

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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SARAH BOYSEN, :
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 PLAINTIFF, :
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 VS. : CASE NO. 2:06cv150
 :
 KAREN HOLBROOK, ET AL., :
 :
 DEFENDANTS. :
 - - -

MOTION FOR A TEMPORARY RESTRAINING ORDER

BEFORE THE HONORABLE ALGENON L. MARBLEY, UNITED STATES
DISTRICT JUDGE, SOUTHERN DISTRICT OF OHIO, EASTERN
DIVISION, SITTING AT COLUMBUS, OHIO, ON FEBRUARY 27, 2006.

APPEARANCES:

ALEXANDER SPATER, ESQ.,
MICHAEL BEAVER, ESQ.,

ON BEHALF OF THE PLAINTIFF.

SANDRA ANDERSON, ESQ.,
KIMBERLY HERLIHY, ESQ.,
JOHN BIANCAMANO, ESQ.,
JAN NEIGER, ESQ.,

ON BEHALF OF THE DEFENDANTS.

Monday Afternoon Session

February 27, 2006

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3 THE COURT: Good afternoon. Mrs. Clark, would you
4 please call the case.

5 THE DEPUTY CLERK: C2-06-150, Dr. Sarah Boysen
6 versus Karen Holbrook, et al.

7 THE COURT: Would counsel please identify
8 themselves for the record beginning with counsel for the
9 plaintiff?

10 MR. SPATER: Your Honor, Alexander Spater and
11 Michael Beaver representing the plaintiff. And between the
12 two of us is Dr. Sarah Boysen.

13 THE COURT: Thank you.

14 Counsel for the defense?

15 MS. ANDERSON: Your Honor, good afternoon. I am
16 Sandra Anderson. With me is my partner, Kim Herlihy, from
17 Vorys, Sater, Seymour and Pease. Also at counsel table
18 with us is John Biancamano, who is in-house counsel at The
19 Ohio State University. And at the right time, Your Honor,
20 I will introduce the other folks from the university who
21 are in the courtroom.

22 THE COURT: Thank you, Ms. Anderson.

23 We are convened pursuant to local rule 65.1 and
24 Federal Rules of Civil Procedure 65(b) on the plaintiff's
25 motion for a temporary restraining order.

1 Mr. Spater, given the significant number of people
2 who have all come down here for this TRO, we will have it
3 in the courtroom as opposed to the conference room where we
4 normally conduct such procedures. But since we are having
5 it here, I will ask you to approach the podium and set
6 forth the basis of your motion for your temporary
7 restraining order. Unless, of course, that would be
8 Mr. Beaver. I just presumed that you were going to.

9 MR. SPATER: I will do it, Your Honor.

10 If it please the Court: What we have here, and we
11 set it forth I think in the verified complaint and the
12 memorandum in support of the motion for a temporary
13 restraining order, is that Dr. Boysen has been -- is a
14 psychologist at Ohio State University and that she has been
15 operating the chimp center, the chimpanzee center, for 23
16 years. And the chimpanzees are basically her entire
17 professional and personal life. They are wrapped up in
18 Dr. Boysen's life, and I think we have set that forth --

19 THE COURT: You have set that forth. There are
20 some questions that the Court has, however, that not only
21 go to the issue of standing, but also would go to the issue
22 of whether you have met the requisite immediacy and
23 irreparability of injury requirements under 65(b).

24 I don't need you to recite the facts. I am
25 familiar with the facts, although I have some questions

1 about the facts, and my first question is: To whom do
2 these chimpanzees belong? In your papers you indicate that
3 one of the chimpanzees was purchased by Dr. Boysen. The
4 remaining eight chimpanzees it appears were donated to --
5 and this is where it becomes fuzzy -- either to Dr. Boysen
6 or to The Ohio State University primate center.

7 And the answer of that question is of some
8 consequence in the Court's view because if they were
9 donated to The Ohio State University, then it would stand
10 to reason that eight chimpanzees at least were property of
11 The Ohio State University.

12 If, however, they were donated to Dr. Boysen, who
13 in turn donated them to The Ohio State University, then
14 perhaps she does have a property interest in those
15 chimpanzees, and then there are certain rights that would
16 flow from that property interest.

17 So could you address that question first?

18 MR. SPATER: Yes, Your Honor, I will. It is our
19 position that they were actually donated to her for her use
20 at the primate center.

21 THE COURT: Are there donor agreements which
22 support that contention?

23 MR. SPATER: Originally -- Well, the four donor
24 agreements originally -- for the other chimpanzees, there
25 aren't any donor agreements. But the donors intended, and

1 if this -- when this, assuming it goes to a hearing, what
2 we hope to do is present perhaps some donors to talk about
3 what their intention was. But it's our position that the
4 chimpanzees were donated to Dr. Boysen for her use working
5 on the cognitive behaviors of chimpanzees at the chimpanzee
6 center.

7 THE COURT: Were they donated to Dr. Boysen while
8 she was employed by The Ohio State University, or were they
9 donated prior to her employment by the university?

10 MR. SPATER: She was employed, at the time they
11 were donated, she was employed at The Ohio State University
12 at the time they were donated to her. But they were
13 donated to her for the purpose for her use in the
14 chimpanzee center.

15 Your Honor, if I have any questions, you know, may
16 I consult with Dr. Boysen?

17 THE COURT: Absolutely.

18 MR. SPATER: To make sure that the facts are
19 accurate.

20 I am sorry, Your Honor.

21 THE COURT: Please continue.

22 MR. SPATER: Dr. Boysen tells me there were five
23 chimps that were donated to her prior to the time that she
24 became an employee of The Ohio State University. And if
25 there are any specific questions obviously that you have

1 concerning the facts, we can -- I will --

2 THE COURT: The four were donated after she became
3 affiliated.

4 MR. SPATER: Four were donated afterwards, yes,
5 Your Honor.

6 THE COURT: Please continue, Mr. Spater.

7 MR. SPATER: So that was -- You had a question
8 particularly about the issue of standing, I think, Your
9 Honor?

10 THE COURT: Yes.

11 MR. SPATER: What I would like to do is address
12 that particular question. It wouldn't make any sense for
13 me to go through issues that you don't want to address.

14 With respect to standing, Dr. Boysen has
15 established an emotional attachment to the chimpanzees.
16 Under the cases that we cited to you, particularly the
17 Glickman and the AFCP versus Ringling Brothers --

18 THE COURT: In Glickman, the plaintiff was suing
19 under a provision that permitted citizen suits, I believe,
20 and I also believe that she was, the plaintiff there was,
21 suing after witnessing primates and other animals endure
22 inhumane treatment.

23 Dr. Boysen's injury is prospective. She believes
24 they are going to be sent to -- Was it Chimp --

25 MR. SPATER: No, to Primarily --

1 THE COURT: Primarily Primates, and Primarily
2 Primates she does not believe would be a safe, caring and
3 humane environment for the chimps.

4 MR. SPATER: Your Honor, if I may interrupt,
5 that's not the only issue. It's also taking the chimps
6 away from her and putting them in this bad place.

7 THE COURT: I understand that that's also one of
8 her claims. But I am focusing now on what appears to be a
9 prospective injury. She believes that they will be injured
10 at Primarily Primates, or at least not well taken of at
11 Primarily Primates. And this would be in contravention of
12 certain donor agreements, according to your papers, because
13 under the donor agreements, they were supposed to be kept
14 in a humane and appropriate manner. And I believe the
15 position that you take, and it was verified by the
16 affidavit that was filed in this case, that Primarily
17 Primates does not meet the standards that are even set
18 forth by the OSU primate center. Is that correct?

19 MR. SPATER: That's correct, Your Honor.

20 THE COURT: So at least in that respect, there has
21 not been an injury in fact, at least not one akin to the
22 injury in fact that was witnessed by the plaintiff in
23 Glickman.

24 MR. SPATER: But there is an imminent injury, Your
25 Honor, and that's why we are before Your Honor at this

1 time.

2 THE COURT: It's not like the chimpanzees are
3 going to be taken to be put to sleep. The imminent injury
4 is speculative, isn't it, Mr. Spater? Because you don't
5 know for certain that they won't be properly cared for at
6 Primarily Primates. You just believe they will be
7 improperly cared for because the standards at Primarily
8 Primates do not comport with the standards at The Ohio
9 State University, the primate center?

10 MR. SPATER: But that's not all, Your Honor.
11 Because the injury also comes from the fact that the
12 chimpanzees are going to taken from her, in addition to
13 obviously going to Primarily Primates, Inc. But in
14 addition to that, as soon they are put on the trucks, this
15 is going to be extremely difficult on the chimps, too. And
16 Dr. Boysen would be injured in that respect also, Your
17 Honor. And there is also economic injury that will result.

18 But this is imminent. I mean she has got a letter
19 from them saying, this is what we are going to do. We are
20 going to send them to Primarily Primates. And we are going
21 to do that now.

22 THE COURT: But it's not just separation anxiety,
23 Mr. Spater, because under the terms of the memorandum of
24 understanding, she agreed with the university that in the
25 event certain funding levels were not attained, then the

1 chimpanzees could be sent to Chimp Haven. And if they were
2 sent to Chimp Haven, they would also not be at the
3 university; isn't that true?

