processing, Inc. v. United States*, 174 F.R.D. 65 (E.D. Mich. 1997) (“Relief under Rule 60(b)(3) is an extraordinary remedy, granted only in exceptional circumstances and therefore the party seeking such relief has the burden of establishing the misrepresentation and its impact by clear and convincing evidence. Rule 60(b)(3) motions are viewed with disfavor and are addressed to the district court’s discretion which will not be disturbed absent an abuse”).

A party moving for relief under Rule 60(b)(3) must demonstrate, by clear and convincing evidence, “that the adverse party committed a deliberate act that adversely impacted the fairness of the relevant legal proceeding in question.” *Jordan v. Paccar, Inc.*, Case No. 95-3478, 97 F.3d 1452 (Table), 1996 WL 52890, *6 (6th Cir. Sept. 17, 1996). In other words, the movant must demonstrate some “bad act” on the part of the adverse party. *Id.* See also *Myers v. United States*, 8 Cl. Ct. 718, 721 (1985) (movant must show that opposing party’s fraud prevented the

movant from “fully and fairly presenting his case.”) Thus, simply presenting conflicting testimony does not entitle a movant to relief from judgment under Rule 60(b)(3). In *Martin v. Chemical Bank*, 129 F.3d 114, 1997 WL 701359 (2nd Cir. 1997), the plaintiff alleged age discrimination in employment. After the trial court found for the employer, the plaintiff filed a motion under Rule 60(b)(3), claiming that the employer “proffered false testimony at trial.” The court denied the motion, writing:

Under Rule 60(b)(3), a judgment may be set aside based on the “fraud ..., misrepresentation, or other misconduct of an adverse party.” However, conclusory allegations of perjury are insufficient to support a finding of this sort. Martin has alleged nothing more than the fact that conflicting evidence was presented at trial. In such a situation, the jury is free to make its own credibility determinations.

Id. at *3.

The sole basis on which plaintiff seeks to overturn this Court’s TRO ruling is its claim that Dr. Gifford Weary made false statements about the possibility of transporting the OSU chimpanzees to Chimp Haven. According to plaintiff, Dr. Weary “testified that the Ohio State University had contacted Chimp Haven in order to have the chimpanzees retired there and that Chimp Haven had refused to take them.” Motion to Vacate at p. 2. This paraphrasing is not quite accurate. According to the transcript, what Dr. Weary actually said was:

When it became clear that there was no possibility of funding, there were no concrete plans for development money, no alternatives available to us, about a year ago – and no apparent grant moneys coming in, we had gone through several grant submissions that hadn’t been reviewed or funded, we then, John Biancamano and I, spoke to Linda Brent at Chimp Haven and told her that we were ready to go, according to the MOU, and move the chimps down there. Dr. Boysen had spoken with her prior to our conversation.

And in the conversation with Linda Brent we were told that she was expecting over 200 NIH chimps and did not have the capacity to take on new chimps. And also she questioned whether she could anyway because not all of ours were NIH chimps, even though they had all been funded by NIH grants.

And so after we pushed a bit on that, we then fell back, started to look for other alternatives...

Transcript of Proceedings, Doc. No. 8, at 37 (emphasis added). Thus, contrary to plaintiff's representation, Dr. Weary did not represent that Chimp Haven had "refused" the chimps, only that it did not then have capacity to take on the chimps and, in any event, was not certain whether it could take non-NIH chimps at all.

