

1 intimately. And I can tell you without question if they  
2 are put together in one group, within an hour there will be  
3 serious, serious injuries to several of the animals. And  
4 if there were no way to stop it, they would be dead. There  
5 is just no question. Thank you.

6 THE COURT: Thank you, doctor.

7 It is now 20 to three at this point. I am going  
8 to take a brief recess to organize my thoughts, and I will  
9 reconvene at 3:15 to announce my decision. That might even  
10 give everyone an opportunity to grab some semblance of a  
11 late lunch.

12 (Short recess.)

13 THE COURT: This Court has considered the rather  
14 thorough arguments of counsel that was supplemented in the  
15 record by the statements of various witnesses with  
16 pertinent knowledge, and I will analyze the issues before  
17 me as follows.

18 First, the plaintiff raised the issue of standing.  
19 The defendant did not believe it was an issue as such. But  
20 to the extent that Ms. Anderson felt that it was an issue,  
21 felt that the plaintiff did not have standing based on the  
22 manner in which she distinguished the relevant cases. I  
23 will consider the issue of standing first.

24 I think that distilled to its essence, the primary  
25 issue of standing is whether there was an issue in fact.

1 Based on this Court's analysis, the possible injury in fact  
2 that could have been suffered by Dr. Boysen was the right  
3 to plan with respect to the placement of the chimps  
4 pursuant to the memorandum of understanding.

5 The Court finds that she may have had under the  
6 memorandum of understanding a right to have a voice, with  
7 the other pertinent university officials who were  
8 signatories to the MOU, to have a voice in where the chimps  
9 were ultimately placed in the event that the triggering  
10 event occurred, and the triggering event essentially was  
11 whether it was determined that funds in the center's  
12 accounts were insufficient to operate the center. In that  
13 respect, she would have suffered an injury in fact.

14 The other injuries to which Dr. Boysen alluded  
15 were far too speculative. For instance, she alleged an  
16 injury in fact that can be characterized as separation  
17 anxiety. She noted that she had been with the chimps for  
18 ~~have been separated from them and suffered an injury were repeated~~555Vp  
19  
20 from them.

21 The Court finds that this argument lacks merit  
22 because in negotiating the memorandum of understanding, the  
23 plaintiff obviously contemplated the possibility of being  
24 separated from the chimps. Dr. Boysen negotiated a  
25 contract under the terms of which the chimps would be moved

1 to Chimp Haven in Shreveport, Louisiana. There was no  
2 concomitant provision stating that if they were to be moved  
3 to Shreveport, she would accompany them. So she apparently  
4 contemplated in negotiating this MOU that she would be  
5 separated from them upon the occurrence of certain events,  
6 which obviously have occurred.

7 She has no property interest or no ownership  
8 interest in eight of the chimps because there is no  
9 evidence supporting such, and no evidence contradicting the  
10 fact that eight of the chimpanzees were donated to the  
11 comparative cognition project, which is an Ohio State  
12 University entity. And it's a distinction without a  
13 difference to say that because she was affiliated with the  
14 project and/or ran the project, that when the chimps were  
15 donated to the project, they were in fact donated to her  
16 and not to the university. I think they were in fact  
17 donated to the university and, therefore, she doesn't have  
18 a proprietary interest in them.

19 She may have a proprietary interest in the one  
20 chimpanzee that she purchased for which she has not been  
21 reimbursed. And in that chimpanzee she may assert an  
22 injury in fact and, hence, have standing. But because she  
23 may have been conferred standing in the memorandum of  
24 understanding in that she has some right to plan with  
25 respect to the placement of the chimps and the fact that

1 she purchased the one chimpanzee, albeit during the time  
2 that she was affiliated with the university, the plaintiff  
3 does have standing.

4 Now I will go on to consider the elements of the  
5 temporary restraining order. As Mr. Spater pointed out in  
6 his papers, courts now look at four factors, especially  
7 whereas here there is not an *ex parte* proceeding, to  
8 determine whether a temporary restraining order should  
9 issue.

10 First, the Court should look at the likelihood of  
11 success on the merits. The first argument advanced by the  
12 plaintiff is a due process argument. She argues that there  
13 was no notice or opportunity to be heard with respect to  
14 the placement of the chimps.