4 MR. SPATER: That is true, Your Honor.

5 THE COURT: Where is Chimp Haven located?

6 MR. SPATER: Shreveport, Louisiana, Your Honor.

7 THE COURT: So just in terms of distance, she was
8 going to be separated from the chimps either way if certain
9 funding levels were attained. Would you agree with that?

10 MR. SPATER: That's correct, Your Honor. But
11 you're forgetting, if I may, Your Honor, the memorandum of
12 understanding also indicates that a plan would be devised
13 for removing them, too.

14 THE COURT: We are going to get to the memorandum
15 of understanding, and many of the questions that I have
16 about the memorandum of understanding are reserved for
17 Ms. Anderson. But at this point I am simply trying to
18 determine what the injury in fact was because in many
19 respects the injury that you are discussing or -- Can you
20 hear me?

21 MR. SPATER: Yes, I can. But my client was saying
22 something. I was trying to --

23 THE COURT: The injury that we have here as
24 opposed to Glickman and I think as opposed to Ringling
25 Brothers is a prospective injury at least as far as what

1 Ms. Boysen thinks the chimpanzees will suffer.

2 And I think that in both Glickman and Ringling
3 Brothers the plaintiffs there had in fact observed some
4 mistreatment of the animals, if I am not mistaken. Isn't
5 that true?

6 MR. SPATER: Yes, Your Honor.

7 THE COURT: How does Ms. Boysen suffer an injury
8 in fact with respect to the chimpanzees?

9 MR. SPATER: She suffers the injury because of
10 their being removed. I mean this is an imminent injury and
11 also -- But in addition to, that she has been locked out.
12 She has been locked out, denied access to the chimpanzees
13 at the present time.

14 THE COURT: So that's an injury as well.

15 MR. SPATER: So this is the present injury. Her
16 restraining order has to do with stuff that is going to
17 happen perhaps any day.

18 She got the notice. She wasn't involved in the
19 planning. Police cruisers were outside her place, would
20 not let her in. She had to send them a -- She had to
21 indicate to them when she wanted to come on the chimp
22 center. And the letter indicated that furthermore, she was
23 required to indicate what she was going to do there when
24 she was there.

25 She sent them a letter indicating: When can I

1 come to the chimpanzee center? They never responded to
2 that letter. She sent the letter on the 21st or the 22nd,
3 last Wednesday.

4 THE COURT: You also note that you believe
5 Dr. Boysen will suffer economic damages.

6 MR. SPATER: That's correct.

7 THE COURT: Those damages, though, can be remedied
8 at law, is that right? Because the amount of economic
9 damages can be ascertained; and hence, money damages will
10 be possible. She doesn't need an equitable remedy to
11 address those money damages, does she?

12 MR. SPATER: I think that's correct, yes, Your
13 Honor.

14 THE COURT: So really the injury that we are most
15 concerned with right now is the injury that was visited
16 upon Dr. Boysen by being locked out, denied access; is that
17 right?

18 MR. SPATER: The present injury, yes.

19 THE COURT: That's the present injury.

20 The injury in terms of her being separated from
21 the chimpanzees, I'm not so clear on that one, Mr. Spater,
22 because if The Ohio State University had acted pursuant to
23 what I understand the terms of the memorandum of
24 understanding would be, then Dr. Boysen would be separated
25 from the chimpanzees in any event because they would have

1 been sent to Chimp Haven -- They would have been sent to
2 Chimp Haven, is that right?

3 MR. SPATER: That's not entirely correct because
4 -- The separation, yes; but the type of treatment they
5 would receive, no.

6 THE COURT: That's what I am saying. If you are
7 predicating this injury in fact on separation, then they
8 would have suffered this injury irrespective of whether
9 they went to Primarily Primates or to Chimp Haven; isn't
10 that true?

11 MR. SPATER: I would think not, Your Honor,
12 because at least at Chimp Haven, they have a better system
13 set up.

14 Your Honor, can I consult with my client for a
15 second?

16 THE COURT: Yes.

17 MR. SPATER: I am just trying to focus on where I
18 was, Your Honor.

19 THE COURT: Here's my question. It appears that
20 with respect to the relocation of the chimps, that was
21 going to happen if certain funding levels were not
22 achieved. I want you to assume for the purposes of my
23 questions that those funding levels were not achieved.

24 If, as you allege in those complaint, those
25 funding levels were not achieved, then certain events are

1 triggered. One of the events that is triggered is the
2 chimps being sent to Chimp Haven, is that right?

3 MR. SPATER: That's one of the possibilities, too.
4 Another one would be that a plan could be set up -- Like
5 Dr. Boysen would have the opportunity of finding housing
6 for them. That would be another opportunity.

7 THE COURT: All right. Paragraph four of the
8 memorandum of understanding reads: If it is determined
9 that the center does not have sufficient funding to operate
10 beyond December, 2004, plans for closing the center will be
11 prepared, Chimp Haven, Inc., will be contacted, and a
12 schedule for moving the chimps to that facility will be
13 established pursuant to the contract between the university
14 and Chimp Haven. The move to Chimp Haven will occur no
15 later than December 15, 2004.

16 My question simply is that if the funding levels
17 were not attained, then it was contemplated by both parties
18 to this agreement that the chimpanzees would be moved to
19 Chimp Haven; is that right?

20 MR. SPATER: Your Honor, and if you will hear me
21 out on my disagreement with this, if it is determined that
22 the center does not have sufficient funding to operate
23 beyond December 4, plans for closing the center will be
24 prepared. And that's where -- and I don't think that's
25 just like a semantic difference because the plans --

1 Dr. Boysen was to be involved with it. And that part of
2 that, implicit in that, is that Dr. Boysen was going to
3 have the opportunity of deciding what could happen to the
4 chimps. And if that fell through, then Chimp Haven would
5 be the alternative.

6 THE COURT: Well, I would concur in your
7 interpretation of the memorandum of understanding if that
8 sentence was standing alone as a separate paragraph, but
9 it's not. It is followed by the next sentence which says
10 that Chimp Haven would be contacted. And that's what you
11 say in your complaint. You complain that she was not
12 consulted, that they weren't supposed to be sent to
13 Primarily Primates. Instead, they were supposed to be sent
14 to Chimp Haven. So I am assuming that they are supposed to
15 be sent to Chimp Haven.

16 My point is she was going to be separated from
17 these chimps if funding levels weren't achieved. Isn't
18 that true?

19 MR. SPATER: That she would be separated from
20 them, if that was according to the plan that she and the
21 university had achieved, according to that, yes. I mean --

22 THE COURT: Let me ask you this.

23 MR. SPATER: -- that could be a possibility, yes.

24 THE COURT: Did Dr. Boysen ever submit a plan,
25 Mr. Spater?

1 MR. SPATER: May I consult?

2 THE COURT: Yes.

3 MR. SPATER: Your Honor, Dr. Boysen tells me there
4 was another version of this that we don't have a copy of,
5 that indicates -- There was a caveat on that that indicates
6 that if funds could not be obtained, then she would have
7 the opportunity of finding alternative housing for them.

8 THE COURT: You would agree with me, though, that
9 neither in your complaint nor in your motion for a
10 temporary restraining order do you reference this
11 alternative housing agreement?

12 MR. SPATER: I would agree with you, yes, Your
13 Honor.

14 THE COURT: So the papers that the Court has
15 before it contemplates the chimpanzees being moved to Chimp
16 Haven instead of Primarily Primates. Wouldn't you agree
17 with that?

18 MR. SPATER: That's part of what we said, yes,
19 Your Honor.

20 THE COURT: We are going then to focus the
21 arguments on what you requested in your pleadings because
22 that's what's before the Court. And you have asked for a
23 temporary restraining order because you didn't want, in
24 part, because you didn't want these chimpanzees to go to
25 Primarily Primates because of the conditions that you

1 allege exist there. Instead, if they are going to be
2 relocated, you want them relocated to Chimp Haven. That's
3 what the Court's understanding is at this point. Am I
4 incorrect?

5 MR. SPATER: In part, that's what we have claimed,
6 yes, Your Honor.

7 THE COURT: All right.

8 MR. SPATER: In that part. But obviously the
9 other part indicates in terms of the plan being set up and
10 taking them away at all.

11 THE COURT: And I want the record to be clear that
12 Dr. Boysen never submitted any plan pursuant to one version
13 of the memorandum of understanding or any other. Is that
14 true? Doctor, you can address the Court. You can answer
15 that question.

16 MS. BOYSEN: Yes, Your Honor. I was not allowed
17 access to my office where the final versions of all these
18 documents occur. But I would imagine that the Ohio State
19 council has the final version with the caveat that I
20 requested such that if I were able to find an alternative
21 route and facilities for placing the animals so we could
22 continue our research, that the university would release
23 the chimps to me.

24 THE COURT: Mr. Biancamano, do you have any --

25 MS. ANDERSON: Your Honor, I have a copy of the

1 signed agreement. It doesn't say what you just heard. I
2 have a copy of the final signed agreement.

3 MS. BOYSEN: There are two.

4 THE COURT: Thank you, Ms. Anderson.

5 Ms. Anderson, may I ask you, I am assuming that
6 you had a chance to compare this, this memorandum of
7 understanding that you have given me -- and I am going to
8 have this marked as Defense Exhibit 1.