Despite having been made without her file and her notes at hand, Dr. Weary's statement summarizing an 8-month-old conversation with Dr. Brent is entirely accurate. According to Dr. Weary, after having the opportunity to reflect upon the July 15, 2005 conversation and to review her contemporaneous notes (Exhibit 14 to her Affidavit), in that conversation:

We informed Dr. Brent that OSU was now interested in moving the chimpanzees, and we asked about the application process and timing. Dr. Brent indicated that the issue of ownership of the animals needed to be resolved, as she was aware from communications with Dr. Boysen that Dr. Boysen claimed ownership. Dr. Brent also expressed concerns about timing because Chimp Haven was scheduled to receive a large number of NIH chimps over the next several months and therefore would be unable to consider the OSU chimps at least until sometime after January 2006. She made it clear that Chimp Haven could not take the chimps now. She told us that the NIH chimps and others on the waiting list were a priority over the OSU chimps. Also, Dr. Brent stated that she had no authority to decide which chimps to take at Chimp Haven and that we would need to talk with representatives affiliated with the NIH because Chimp Haven is an NIH sanctuary. Specifically, she told us that Dr. Bill Watson and Dr. Ray O'Neill needed to decide on behalf of NIH. Finally, Dr. Brent told us that OSU would need to pay an endowment for any transfer of animals to Chimp Haven.

Weary Aff. at ¶ 18 and Ex. 14 (emphasis added). Dr. Weary remembers, and her notes reflect, that OSU was particularly surprised and disappointed by Dr. Brent's statements that NIH, and not Chimp Haven, would have to make the ultimate decision as to whether OSU's chimps could eventually be accepted at Chimp Haven. After all, Chimp Haven – not NIH – had signed the Chimp Haven MOU. *Id.* at ¶ 19 and Exh. 14; see also *id.* at Exh. 2.

Dr. Weary's recollection of that conversation is corroborated by Dr. William Yonushonis, the Director of University Lab Animal Resources, who was also on the phone call with Dr. Brent. Weary Aff. at ¶ 18; Yonushonis Aff. at ¶ 4. Dr. Yonushonis recalls Dr. Brent saying that OSU's chimps were not a priority and making it clear that Chimp Haven did not have the capacity for the OSU chimps at that time. Dr. Yonushonis also heard Dr. Brent say that, in any event, Chimp Haven could not make the decision about accepting the chimps; rather, NIH would have to make that decision. Id. at ¶ 4. To that end, and as detailed above and in Dr. Yonushonis's affidavit, he contacted the NIH, and was told that Chimp Haven would not be a possibility for the OSU chimps. Id. at ¶¶ 5-7.

The record thus leaves room for only one conclusion: OSU was notified that Chimp Haven could not perform under the MOU. Plaintiff nevertheless proclaims without benefit of evidence that "Chimp Haven could indeed house the chimpanzees," Motion to Vacate at p. 3, and that "the evidence shows that Chimp Haven was willing to take the chimpanzees." Motion to Vacate at p. 4. These claims significantly overstate, if not ignore, the "evidence."⁵ At best, Dr. Brent's letter indicates only that Chimp Haven "would be glad to reopen negotiations with OSU regarding retirement of the chimpanzees at Chimp Haven or to assist the university [to] find a more appropriate home for the chimpanzees." Motion to Vacate, Exh. D at p. 3. The letter does not represent that Chimp Haven could have taken the OSU chimpanzees in July, 2005, or that it could do so now. Id. Dr. Brent's affidavit likewise nowhere represents that Chimp Haven could have accepted the chimps then, now or ever. See generally Affidavit of Dr. Linda Brent, Exh. A to Motion to Vacate.

⁵ Dr. Brent's letter, the chief "evidence" on which plaintiff relies, is both unsigned and unauthenticated by sworn testimony, despite the fact that her affidavit was signed after the letter was sent. As such, the letter is inadmissible. See *Midwest Sports Medicine and Orthopedic Surgery, Inc. v. United States*, 73 F.Supp.2d 870, 873 n. 13 (S.D. Ohio 1999) (refusing to consider correspondence that had not been properly authenticated).

Further, even if there were evidence that Chimp Haven was willing to take the OSU chimpanzees, the evidence is indisputable that Chimp Haven was not, and is still not, able to do so. As an NIH-established sanctuary, Chimp Haven had no authority to make the decision to receive the OSU chimpanzees, even if there were capacity; rather, approval was needed from the NIH, whose representatives undisputedly told OSU that Chimp Haven could not take its chimps. Weary Aff. at ¶ 20; Yonushonis Aff. at ¶¶ 5-7.