15 As a threshold consideration, and as I have said  
16 before and all of the parties agree, the memorandum of  
17 understanding, which is Defense Exhibit 1, controls this  
18 case. The evidence demonstrates that the plaintiff had  
19 notice and an opportunity to be heard. So Exhibit D, the  
20 letter of February 21, 2006, certainly can be construed as  
21 notice because the chimps had not been placed, but she was  
22 advised that they were going to be placed.

23 Secondly, the plaintiff knew that the triggering  
24 event that would lead to the placement of the chimps was a  
25 lack of funding, or under-funding more appropriately.

1 Since the plaintiff was intimately involved in the project,  
2 the evidence shows that she was aware of the fact that  
3 funding levels had not been met. And she doesn't contest  
4 that the funding levels had not been met.

5 More tellingly, however, the fact that she went to  
6 Iowa to arrange for -- to join Iowa and Great Ape, Inc., to  
7 initiate negotiations relating to the placement of the  
8 chimpanzees indicates that she knew that the triggering  
9 event had occurred and that she was to take steps to place  
10 the chimpanzees in a facility. So she obviously knew.

11 Now it's uncontroverted also that OSU attempted to  
12 perform under the memorandum of understanding. If you look  
13 at paragraph five, which is the operative paragraph as far  
14 as the issues in this proceeding are concerned, that  
15 paragraph reads, beginning in 2005 and in each year  
16 thereafter, the parties will review the financial status of  
17 the center in June and December. If it is determined that  
18 funds in center accounts are insufficient to operate the  
19 center for the entire six-month period following the  
20 review, plans for closing the center will be prepared, and  
21 the center's funding will be closely monitored. If it is  
22 determined that available funds will be exhausted in three  
23 months or less, Chimp Haven, Inc., will be contacted, and a  
24 schedule for moving the chimps to that facility will be  
25 established.

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

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

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

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

22 It is also telling that paragraph six of the MOU,  
23 upon which the plaintiff relied during this hearing,  
24 provides no recourse. That paragraph only comes into play  
25 if another institution expresses an interest in

1        establishing a chimpanzee research facility under the  
2        leadership of Dr. Boysen.  If that is the case, or were  
3        that to be the case, the university would then have to  
4        facilitate the transfer of ownership and the chimps to that  
5        institution.

6                However, there was no evidence adduced at this  
7        hearing which indicated that another institution expressed  
8        an interest in establishing a chimpanzee research facility  
9        under Dr. Boysen's leadership.  Therefore, the university  
10       was not required to facilitate the transfer of ownership  
11       and the chimps to that institution.

12               I should also note that there is nothing in the  
13       memorandum of understanding which places an obligation upon  
14       OSU to provide seed money, as Dr. Boysen alluded to during  
15       the hearing, which she would then match to keep the  
16       facility at OSU viable.

17               The memorandum of understanding, when read in its  
18       entirety, contemplated ongoing fund-raising efforts by the  
19       chimpanzee center and Dr. Boysen.  But it did not require  
20       seed money by the university.

21               OSU also acted properly in contracting with  
22       Primarily Primates, Inc.  Under the memorandum of  
23       understanding, Dr. Boysen's objection is of no moment.  She  
24       objects to the site itself, not to the fact of the  
25       chimpanzees being placed because obviously she contracted

1 in entering into this agreement to have the chimpanzees  
2 placed if there was a triggering event.

3 There is nothing that prohibits OSU from  
4 contracting with Primarily Primates or some other  
5 institution. In fact, OSU could possibly expose itself to  
6 some liability by not contracting since it attempted to  
7 contract with Chimp Haven and couldn't perform in that  
8 context because Chimp Haven wouldn't accept the  
9 chimpanzees. And so it's something akin almost to acting  
10 in mitigation because OSU then negotiated with other  
11 facilities to move the chimps to other facilities.

12 The second legal theory advanced by the plaintiff  
13 was that OSU's actions amounted to a taking in violation of  
14 the Fifth Amendment to the Constitution. Well, as I have  
15 indicated earlier, there was no taking of the eight chimps  
16 because those eight chimps belonged to OSU, and OSU  
17 couldn't take from itself as a matter of law.