9 MS. ANDERSON: Yes, Your Honor, I have.

10 THE COURT: Have you compared this to Plaintiff's
11 Exhibit C?

12 MS. ANDERSON: I have, Your Honor.

13 THE COURT: Is it the same language?

14 MS. ANDERSON: It's the same up until paragraph
15 six. Paragraph six is new language, Your Honor. And also
16 the signature page is somewhat different, including the
17 signatures themselves and the titles, the capacity in which
18 everyone signed the agreement.

19 THE COURT: Thank you. I will note for the record
20 that paragraph six reads as follows: Subject to the time
21 deadlines and expenditure limitations set forth above, if
22 another institution should express an interest in
23 establishing a chimpanzee research facility under the
24 leadership of Dr. Boysen, the university will facilitate
25 the transfer of ownership and chimps to that institution.

1 Dr. Boysen, is this the caveat to which you
2 referred?

3 MS. BOYSEN: Yes, Your Honor.

4 THE COURT: Thank you.

5 Mr. Spater, you may return to the podium. We
6 aren't done yet.

7 MR. SPATER: I didn't think we were, Your Honor.

8 THE COURT: Now let's move on to the basis for the
9 TRO itself. First of all, what relief do you seek,
10 Mr. Spater?

11 MR. SPATER: We seek to force the university to
12 allow Dr. Boysen to have access to her chimpanzees and the
13 center, and we also are requesting that the Court enjoin
14 defendants from removing the chimpanzees.

15 THE COURT: Do you agree that the MOU controls in
16 this case?

17 MR. SPATER: Your Honor, excuse me. I have a
18 different -- I guess I have a problem with the question of
19 whether that controls because there is also the issue of
20 the donors' intent and the donors' intent that they be used
21 at this center and that, if at all possible, they be used
22 for Dr. Boysen's research.

23 If you throw in the donors' intent and what they
24 intended that the chimpanzees should be used for and
25 indicate and you put in the entire memorandum of

1 understanding, with that in mind, I think that would be
2 correct, Your Honor. But I don't think it's as simple as
3 saying that this one document controls what would happen to
4 the chimpanzees.

5 THE COURT: Maybe it would be better to approach
6 it this way, Mr. Spater. You have claimed first that you
7 are entitled to a temporary restraining order because you
8 meet all the elements. Under rule 65(b), basically you
9 need to show immediacy of harm and irreparability of
10 injury.

11 Under the case law that has developed, the courts
12 have expanded those requirements, as you noted in your
13 brief, to include a likelihood of success on the merits,
14 balancing of hardship, that is hardship weighing in favor
15 of the granting of injunctive relief, and the
16 irreparability of harm, as I just mentioned, and the public
17 interest would be vindicated by the issuance of TRO.

18 Let's begin with the likelihood of success, and
19 your first argument is a due process argument. Please
20 proceed.

21 MR. SPATER: Yes, Your Honor. What we are
22 claiming is that because she had ownership of the
23 chimpanzees, the university was taking the chimpanzees
24 without compensation, without providing a means by which
25 she would be compensated. Also, that they were taking her

1 property without notice or an opportunity for a hearing.

2 THE COURT: All right.

3 MR. SPATER: That's essentially it.

4 THE COURT: Now my first question is: Does the
5 memorandum of understanding confer a property right upon
6 Dr. Boysen?

7 MR. SPATER: The memorandum of understanding does
8 not confer a property right on Dr. Boysen. However, the
9 donors, by donating to Dr. Boysen, conferred the property
10 right on to her. And by her purchasing the chimpanzees.

11 THE COURT: So five of the chimpanzees were either
12 purchased or donated prior to her affiliation with the
13 university, is that right?

14 MR. SPATER: Let me modify my response on the
15 property rights, Your Honor. But in addition it does in
16 the limited sense of saying if the plan could not be worked
17 out, if there was no other facility that would take the
18 chimpanzees, then they would go to Chimp Haven. In that
19 limited sense it does create a property right. I am sorry.

20 THE COURT: Before we get there, five of the
21 chimpanzees were in the possession of Dr. Boysen prior to
22 her affiliation or -- affiliation with or employment by the
23 university. Is that right?

24 MR. SPATER: Employment by, yes.

25 THE COURT: Because she was affiliated with the

1 university prior to being employed by the university.

2 MR. SPATER: That's correct, Your Honor.

3 THE COURT: But four of the chimpanzees were
4 donated after Dr. Boysen was employed by the university.

5 MR. SPATER: That's correct, Your Honor.

6 THE COURT: So an argument could be made that
7 those four chimpanzees belong to the university.

8 MR. SPATER: An argument could be made, yes; but I
9 would disagree.

10 THE COURT: But you don't have a memorandum of
11 agreement with respect to those donations, the four
12 donations, the four post-employment donations, that
13 indicate they were donated to Dr. Boysen in her individual
14 capacity, do you?

15 MR. SPATER: We don't have the donor agreements,
16 Your Honor.

17 MS. BOYSEN: We have agreements for some of them;
18 but I am a donor, too.

19 MR. SPATER: Your Honor, we don't have like the
20 signed copies of the donor agreements. We have one that's
21 in form, because she hasn't been able to get into her
22 office, and the donor agreements relate to four of the
23 chimpanzees. The trouble we have is she hasn't been able
24 to get into her office; and, therefore, we haven't been
25 able to get those donor agreements.

1 THE COURT: Please continue.

2 MR. SPATER: That was essentially our due process
3 argument, and you had some follow-up questions on that, and
4 basically that these are her chimpanzees, and they are
5 taking them without compensation, in the Fifth and -- as
6 incorporated in the Fourteenth Amendment and denied --

7 THE COURT: Would it also stand to reason then if
8 the Court finds that any of the chimpanzees are the
9 property of the university, then it is not a taking under
10 the Fifth Amendment, and she does not have a right to
11 notice and a hearing; is that right?

12 MR. SPATER: Well, the Court should find, because
13 you are talking about with the donors' intent, and the
14 Court has taken into consideration the fact the donors were
15 giving them to her, yes. If the university should find
16 that -- But you see part of our due process claim, too, is
17 that she was denied access to research opportunities.

18 THE COURT: How was she denied access to research
19 opportunities? Because she was locked out of the facility?

20 MR. SPATER: She was locked out of the facility,
21 yes. She has no access to the chimpanzees. And she's
22 going to be denied this in the future. So in a sense, her
23 ability to continue to do her work is substantially
24 impaired. If you look at particularly her curriculum
25 vitae, you would see -- I can't say all but predominantly

1 most of the work that she has done has been wrapped up in
2 the chimpanzees.

3 THE COURT: Here's the problem that I have with
4 that argument. Here's what causes me some concern with
5 that argument, Mr. Spater. On the one hand, your papers
6 and your argument today center around the fact, in part at
7 least, that the chimps are going to be taken to Primarily
8 Primates. You want me to invalidate that transaction in
9 effect because you don't believe that Primarily Primates is
10 a safe haven. Instead, you want these chimps, if they are
11 going to be transferred at all, to be transferred to Chimp
12 Haven.

13 Now you are talking about, in practical terms, you
14 are talking about the difference between San Antonio,
15 Texas, and Shreveport, Louisiana. In either event,
16 Dr. Boysen, unless she was going to follow the chimps to
17 Shreveport but not to San Antonio, is going to be separated
18 from these chimpanzees.

19 Since she contemplated the possibility of being
20 separated from the chimpanzees in signing this memorandum
21 of understanding, how can she now come in and say that the
22 fact that the chimpanzees are going to be transferred to
23 another facility is going to deprive her of research
24 opportunities? If that's the case, she contracted to be
25 deprived of research opportunities, didn't she?

1 MR. SPATER: No, she did not, Your Honor. She
2 contemplated that the chimps -- that she would have the
3 opportunity of being able to place the chimpanzees in the
4 first place.

5 THE COURT: Okay. You seem to insist on that even
6 though there is nothing in the agreement which says that.
7 But let's take that one anyway, Mr. Spater. Maybe that way
8 I can get an answer to my question. Even if she
9 contemplated having them sent to Chimp Haven, which is the
10 only other facility that she mentioned in the contract, is
11 there evidence that she intended to go with these chimps to
12 Shreveport to study them?

13 MR. SPATER: There is no evidence of that, Your
14 Honor. But --

15 THE COURT: Don't get ahead of me.

16 MR. SPATER: Okay.

17 THE COURT: Now if pursuant to the memorandum of
18 understanding that is Defendant's Exhibit 1 that is signed,
19 if the university were to tell me, when Ms. Anderson gets
20 up to address the Court, Your Honor, we are not going to
21 send them to Primarily Primates. We are going to send them
22 to Chimp Haven as contemplated in the MOU, would these
23 claims disappear?

24 MR. SPATER: No.

25 THE COURT: Why?

1 MR. SPATER: We are going back to the same part of
2 it because it is still the fact --

3 THE COURT: She would make the claim that the
4 university was depriving her of research opportunities
5 when the university acts pursuant to the agreement that she
6 signed?

7 MR. SPATER: There is also paragraph six of the
8 memorandum of understanding, Your Honor, the donors'
9 agreement.

10 THE COURT: Wait a minute, Mr. Spater. We will
11 get to that. But you have to answer my question first. If
12 the university were to send these chimps to Chimp Haven
13 instead of Primarily Primates, how could Dr. Boysen be
14 heard to argue that she had been deprived of a research
15 opportunity when she clearly contemplated that possibility
16 in signing this agreement?