Finally, based on Chimp Haven's own words to the world on its website, www.chimphaven.org, Chimp Haven is not able to take the OSU chimps, even to this day. According to Chimp Haven's news release dated January 18, 2006, it recently issued an "urgent financial appeal ... to help bring 150 chimpanzees to the sanctuary who are currently waiting for retirement in medical research facilities" and stated that, unless an additional \$2.5 million is raised to complete the second phase of construction, "Chimp Haven may have to turn away chimpanzees already identified by the federal government for retirement and in need of the sanctuary." Weary Aff. at ¶ 7 and Exh. 5. Thus, by its own admission, Chimp Haven is unable at this time to provide sanctuary to the NIH chimps already identified for retirement, and is contemplating turning away even those chimps. Oddly, Dr. Brent's affidavit and plaintiff's assertions fail to disclose these current challenges facing Chimp Haven. There is therefore no evidence, contrary to plaintiff's assertion, that Chimp Haven could have taken OSU's chimps in July of 2005, or even today.

Dr. Brent's affidavit and her letter expressing "surprise" are themselves a surprise to OSU, because they do not square with the facts. It may be that Dr. Brent does not have – or does not remember – all of the relevant information. First, she was not involved in the communications between OSU and the NIH representatives to whom she referred OSU –

namely, Dr. Watson and Dr. O'Neill, who gave the final word that OSU's chimpanzees could not be retired to Chimp Haven. Second, Dr. Brent is apparently unaware that Dr. Thomas Butler, the Chair of Chimp Haven's Board of Directors, accompanied Dr. Yonushonis to Primarily Primates in November, 2005, for the purpose of ascertaining whether it would be an appropriate facility for OSU's chimpanzees, and unaware that Dr. Butler provided Dr. Yonushonis with a report approving of Primarily Primates. Certainly were Chimp Haven willing and able to take the OSU chimpanzees at that time, the Chair of its Board of Directors (who had signed the Chimp Haven MOU two years earlier) would not have been recommending another facility.

Finally, this record comports with common sense. Clearly, OSU desired for very good reasons to close the Chimpanzee Center and to retire the chimps, and OSU made that intention known to Dr. Boysen, who agreed to the overall plan in signing the OSU MOU years ago. If Chimp Haven could have taken these chimps, OSU would have gladly and promptly transferred them. Plaintiff suggests no sensible reason, because there is none, for the notion that OSU somehow "breached" the Chimp Haven MOU. The fact is that Chimp Haven could not perform and still cannot perform to this day.

Dr. Weary did not make a false statement to this Court. She stated that OSU contacted Chimp Haven, that it was told that Chimp Haven did not have capacity for the OSU chimps, and that there was a question about whether Chimp Haven could accept OSU's chimps at all, because they were not NIH chimps. This is entirely true. There is no basis for vacating the TRO ruling.

3. Plaintiff is not entitled to a TRO

By moving to vacate, plaintiff is presumably requesting that the Court reverse its ruling and enter some extraordinary form of TRO against defendants, apparently to force the transfer of the chimps again, this time “to the care of Dr. Boysen.” Motion to Vacate, at p. 1. As plaintiff recognized in her Motion for a TRO, a TRO requires a careful consideration of four factors: likelihood of success, irreparability and immediacy of harm, harm to third parties and public interest. *Overstreet v. Lexington-Fayette Urban Cty. Gov’t.*, 305 F.3d 566, 573 (6th Cir. 2002). Plaintiff does not even attempt to address these four factors in her Motion to Vacate, and is therefore not entitled to a TRO or any other injunctive relief.