18 With respect to the one chimp, there was no taking  
19 because -- there was no taking in violation of the Fifth  
20 Amendment because Dr. Boysen had contemplated a scenario  
21 under which that chimp, the chimp that she had purchased  
22 and had not been reimbursed for, would be at some point  
23 taken if the center did not meet certain funding levels.  
24 And as I indicated earlier, as further evidence of that,  
25 she went to Iowa to negotiate with Great Ape, Inc., for

1 that chimp along with the other eight chimps to be placed.

2 So the factor of likelihood of success on the  
3 merits does not auger in favor of the plaintiff but in  
4 favor of the defendant. It is likely that at either a  
5 preliminary injunction hearing or a trial on the merits OSU  
6 would likely be successful.

7 Then when I turn to balancing the hardships,  
8 Dr. Boysen's legal theories are not supported by the  
9 evidence in this case in which she has alleged in addition,  
10 repeatedly in her papers, is the emotional hardship that  
11 would be visited upon her by separation from the  
12 chimpanzees to whom she dedicated 23 years of her life.  
13 Juxtaposed that to the hardship that would be visited upon  
14 OSU, which committed approximately \$245,000 to this  
15 project, not to mention the contractual obligation that it  
16 has incurred with Primarily Primates, Inc., the Court finds  
17 that the hardship would be greater to Ohio State University  
18 than to Dr. Boysen.

19 The next factor is irreparability and immediacy of  
20 the harm. The Court finds that the injury to The Ohio  
21 State University would be irreparable and immediate because  
22 they have already properly contracted under a memorandum of  
23 understanding, I believe, with Primarily Primates.

24 Fourth, the public interest. As the case law  
25 uniformly supports, the public interest is always

1 vindicated when contracts are honored. And from a purely  
2 legal vantage point, the contract with Primarily Primates,  
3 which is a valid contract, should be honored.

4 From a humanitarian vantage point, it is clear to  
5 the Court that the university's commitment of \$230,000 to  
6 construct a facility for these chimpanzees plus the \$15,000  
7 for the interim facility demonstrate that the university  
8 has the chimpanzees' best interests at heart under the  
9 circumstances.

10 Obviously the chimpanzees will not remain at the  
11 university, but that's a function of funding more than the  
12 university's desire to maintain the facility. And what we  
13 see is an eventuality that was contemplated by all of the  
14 parties to this memorandum of understanding. They all  
15 knew, including the plaintiff, that if funding levels were  
16 not met, the chimpanzees would have to be placed.

17 We also have a letter from a veterinarian, which  
18 is admittedly contradicted by the affidavit of April  
19 Truitt, but Dr. Thomas Butler indicates that Primarily  
20 Primates is a well-established animal sanctuary; and based  
21 on his observations, the chimpanzees were physically and  
22 behaviorally healthy, the ones that he observed at  
23 Primarily Primates. In addition to the moneys committed,  
24 there is an endowment of \$72,000 that is earmarked for the  
25 ongoing care of these chimpanzees.

1                   So the public's interests, the public's  
2 humanitarian interests, have been vindicated under the  
3 terms of the contract between The Ohio State University and  
4 Primarily Primates.

5                   For all of the reasons set forth therefore, the  
6 plaintiff's motion for a temporary restraining order is  
7 denied.

8                   Are there any other matters that we need to take  
9 up from the plaintiff, Mr. Spater?

10                  MR. SPATER: No, Your Honor, not today.

11                  THE COURT: From the defense, Ms. Anderson?

12                  MS. ANDERSON: No, Your Honor. Thank you.

13                  THE COURT: Thank you very much everyone.

14                  Court is adjourned.

15                  (Court was adjourned at 3:30 p.m. on February 27,  
16 2006.)

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C E R T I F I C A T E

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I, Laura L. Samuels, do hereby certify that the foregoing is a true and correct transcript of the proceedings before the Honorable Algenon L. Marbley, Judge, in the United States District Court, Southern District of Ohio, Eastern Division, on the date indicated, reported by me in shorthand and transcribed by me or under my supervision.

  
Laura L. Samuels

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