17 MR. SPATER: That part of the agreement, Your
18 Honor, was as a last resort.

19 THE COURT: That is not an answer to my question.

20 MR. SPATER: You asked how could she claim there
21 was injury to her?

22 THE COURT: That's right.

23 MR. SPATER: That's the answer unfortunately. The
24 answer is that that was not contemplated. It was
25 contemplated that she would have the opportunity --

1 THE COURT: Now you're making, in effect, a duress
2 argument, a contract of adhesion or something like that,
3 that she was forced to sign this contract. There is no
4 evidence, at least none that you pled, that she was forced
5 to sign the contract.

6 MR. SPATER: No, I am not arguing a contract of
7 adhesion.

8 THE COURT: So the fact that she has contracted to
9 send them to Chimp Haven is now rendered meaningless.

10 MR. SPATER: No, Your Honor, not at all rendered
11 meaningless. But --

12 THE COURT: You just can't have it both ways. If
13 she has contracted to send them to Chimp Haven under
14 certain circumstances --

15 MR. SPATER: Yes.

16 THE COURT: -- then she can't argue that sending
17 them someplace in and of itself deprives her of research
18 opportunities, unless there is evidence that she intended
19 to follow them to Chimp Haven also.

20 MR. SPATER: Your Honor, as I said before, this
21 was the last resort, yes. Chimp Haven, if all this else
22 didn't work out, the plan was going to be set up -- and I
23 don't want to give the Court the impression that I am
24 avoiding the question because this was the last resort.
25 And yes, that is part of our claim. As a last resort, they

1 should have sent them to Chimp Haven. But prior to that,
2 they should have worked out a plan with her. They should
3 have given her an opportunity of finding some other
4 place --

5 THE COURT: That's not what the MOU says,
6 Mr. Spater. What the MOU says is if another institution
7 should express an interest. There's no evidence that some
8 other institution has expressed an interest. The way you
9 postured your argument, it was such that she could develop
10 an alternative plan, even alternative to having the chimps
11 sent to Chimp Haven, if funding levels were met.

12 But that's not reflected in the literal text of
13 this memorandum of understanding. And the only additional
14 condition is that another institution should express an
15 interest. And there is no other institution that has
16 expressed an interest, at least not in the evidence before
17 the Court at this time.

18 Do you have evidence that some other institution
19 has expressed an interest?

20 MR. SPATER: I will consult with Dr. Boysen.

21 There has been an interest expressed by the
22 community in Pickaway County that's indicated an interest,
23 and they're scheduling meetings so this could be set up.
24 And this was contemplated all along, that a plan would be
25 devised, but it didn't happen in this case. She was just

1 told that the chimps are going, and that's the way it is
2 going to be, and they are going to go to Primarily
3 Primates.

4 So she has been in the process of trying to
5 develop this and trying to work with it, but she has been,
6 in our opinion, her efforts have been shortchanged by the
7 university in its immediate efforts.

8 THE COURT: All right.

9 MR. SPATER: Okay.

10 THE COURT: So the basis of her property interest
11 really is that certain of the chimps belong to her, and
12 those chimps are being taken, and she hasn't had a hearing.

13 MR. SPATER: Yes, that's part of it.

14 THE COURT: But she has had notice because the
15 university sent her what was attached as Exhibit D and
16 indicated to her that they were going to send the chimps to
17 Primarily Primates. So they told her that the chimps were
18 going to be sent, is that right?

19 MR. SPATER: They did tell her that, yes, when
20 they locked her out.

21 THE COURT: And the chimps have not yet been sent.

22 MR. SPATER: As far as I know.

23 THE COURT: They also devised a plan by which she
24 would be allowed to see the chimps; that is, she would have
25 to submit a letter and specifically outline the reasons for

1 her going to see the chimps, is that right?

2 MR. SPATER: I wouldn't refer to it as a plan, but
3 part of that letter did indicate she could come in and say
4 good-bye, yes.

5 THE COURT: Or if she needed to see them for any
6 other reason, she had to specify, the university, I
7 suppose, would have the last word on whether that reason
8 would be legitimate, but she could submit a request to
9 visit with the chimps?

10 MR. SPATER: Yes, and she did do that.

11 THE COURT: And she visited with them once.
12 That's when she was escorted --

13 MR. SPATER: No, she did not. Your Honor, she did
14 not visit. She requested the opportunity to visit with
15 them, and they never got back with her.

16 THE COURT: When did she last visit with the
17 chimps?

18 MR. SPATER: Before she was locked out.

19 THE COURT: When was that?

20 MR. SPATER: Monday, would be --

21 THE COURT: Last week.

22 MR. SPATER: The 20th. Today is the 27th. The
23 20th.

24 THE COURT: All right. Thank you, Mr. Spater.
25 Ms. Anderson?

1 MR. SPATER: Thank you, Your Honor.

2 MS. ANDERSON: With the Court's permission, I
3 would like to introduce you, Your Honor, to the folks in
4 the courtroom today. I know they are absolutely bursting
5 because much of what has been said needs to be corrected
6 and fleshed out, but I want you to know who is available
7 here to tell you -- to answer your questions to the extent
8 that I cannot on their behalf.

9 The folks who are here, Your Honor, Robert
10 McGrath, Dr. McGrath. He is the senior vice president for
11 research. He is the author of the letter that is attached
12 to the complaint, the letter dated February 21, 2006.
13 Among other things that letter gives you a good history,
14 Your Honor, and certainly is a representation of what
15 Dr. McGrath would tell you about the years of notice that
16 have been given to Dr. Boysen about what could happen or
17 what should happen to the chimps should she not have
18 funding, which as it turns out has come to pass. So he's
19 here.

20 Carol Anderson who is the vice provost for
21 academic policy and faculty resources. She has been
22 involved in the decision making that leads us to the
23 decision to send these chimps to Primarily Primates.

24 Dr. Gifford Weary is with the department of
25 psychology at Ohio State. And you will note that Dr. Weary

1 is a signatory to the memorandum of understanding, and it
2 is under her supervision that Dr. Boysen works at the
3 university is my understanding. Dr. Weary, among others,
4 could explain what happened to the opportunity to send
5 these chimps to Chimp Haven and how that opportunity was
6 lost, and so we had to find another place, and the place we
7 found after careful study was Primarily Primates.

8 Earl Holland is here. Mr. Holland is assistant
9 vice president for research communications at The Ohio
10 State University.

11 And Dr. William Yonushonis. I apologize if I
12 mispronounced the name. He is director at the university
13 of laboratory animal resources. It is under his
14 supervision that all of the animals used in research,
15 including these particular animals, are taken care of and
16 overseen.

17 All of these folks, Your Honor, at the university
18 have been involved in a very careful decision-making
19 process that led the university to the decision to close
20 this facility and send the animals essentially to a
21 retirement place where, we submit, they are going to be
22 better off than where they are now. Frankly, Your Honor,
23 we can get into that.

24 Also in the room, as I introduced, is John
25 Biancamano who is with the in-house counsel with The Ohio

1 State University. He has been involved for some time in
2 negotiating the contract with Primarily Primates, in
3 dealing with the so-called ownership issues, and
4 documenting that the chimpanzees do not belong to
5 Dr. Boysen but all of them do belong to The Ohio State
6 University.

7 Also in the room also in-house with The Ohio State
8 University is Jan Neiger.

9 And that's who we brought with us today who know
10 this whole story a lot better than I possibly could in just
11 the short amount of time that I have had to spend on this
12 case.

13 THE COURT: Ms. Anderson, could I interrupt you?
14 And I am going to in advance offer my apologies to both
15 sides because there is one matter that I did not address
16 with Mr. Spater, and I just thought about it when you
17 introduced Mr. Biancamano. It has arisen in other cases,
18 but we have always been able to dispose of it. And why I
19 did not address it initially is beyond me.

20 But I think in all fairness -- and I think that
21 Mr. Spater is aware of it, I know that you are,
22 Ms. Anderson -- I teach at Ohio State. I am an adjunct
23 professor at the law school. I hadn't forgotten that I
24 taught there. I just didn't think about it. I got the
25 case in, and I started getting prepared to hear the TRO.

1 And I probably should have asked you before you
2 began your arguments, Mr. Spater, if you had any objection
3 to me presiding over this matter. I typically don't recuse
4 myself from Ohio State matters, since I only teach one
5 course. But I think that I would hear arguments if you
6 believe that I should recuse myself one way or the other.
7 And the same goes for you, Ms. Anderson. We have taught
8 together on the faculty there. But Mr. Spater?

9 MR. SPATER: Your Honor, I am aware that you teach
10 a course at The Ohio State University, and I am not going
11 to request Your Honor to recuse yourself.

12 THE COURT: And I will give you time to discuss
13 this with your client before you take that position.

14 MR. SPATER: Your Honor, I really don't need any
15 time to discuss it.

16 THE COURT: Ms. Anderson?

17 MS. ANDERSON: Your Honor, the university has no
18 difficulty with your presiding.

19 THE COURT: All right. Thank you. Please
20 proceed.

21 MS. ANDERSON: And I did remember you taught
22 there. We both sometimes have senior moments, I
23 understand, but I did recall.