The only basis on which plaintiff moves to vacate, as addressed above, is her claim that Dr. Weary made a false statement. As noted, this claim is without merit, and therefore provides no basis for affirmative relief. Plaintiff’s Motion to Vacate also attaches unauthenticated, hearsay statements regarding the unfortunate death of one of the chimpanzees⁶ and various accusations by Dr. Brent and the People for the Ethical Treatment of Animals (PETA) against Primarily Primates.⁷ Plaintiff does not make any attempt, however, to explain how these circumstances entitle her to have the TRO ruling vacated in favor of affirmative relief. Plaintiff offers nothing new as to how or why she is entitled to a TRO, and the Court’s denial therefore should stand.

⁶ As explained, it was recently determined that this chimpanzee, Kermit, suffered from pre-existing myocardial fibrosis and died of a heart attack. *Yonushonis Aff.* at ¶ 26 and Exh. 13.

⁷ As noted above, the letter from Dr. Brent (Exhibit D to the Motion to Vacate) is neither signed nor authenticated. Likewise, neither the news article nor the PETA letter, Exhibits B and C respectively, is authenticated in any way. Thus, these attachments are inadmissible. See *Midwest Sports Medicine*, supra, 73 F.Supp.2d at 873 n. 13. To the extent the Court considers the hearsay statements ostensibly from Dr. Brent and PETA, in fairness the Court should also consider the “Open Statement from Primarily Primates, Regarding Kermit and the Chimpanzees Formerly the Property of Ohio State University,” issued by Wally Swett of Primarily Primates on March 14, 2006. *Yonushonis Aff.* at ¶ 21 and Exh. 9.

B. Plaintiff's motion for preliminary injunction should be denied.

Plaintiff asks that the Court "preliminarily enjoin defendants to return the chimpanzees to the care of Dr. Boysen and have her involved in decisions relating to the chimpanzees' future care." Motion at 1. This request should be denied.

As an initial matter, plaintiff's attempt to use a Rule 65 preliminary injunction to require transport of the chimpanzees from Texas to Ohio is inappropriate. The purpose of a preliminary injunction is to preserve the status quo between the parties until a full hearing on the merits. *United States v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004), citing *University of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L.Ed.2d 175 (1981). The chimpanzees have already been transported to their new home in Texas. Ownership, custody and control of the chimpanzees have been transferred to Primarily Primates by contract. As such, plaintiff is not requesting maintenance of the status quo; rather, she wants to undo the contract between OSU and Primarily Primates, upset the current ownership of the chimpanzees, and disrupt the transition of the chimpanzees to their new home in Texas.

Moreover, plaintiff has not met the significant burden of establishing entitlement to any injunctive relief. In fact, she has not even attempted to demonstrate to this Court that she can meet any of the four factors necessary to determine whether to issue a preliminary injunction. And, as noted above, she cannot establish any fraud on this Court. There is therefore no basis for this Court to revisit its prior decision and/or to afford plaintiff injunctive relief.

IV. Conclusion

For all of the foregoing reasons, plaintiff's Motion to Vacate Judgment and for Preliminary Injunction should be denied in its entirety.

Respectfully submitted,

JIM PETRO
ATTORNEY GENERAL OF OHIO

/s/ Kimberly Weber Herlihy

Sandra J. Anderson, Trial Attorney (0002044)
Kimberly Weber Herlihy (0068668)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street, P.O. Box 1008
Columbus, Ohio 43216-1008
Telephone: (614) 464-6400
Facsimile: (614) 464-6350
E-mail: sjanderson@vssp.com
E-mail: kwherlihy@vssp.com

Special Counsel to the Attorney General and
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2006, I electronically filed the foregoing, as well as the supporting affidavits of Dr. Gifford Weary and Dr. William P. Yonushonis, with the Clerk of Courts using the CM/ECF system, which will send notification of such filing to Alexander M. Spater and Michael Beaver, Spater Law Office, 565 East Town Street, Columbus, Ohio 43215, counsel for plaintiff Dr. Sarah Boysen.

/s/ Kimberly Weber Herlihy

Kimberly Weber Herlihy (0068668)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street, P.O. Box 1008
Columbus, Ohio 43216-1008
Telephone: (614) 464-8283
Facsimile: (614) 464-6350
E-mail: kwherlihy@vssp.com