24 THE COURT: I probably have more than you,
25 Ms. Anderson.

1 MS. ANDERSON: Let me start with the question that
2 you asked of Mr. Spater, and that is the ownership
3 question. And really this goes to the heart of whether or
4 not this plaintiff has any right to stop what the
5 university is about to do. Who owns the chimps? And even
6 if she did have some arguable property interest in any
7 single one of them, has she been given notice and
8 opportunity to be heard? And we submit even in the
9 materials that you have before you, in the limited amount
10 of materials, she has been given notice since 2002 that
11 something like this was going to happen if this research
12 laboratory could not be supported by funding sources, and
13 it has not been for four years. I think that's undisputed
14 on the record.

15 THE COURT: Ms. Anderson, do you dispute that the
16 memorandum of understanding is controlling in this case?

17 MS. ANDERSON: It is controlling to a certain
18 extent, yes, Your Honor. But it has been superseded
19 because Chimp Haven is no longer available, for reasons
20 that the folks in the room can explain, to take these
21 chimps. It was available, and that opportunity was
22 interfered with and went away.

23 THE COURT: Tell me about that because I think
24 that that's key to this case in many respects.

25 MS. ANDERSON: Let me point out, Your Honor, that

1 the reason that we brought Dr. Gifford Weary here is that
2 she signed the memorandum of understanding. She can answer
3 your questions about that, frankly, better than I can. And
4 I don't want to mis-speak. But you will notice -- and what
5 I have, Your Honor, let me help the Court this way. Let me
6 submit a copy of the agreement that was entered with
7 Primarily Primates. Maybe that will help.

8 THE COURT: I will have this marked as Defense
9 Exhibit 2.

10 MS. ANDERSON: And, Your Honor, I apologize. This
11 all would have been pre-marked. It was on a rushed basis.

12 THE COURT: This is a TRO, so we have to make
13 those adjustments.

14 MS. ANDERSON: This is obviously an unsigned copy
15 that I have submitted under the exigencies of time here,
16 but this is, as you will see, an agreement between The Ohio
17 State University and Primarily Primates.

18 What I will submit to you, Your Honor, is that the
19 memorandum of understanding with Chimp Haven, with respect
20 to Chimp Haven, that essentially Chimp Haven has been
21 replaced by Primarily Primates with respect to the decision
22 made by the university on the location for them to go to.

23 THE COURT: All right.

24 MS. ANDERSON: You will notice also that in the
25 memorandum of understanding there were certain deadlines

1 that came and went before the chimps could be transferred
2 to that location. For that and reasons that other people
3 in the room can explain better than I, a new facility had
4 to be found. That facility that was found was Primarily
5 Primates.

6 THE COURT: All right.

7 MS. ANDERSON: And I will add, Your Honor, that I
8 am aware that other universities, such as the University of
9 California at Berkeley, have sent their chimpanzees to
10 Primarily Primates. The U.S. Air Force I believe is one
11 entity that has sent research animals to Primarily
12 Primates. So there is an abundance of evidence and many
13 reasons why the university chose this place to send the
14 chimpanzees to, to relocate to as their retirement, as it
15 were, and Chimp Haven is no longer available.

16 If you have questions about that, I am going to
17 have to turn to someone else in the courtroom.

18 THE COURT: Let's hear from Dr. Weary. Please
19 come forward.

20 MS. ANDERSON: Your Honor, I will correct myself.

21 THE COURT: Page 4 is signed.

22 MS. ANDERSON: Yes, it is signed. I was looking
23 at the wrong page, Your Honor.

24 THE COURT: I don't think that you are going to be
25 questioned. You can just explain to the Court what went

1 into the decision to send the animals to Primarily Primates
2 instead of Chimp Haven.

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

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

19 And so after we pushed a bit on that, we then fell
20 back, started to look for other alternatives. Dr. Boysen
21 suggested a place in Iowa, the Great Ape Trust in Iowa. We
22 spoke with the individuals in charge there over a period of
23 several months. We had plans to move them to the Great Ape
24 Trust in Iowa. Dr. Boysen would have been allowed to go
25 there and do research with them. So in many ways it seemed

1 like a perfect situation from our point of view.

2 And the negotiations got fairly far along. We
3 were ready to write an MOU with the Great Ape Trust in
4 Iowa. Dr. Boysen got on a plane, flew out; and within
5 several days we learned that they were no longer willing to
6 talk with OSU about moving our chimps out there.

7 THE COURT: Do you know why?

8 MS. WEARY: I do not know what transpired that led
9 them to back out, but they did back out at that point.

10 I let about four to six weeks go by, contacted
11 them again. I do know part of the reason. Part of the
12 reason was the ownership issue. They did not -- Dr. Boysen
13 was asserting her ownership of the chimps, and they did not
14 want to get into a struggle with us since it had not been
15 resolved with her, with the parties.

16 So I called four to six weeks later, said, if the
17 university settles the ownership issue, would you consider
18 entering into a negotiation with us again about moving our
19 chimps there? He went and talked his board of directors
20 and said no.

21 So at that point we then asked Dr. Yonushonis to
22 investigate all other possibilities that he could find for
23 these. At this point we needed somebody who could tap into
24 the larger primate community.

25 THE COURT: And that's how you got to Primarily

1 Primates?

2 MS. WEARY: And he investigated a variety of
3 places where these chimps could be placed and came back
4 with a recommendation for Primarily Primates.

5 THE COURT: Thank you very much, doctor.

6 MS. ANDERSON: Your Honor, I hope that clears it
7 up a little bit.

8 THE COURT: That does. It does clear it up. Go
9 ahead.

10 MS. ANDERSON: I was going to speak next, unless
11 you have a question, Your Honor, I was going to speak next
12 to the claim of ownership --

13 THE COURT: That's what I was going to ask you
14 about.

15 MS. ANDERSON: It is the university's position
16 that it has ownership of all of these chimps. There may be
17 some dispute, at least as far as Dr. Boysen is concerned,
18 about one or two or three, but it is the university's
19 position that it has ownership of all these chimps.

20 For one, if you will notice on Dr. Boysen's
21 resume, she has been at the university since 1983. Every
22 single one of these chimps has been acquired in 1983 and
23 thereafter. So all of the acquisitions have taken place,
24 we contend, since she has been at the university.

25 THE COURT: She hasn't been an employee of the

1 university since 1983, though, has she?

2 MS. ANDERSON: I believe so according to her
3 resume. She has -- I am looking at the resume that shows
4 1983.

5 But be that as it may, Your Honor, as to five of
6 the chimps, we do have donation agreements. We have gift
7 agreements that they were donated to the university. And
8 so we have ownership documentation for sure --

9 THE COURT: That is five of them.

10 MS. ANDERSON: I believe as to five of them, Your
11 Honor. We do have donation agreements. We have those with
12 us today should the Court care to see them.

13 THE COURT: I would like to see them.

14 MS. ANDERSON: Yes?

15 THE COURT: Yes.

16 MS. ANDERSON: Ms. Herlihy will provide those to
17 us. The one that I have in front of me is the one for Ivy.

18 For the record, Your Honor, the proof that we have
19 on donation agreements relates to the following
20 chimpanzees: To Kermit, to Darrell, to Sheba, to Abby and
21 to Digger. I believe that -- Do I have that wrong, John?
22 Make sure that I have got this right.

23 MS. HERLIHY: We have donation agreements, Your
24 Honor, for Kermit and Darrell. It's the same donation
25 agreement. The one for Sheba, one for Ivy, and one for

1 Keeli, although his name was Mo at the time. So the
2 donation agreement says Mo. There are four donation
3 agreements, five chimpanzees --

4 THE COURT: Sheba, Ivy and Mo.

5 MS. HERLIHY: Keeli/Mo, K E E L I, slash Mo. And
6 his name was Mo, M O, at the time that he was donated.

7 THE COURT: So there are four donations agreements
8 covering five chimps?

9 MS. ANDERSON: That's right, Your Honor. And I
10 believe that we have also documentation, although I don't
11 have it right at hand, as to a sixth chimpanzee, Sarah.
12 Sarah is the sixth chimpanzee that we have -- that we know
13 that we have documentation for.

14 But, Your Honor, above and beyond that --

15 THE COURT: All of these donation agreements -- Do
16 you have the donation agreements, Ms. Herlihy?

17 MS. HERLIHY: I do have, Your Honor.

18 THE COURT: Do they all show that the university
19 was the owner of the --

20 MS. ANDERSON: Yes. For example, the one that I
21 have in front of me, donation agreement, it starts out by
22 saying, the Southwest Foundation for Biomedical Research
23 agrees to donate the chimpanzee known as Ivy to the
24 comparative cognition project of The Ohio State University
25 on the following terms. And thereafter the party

1 designated as the recipient is Ohio State throughout the
2 document.

3 THE COURT: Is that the same for the other four?

4 MS. ANDERSON: Yes, Your Honor. But above and
5 beyond that, Your Honor --

6 THE COURT: Let me ask you, Ms. Anderson, let's
7 assume then that all -- just for the purpose of my
8 question -- assume that all of the animals belong to The
9 Ohio State University. Does that mean that under, I
10 believe it is, Ringling Brothers, that the plaintiff cannot
11 allege an injury in fact sufficient to satisfy the standing
12 requirement?

13 MS. ANDERSON: I would take that position, Your
14 Honor, yes, I would. I would also point out that although
15 we are talking about something that certainly has a great
16 deal of passion and emotion for Dr. Boysen, and we all
17 recognize that, and the university has taken great steps to
18 try to take care of that recognition, in the broader sense
19 in university settings when research laboratories like this
20 lose their funding, the labs close. It happens countless,
21 countless, countless times. So this is not any different
22 from any university professor simply not having research
23 funds, and the university having no Constitutional or other
24 commitment to hold open a laboratory that has no basis for
25 being, no reason for being currently and into the future.

1 So this is a little different from those cases
2 because the context is different, the interests are
3 different, where it is a university in a research setting.

4 As Your Honor pointed out, we are not seeking to
5 dispose of these animals. We are relocating them, simply
6 relocating them to a place, and you will see in the
7 agreement that we have Primarily Primates, to a place where
8 they have contracted to abide by all federal and state
9 laws, which would include things like, believe it or not,
10 Your Honor, something called the chimp act, the Chimpanzee
11 Health Improvement Maintenance and Protection Act, that is
12 a federal law. So we have contracted with a place that
13 agrees to abide by federal and state law.

14 We, the university, have agreed to spend money to
15 support our chimps that we are sending down there. And we
16 have already spent money to build a facility on an interim
17 basis to receive them. And we are spending a lot of money,
18 almost \$300,000, to build a structure that will house them
19 in two separate areas. That's important, Your Honor,
20 because some of the pleadings from the plaintiff allege
21 that somehow these animals are going to be in danger
22 because they are in two separate social groups. We
23 recognize that, and so we are building two separate places
24 for these two separate social groups to be.

25 But I want to be clear, Your Honor, that the

1 university -- our position is that we have ownership of
2 these chimps, and the university has a right to do what it
3 is about to do after a very careful decision-making
4 process.

5 THE COURT: You have accounted, Ms. Anderson,
6 for --

7 MS. ANDERSON: Six of the nine.

8 THE COURT: Six of the nine.

9 MS. ANDERSON: On a documentation basis.

10 THE COURT: On a documentation basis. Let's parse
11 out the last three. One of those three Dr. Boysen claims
12 to have purchased herself. Does the university assert an
13 ownership interest in that chimpanzee?

14 MS. ANDERSON: If I may, Your Honor, let me find
15 out who among the crowd here could answer factually your
16 questions because I don't want to mis-speak on what has
17 happened. Let me consult with Mr. Biancamano.

18 Serving as my co-counsel, may Mr. Biancamano
19 answer your question, Your Honor?

20 THE COURT: Yes.

21 MR. BIANCAMANO: Your Honor, with respect to the
22 remaining three chimpanzees, we understand that Dr. Boysen
23 purchased one of them, although at least I never heard an
24 exact figure for how much she might have spent for it.
25 With respect to the other two, we understand that she

1 rescued them from some other place, from some facility or
2 entity that was using the chimps.

3 The university has in place policies and
4 procedures for procurement of laboratory animals. If, as
5 Dr. Boysen maintains, she took possession of these
6 chimpanzees in her personal capacity, she would have done
7 so in violation of university rules.

8 The fact is that the three animals in question
9 were procured by Dr. Boysen. They were brought to the
10 university. They were housed in a university facility.
11 They were kept under the jurisdiction of the office of
12 university lab animal resources. They were subject to all
13 university policies and procedures. And they were used in
14 connection with her university research. So by all
15 objective criteria I think we have to reach the conclusion
16 that they are owned by the university.

17 It is our belief that when Dr. Boysen took
18 possession of the chimpanzees, she did so in her capacity
19 as a university employee. I am quite sure that she would
20 have identified herself as Dr. Boysen from The Ohio State
21 University. She would have stated that she was going to
22 bring them to Ohio State and use them in connection with
23 OSU research. So that forms the basis of our position that
24 the remaining three are owned by OSU.

25 THE COURT: I think that your argument,

1 Mr. Biancamano, has appeal with respect to two of
2 chimpanzees because she took possession of those -- she
3 rescued those two. So let's set those two aside. They can
4 easily fit under the same rubric of the other six.

5 But then unless the university reimbursed her for
6 the other chimpanzee, what evidence do you have that you
7 have an ownership interest where, unlike the two who were
8 rescued, she actually purchased that one? Wouldn't that be
9 somewhat akin to purchasing a pet?

10 MR. BIANCAMANO: The university acknowledges that
11 she is entitled to reimbursement for the last chimpanzee,
12 she has always been; and at any time had she requested, she
13 would have been reimbursed. For a period of time we were
14 unaware of the fact that she had actually purchased it.
15 And we are fully prepared to make that reimbursement today.

16 THE COURT: Thank you, Mr. Biancamano.

17 Now one question, so that we can move on,
18 Ms. Anderson, the Court in Ringling Brothers, read Glickman
19 and Laidlaw, and said, an injury in fact can be found when
20 a defendant adversely affects a plaintiff's enjoyment of
21 flora or fauna which the plaintiff wishes to enjoy again
22 upon the cessation of the defendant's actions. And they
23 found standing in that case. In that case they conferred
24 citizen standing under a statute that actually dealt
25 specifically with those types of matters.

1 Why can't Dr. Boysen assert a similar level of
2 standing irrespective of the fact that the animals are
3 owned by the university?

4 MS. ANDERSON: Your Honor, these animals are not
5 currently in a zoo or a game farm or a circus or someplace
6 where the public can come and enjoy them by paying an
7 admission price. They are research animals in the
8 university facility. So I think the setting is quite
9 different.

10 I would also submit that any arguments about
11 standing don't argue the TRO questions that the Court has
12 to address today. She has alleged an ownership right, and
13 we have talked about that.

14 THE COURT: Yes.

15 MS. ANDERSON: She has alleged that she has been
16 denied notice and an opportunity to be heard, and we
17 pointed out that even her own attachments to the affidavit
18 -- to the complaint show that's not true. She has been
19 given plenty of notice, plenty of opportunity to be heard.
20 She just simply doesn't like the decision the university,
21 all these folks, has reached after that notice and
22 opportunity to be heard.

23 So the cases about standing I don't think have
24 anything to do with what we are here today to address, Your
25 Honor, on the TRO.

1 THE COURT: Well, they do to this extent,
2 Ms. Anderson. Before I reach the issue of whether I should
3 even entertain her claims to injunctive relief, I want to
4 make sure that she has a right to assert those claims. And
5 to that extent --

6 MS. ANDERSON: I understand.

7 THE COURT: -- I want to be clear that she has
8 standing.

9 You made the point that it is contextual. And I
10 was looking for the provision under which the plaintiff in
11 Ringling Brothers brought suit, and they brought suit under
12 the citizenship suit provision of the Endangered Species
13 Act. And, of course, we don't have that here.

14 So what the Court has to determine is whether that
15 dicta will be applicable to a circumstance such as this or
16 whether that dicta is limited to citizen suits in the
17 context of the Endangered Species Act.

18 MS. ANDERSON: Your Honor, I guess in answer to
19 your question, I am having difficulty in envisioning any
20 citizen, including Dr. Boysen, any citizen having standing,
21 as it were, to interfere with the decision of a university
22 with respect to closing one of its research facilities.

23 Again, I am a little puzzled about how standing
24 can get Dr. Boysen to where she wants to be, which is to
25 erase the memorandum of understanding, contradict the

1 contract with Primarily Primates, erase the ownership
2 documents, the donation agreements. I don't perhaps
3 understand where Your Honor is getting to on how standing
4 can do all of those things. I don't think any citizen has
5 standing to interfere with what the university is about to
6 do.

7 THE COURT: And that simply may address the issue
8 raised by the plaintiff. The plaintiff first -- In their
9 papers they assert that the plaintiff has standing to bring
10 this suit. You don't take it one way or the other --

11 MS. ANDERSON: I don't see a need to oppose that,
12 Your Honor.

13 THE COURT: All right.

14 MS. ANDERSON: Because I don't see any need to
15 oppose standing because of the other things that I have
16 just mentioned. The ownership issue, we have got proof
17 that they are not hers. The notice and opportunity to be
18 heard, we have got proof that she had all of that.

19 And then we go on to some of the other things that
20 you addressed with Mr. Spater, and that is one of
21 differences between her case and the cases that you have in
22 front of you is she's speculating about what injury might
23 happen.

24 I have got folks here today who can testify that
25 where these chimpanzees are going in Texas -- among other

1 things, they don't have snow down there. But for another
2 thing, they are going to a place where they are going to
3 have fully twice as much space as they have here. They are
4 going to be able to be outside. They are going to a place
5 where the folks there are experts in taking care of
6 animals. Other universities, as I mentioned, have sent
7 animals to Primarily Primates. Animals from research
8 facilities have retired there.

9 So, first of all, she is speculating that the
10 animals will be worse off somewhere other than under her
11 care. And secondly, it's not true that they will be worse
12 off because of the care taken by the university in
13 selecting this place, Primarily Primates.

14 And you heard Dr. Weary testify -- not testify but
15 explain to the Court the efforts in years past for the
16 university to try to find an appropriate place, and they
17 found two that fell through. And now we have this third
18 one, and we hope that it does not fall through, Your Honor,
19 as a result of what's going on here.

20 THE COURT: Thank you, Ms. Anderson.

21 MS. ANDERSON: I hopes that answers your question.

22 THE COURT: Thank you, Ms. Anderson.

23 Mr. Spater?

24 MR. SPATER: Your Honor, could I have Dr. Boysen
25 talk about what happened with respect to the Iowa facility?

1 THE COURT: Certainly you may.

2 MS. BOYSEN: Your Honor, I wanted to explain
3 further it wasn't quite an accurate description, I don't
4 think, of the events that ensued. In fact the researchers
5 who are based in the Great Ape Trust, which is a private,
6 nonprofit foundation now, include my former Ph.D. advisor
7 and collaborator when I was a researcher at Emory
8 University from 1977 to 1980. The collaborative efforts
9 also include another young investigator from the national
10 zoo, Dr. Robert Shoemaker, and we have had a long-time
11 professional relationship. So there's certainly nothing
12 negative about any reason why they would not want us here.

13 Unfortunately, they are also in a situation, while
14 they are funded by a private individual for the
15 infrastructure, it's my understanding that for several
16 years the Rumbas proposed that they were going to bring in
17 operating funds through federal grants. And,
18 unfortunately, that did not happen to them either.

19 And in point of fact I served on the NIH review
20 panel for that grant, the last grant, which was a week
21 before I visited Iowa.

22 THE COURT: Dr. Boyesen -- and I am going to allow
23 you to certainly finish explaining to the Court your Iowa
24 visit. But I have a couple of questions that perhaps you
25 can help the Court resolve.

1 First of all, do you dispute that attempts were
2 made to place the chimps in Chimp Haven before Iowa was
3 looked at as an alternative?

4 MS. BOYSEN: Yes, I believe really to the letter
5 of the law, yes.

6 THE COURT: Okay. And how so then?

7 MS. BOYSEN: Well, while I don't have direct
8 evidence, you should understand also that the -- that Chimp
9 Haven is the first NIH-supported sanctuary for ex-research
10 animals mandated by law. And also included in that
11 legislation was a requirement of a seven-member federal
12 committee to oversee the policies and guidelines. I am the
13 representative on that federal committee for the chimpanzee
14 behavioral issues and questions.

15 THE COURT: Did you contact Chimp Haven at any
16 time with respect to these nine chimpanzees?

17 MS. BOYSEN: Well, we have visited there as a
18 federal committee when it first opened. So I have been
19 there.

20 THE COURT: Did you ever seek to have your nine
21 chimpanzees placed at Chimp Haven?

22 MS. BOYSEN: Personally?

23 THE COURT: Yes.

24 MS. BOYSEN: That was not in my hands.

25 THE COURT: No, I understand. But you never had

1 any contact with Chimp Haven about them taking --

2 MS. BOYSEN: I did.

3 THE COURT: -- the nine chimpanzees? You did?

4 MS. BOYSEN: Yes.

5 THE COURT: Did they ever indicate to you, as
6 Dr. Weary noted, that they would be unable to take the
7 nine?

8 MS. BOYSEN: No.

9 THE COURT: Did you first discover that they had
10 been contacted as a first source of placement?

11 MS. BOYSEN: Would Your Honor allow me to discuss
12 the previous MOU that has not been brought up here?

13 THE COURT: Well, I --

14 MS. BOYSEN: It is critical.

15 THE COURT: -- wanted us to stay focused on the --

16 MS. BOYSEN: It is focused because I was asked to
17 attend meetings beginning some three years ago. And at the
18 very first meeting with the provost, the vice president for
19 research, the vice president of legal affairs, a
20 representative from our dean's office and my chair asked me
21 to come because, as the provost said at the opening of the
22 meeting, we are concerned about what would happen if Sally
23 got hit by a bus. So the original MOU -- and I myself was
24 given the responsibility to locate a facility. And this
25 was to be a plan in place in the event that something

1 happened to me since I am the principal investigator and
2 the pivotal person behind the project.

3 However, over the course of the meetings, and I
4 was required to meet with this group about every four
5 months for several years, which was difficult for me to
6 understand why, and over the course of that time, then
7 suddenly a second MOU emerged with similar criteria about
8 Chimp Haven, but it -- The discussions have always been
9 about Chimp Haven. And it was also indicated in the MOUs
10 that in June and December, we would meet from this point on
11 to discuss fiscal matters and make decisions at that point.
12 Those things have not happened within the last period of
13 time.

14 THE COURT: All right.

15 MS. BOYSEN: So do you understand that --

16 THE COURT: The MOU that is signed, that is
17 Defendant's Exhibit 1, you would agree is the MOU that you
18 signed?

19 MS. BOYSEN: Yes.

20 THE COURT: It is the only one that you signed, is
21 that correct?

22 MS. BOYSEN: Well, yes, I believe so -- Well,
23 there was a first MOU, and this is the second MOU.

24 THE COURT: The second MOU that you signed, dated
25 January 13, 2004, is the MOU under which you have been

1 operating; is that correct?

2 MS. BOYSEN: Yes. Once I asked for the addition
3 of the caveat that the --

4 THE COURT: You were given the caveat. So it's
5 clear that Defendant's Exhibit 1 is the MOU under which you
6 operated. True?

7 MS. BOYSEN: Yes, sir.

8 THE COURT: Under this MOU, the center that was to
9 be the retirement home, if you will, for the chimpanzees
10 was identified as Chimp Haven; is that right?

11 MS. BOYSEN: Yes, sir.

12 THE COURT: Now Dr. Weary has indicated that they
13 attempted to place the chimps at Chimp Haven, but Chimp
14 Haven in effect declined the placement. That was the
15 statement that she made to the Court. Is that true?

16 MS. BOYSEN: I don't have direct evidence, but it
17 may be the case that a considerable sum of money was
18 requested for the animals' long-term care and endowment by
19 Chimp Haven which was something that the university was not
20 interested in investing.

21 THE COURT: You don't have any evidence that Ohio
22 State did not attempt to place the chimps at Chimp Haven,
23 do you?

24 MS. BOYSEN: I am sorry, could you repeat that?

25 THE COURT: You don't have any evidence or

1 knowledge that Ohio State did not attempt to place the
2 chimps at Chimp Haven?

3 MS. BOYSEN: Well, recent correspondence to me
4 from the president of that organization told me that they
5 were very surprised because they were assuming they were
6 still under an MOU agreement with Ohio State.

7 MS. ANDERSON: Your Honor, I would object on
8 hearsay grounds, although I know we are not in the
9 testimonial phase.

10 THE COURT: Do you have a copy of that letter,
11 doctor?

12 MR. SPATER: It's e-mail correspondence, and that
13 can be produced.

14 THE COURT: And that's from the president of Chimp
15 Haven?

16 MS. BOYSEN: Yes, Dr. Linda Brent.

17 THE COURT: And it was your understanding based
18 upon that letter that attempts had not been made to place
19 the chimps at Chimp Haven?

20 MS. BOYSEN: Well, I am not sure. I don't know
21 about whether or not a request for exchanging funds was
22 made.

23 THE COURT: You don't know, in other words,
24 whether Dr. Weary's statement to the Court was incorrect or
25 inaccurate?

1 MS. BOYSEN: Well, I had prior assurance from
2 Dr. Brent that if any attempt were made, I would be
3 contacted. That never happened.

4 THE COURT: And I understand that. But you don't
5 know from your own knowledge that Dr. Weary's -- the
6 information that Dr. Weary related to the Court was
7 incorrect or inaccurate?

8 MS. BOYSEN: I don't know an exact reiteration of
9 what she said. But if she said that those plans fell
10 through, then that could involve a whole number of reasons
11 why that I had not been privy to, sir.

12 THE COURT: You did not object to going to Iowa to
13 -- What is the name? The Great Ape --

14 MS. BOYSEN: The Great Ape Trust.

15 THE COURT: To the Great Ape Trust for placement
16 of the chimpanzees?

17 MS. BOYSEN: I would become part of the research
18 faculty at that facility and would have relocated to Iowa.

19 THE COURT: So your answer is no, you did not
20 object?

21 MS. BOYSEN: No, I was invited by them to join the
22 organization.

23 THE COURT: Well, that puts us back to your
24 statement about Iowa. Go ahead.

25 MS. BOYSEN: Yes. I had mentioned that the

1 infrastructure had been funded by a private individual who
2 had enough disposal income to build a considerable
3 compound, if you will.

4 THE COURT: Were negotiations ongoing between The
5 Ohio State University and the Great Ape Trust?

6 MS. BOYSEN: That time line was not the way I
7 recall it because in fact it was only a matter of a few
8 days, as I recall, once I returned from the Great Ape Trust
9 that their attorneys provided some preliminary verbiage for
10 an MOU that was forwarded to legal affairs, and no response
11 was forthcoming.

12 And some time, about a week, later the Great Ape
13 Trust withdrew their interest in signing the MOU. But I
14 believe it was based on concerns about Dr. Savage not
15 bringing in the operating budget that she had told them
16 would be forthcoming.

17 THE COURT: In any event, the effort to bring
18 about an MOU between The Ohio State University and the
19 Great Ape Trust that would have provided for the care of
20 these nine chimps did not reach fruition; is that right?

21 MS. BOYSEN: That's correct.

22 THE COURT: And before you went out there, there
23 was negotiations ongoing. Some time after you returned,
24 the negotiations did not result in an MOU. Is that true?

25 MS. BOYSEN: The initial negotiations were begun

1 without my knowledge or involvement.

2 THE COURT: And I don't doubt that. I am just
3 trying to get a time line. You went out there during the
4 time when the negotiations were ongoing and --

5 MS. BOYSEN: No, I initiated that serious end of
6 the negotiations.

7 THE COURT: When you went out there, negotiations
8 began.

9 MS. BOYSEN: Yes, sir.

10 THE COURT: And when you left, the negotiations
11 were ongoing. At some time after you returned, the
12 negotiations did not reach fruition?

13 MS. BOYSEN: Yes, within the next two weeks.

14 THE COURT: Thank you very much. Is there
15 anything else that you needed to advise the Court of?

16 MS. BOYSEN: Not at this time.

17 THE COURT: Mr. Spater?

18 MR. SPATER: Thank you, Your Honor. I have a few
19 things I want to point out. One thing that Dr. Boyesen said
20 that I don't know whether the Court made note of was the
21 fact that what she had heard was that Chimp Haven required
22 the university to come up with a particular amount of money
23 in order to send the chimpanzees there. They were
24 unwilling to do that. So it was sort of a -- what she --

25 THE COURT: There's a conflict. Do you have any

1 evidence, Mr. Spater, that Dr. Weary's statement to the
2 Court was either incorrect or inaccurate?

3 MR. SPATER: I don't have any -- I mean I don't
4 have any evidence to present at this time. It is just
5 based on what Dr. Boysen was told by people there. That's
6 the evidence. Obviously, I mean that's hearsay based on
7 what she was told by people there. At this point I don't
8 have somebody from Chimp Haven to come in and talk about
9 that because the memorandum of understanding did say that
10 they would go to Chimp Haven. It didn't say they would go
11 to Primarily Primates, Inc., or any other organization.
12 Certainly if they feel --

13 THE COURT: As a matter of contract law, would
14 there be an impossibility of performance? Because one of
15 the things that the MOU obviously did not contemplate was
16 the scenario in which Chimp Haven would say, we can't take
17 them. Would it be any different -- Let's say Chimp Haven
18 had burned down. It was no longer an ongoing entity. What
19 recourse would the university have under the contract
20 process?

21 MR. SPATER: Well, under that, the contract talked
22 about coming up with a plan. They presumably would have
23 talked with Dr. Boysen about it. They would have come up
24 with a different arrangement. Obviously that would be
25 impossibility of performance. I am not sure we have

1 impossibility of performance in this case, though.

2 THE COURT: It's been a while since I looked at
3 this question, but when performance depends on a third
4 party, and in this case performance depends on Chimp Haven,
5 and the third party is unwilling to perform, is that an
6 impossibility of performance?

7 MR. SPATER: Yes, it would be.

8 THE COURT: Now we have testimony which is
9 uncontroverted that The Ohio State University attempted to
10 perform pursuant to the MOU. The third party, Chimp Haven,
11 said, we can't take them partly because some of the chimps
12 are not NIH chimpanzees, and we don't know whether we will
13 have the proper facilities for the remainder of them.

14 If that is the case, then does that relieve the
15 university of its obligation to place the chimpanzees at
16 Chimp Haven? I mean as a matter of law?

17 MR. SPATER: If that's true as a matter of law.
18 But you also had hearsay testimony from Dr. Weary, and you
19 had the same type of testimony from Dr. Boysen who
20 indicated that she talked with the director and --

21 THE COURT: But Dr. Boysen simply said that it
22 came as a surprise to her, that the declarant indicated to
23 Dr. Boysen that this move came as a surprise to her. She
24 never indicated that Dr. Weary's statements were either
25 incorrect or inaccurate. In other words, she never got up

1 and said, I talked to Chimp Haven, and the principals at
2 Chimp Haven said, no, no one ever contacted us from Ohio
3 State. And sure, we would be willing to take them if you
4 would be willing to send them.

5 Now what she said is, I talked to the president of
6 Chimp Haven, and the president said that certain things
7 came as a surprise to her. I don't mean to mince words,
8 but that doesn't seem to be the same to me.

9 MR. SPATER: Dr. Boysen also talked to NIH, and
10 NIH said that they would allow them. But it is still, Your
11 Honor, she did have that conversation with them, and that
12 surprise is of the same nature, it would seem to me, that
13 they in fact indicated surprise that the university would
14 not be sending the chimps here because that's what they
15 expected them to do pursuant to the memorandum of
16 understanding they had with Chimp Haven. Chimp Haven still
17 expected the chimps to come there. That seems to be
18 contrary to what Dr. Weary said about Chimp Haven making a
19 decision that it would no longer go through with their
20 memorandum of understanding and not take the chimps.

21 Also the donation agreements, Your Honor, say
22 that, for instance this one I am looking at, the Columbus
23 zoo agrees to donate the chimpanzee known as Sheba to the
24 comparative cognition project of The Ohio State University.
25 They didn't donate it to The Ohio State University. It was

1 the comparative cognition project of The Ohio State
2 University --

3 THE COURT: Doesn't that split hairs, Mr. Spater?
4 It's almost like me donating a lump sum to the athletic
5 department. And then someone comes along and says, no, but
6 that wasn't donated to the university. It was donated to
7 the football team. Isn't the cognition project part of The
8 Ohio State University?

9 MR. SPATER: Yes, Your Honor, but the chimpanzees
10 were to be donated for the purposes of the use in the
11 cognition project. That was the understanding of the
12 donors, and that's what they were using them for, and
13 Dr. Boysen's signature is on there. When it refers to Ohio
14 State, it says, known as Sheba to the comparative cognition
15 project at Ohio State University, and in parenthesis Ohio
16 State. But that was the intention of the donors. I mean
17 that's what the donation agreement says.

18 And also, of course, Dr. Boysen is a signatory to
19 that on behalf of the comparative cognition project. The
20 memorandum of understanding, of course, has her signature
21 on that as well. And if these chimpanzees were entirely
22 the property of the university, one would think that it
23 would not be necessary to have her as a signatory as well.

24 THE COURT: Is there anything further, Mr. Spater?

25 MR. SPATER: Yes, Your Honor, briefly. One thing

1 that Dr. Boysen pointed out to me is that -- It's only a
2 minute, Your Honor -- that with the temporary housing,
3 there are not two facilities that are built at the present
4 time. With the temporary housing, all of the chimpanzees
5 will be put in one location, and some of them will kill the
6 others. There's just no doubt in her mind.

7 One of the problems, and this really relates to
8 the donation agreement, it relates to the memorandum of
9 understanding, it relates to the working relationship that
10 Dr. Boysen has, she is the expert of the chimpanzees, and
11 all of this contemplated that she would be involved in
12 developing a plan, when they had to be removed, finding
13 another place for them, whether they would go to -- In fact
14 the contemplation was Chimp Haven because this was an
15 acceptable location.

16 With respect to PPI, Primarily Primates, Inc., we
17 have got some testimony, and there are others, too, that
18 have done investigations and studies of this organization,
19 that it does not meet standards and is not certified and
20 not an authentic location to house any chimpanzees. Thank
21 you, Your Honor.

22 THE COURT: Thank you.

23 MS. ANDERSON: Your Honor, may I add new things to
24 the record?

25 THE COURT: Yes, you may.

1 MS. ANDERSON: I just have three points, if the
2 Court would indulge me. Just three points, Your Honor.

3 First of all, as to the argument that she has not
4 been given access to the chimps, let me correct that and
5 offer, if you care to hear from him, Dr. Yonushonis about
6 this or Dr. McGrath. Dr. Yonushonis did respond after
7 February 21 to Dr. Boysen's request for access to the
8 primate lab and to her second office. He responded to that
9 in an e-mail and also verbally to Dr. Boysen. And access
10 was granted the same day that the request was received, and
11 that was February 23. That was a point that I didn't get a
12 chance to make when I was up before Your Honor about her
13 access to the chimps.

14 THE COURT: All right.

15 MS. ANDERSON: The second thing has to do with
16 Primarily Primates and what Dr. Boysen's own words said to
17 Dr. Linda Brent, president of Chimp Haven, in May of 2003.
18 And I am going to offer a letter to the Court -- I have
19 lost track, I apologize, of our exhibit number.

20 THE COURT: You are at Defendant's Exhibit 4 -- I
21 am sorry. Because of the donation agreements, that will be
22 Defendant's Exhibit 8.

23 MS. ANDERSON: Defendant's Exhibit 8, Your Honor,
24 is a letter, a copy of a letter, from Dr. Boysen to
25 Dr. Linda Brent at Chimp Haven. And I call your particular

1 attention to the very first paragraph which addresses two
2 of the key arguments today.

3 She says, Dear Dr. Brent, thank you for the recent
4 opportunity to discuss by telephone a proposed arrangement
5 between Chimp Haven and The Ohio State University. As we
6 discussed, we are interested in having a contingency plan
7 for placement of our nine chimpanzees should I, as the
8 principal investigator, become unexpectedly incapacitated
9 or funding for maintaining the animals was not available.

10 So, Your Honor, this goes historically to the
11 background behind the MOU. It does show, I submit,
12 Dr. Boysen representing to Chimp Haven that these
13 chimpanzees were owned by The Ohio State University, and
14 that's what the agreement was going to be.

15 And the third point, Your Honor, and is in answer
16 to something Mr. Spater just argued about Primarily
17 Primates, and this also goes to show the care and due
18 diligence that the university went through in choosing this
19 place, Primarily Primates, after the first two fell
20 through, I have a copy of a letter dated December 8, 2005,
21 which I will submit is our next defense exhibit.

22 THE COURT: Nine.

23 MS. ANDERSON: It is a letter to Dr. Yonushonis
24 from Thomas M. Butler, who is a veterinarian, who went down
25 to Primarily Primates with Dr. Yonushonis to actually visit