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SARAH, KEELI, IVY, SHEBA, DARRELL,
HARPER, EMMA, RAIN, ULYSSES,
HENRY MELVYN RICHARDSON,
STEPHANY HARRIS and KLAREE BOOSE

DEPUTY
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IN THE DISTRICT COURT

Plaintiffs,

v.

73RD JUDICIAL DISTRICT

PRIMARILY PRIMATES, INC.
Defendant.

BEXAR COUNTY, TEXAS

PLAINTIFFS' SECOND AMENDED ORIGINAL PETITION

Now come Plaintiffs, SARAH, HARPER, EMMA, KEELI, IVY, SHEBA, and DARRELL (chimpanzees), whose photographs are attached to Plaintiffs' Original Petition as Exhibit "A," along with RAIN, and ULYSSES (capuchin monkeys) (collectively "Plaintiffs"), by and through their undersigned attorneys, and through HENRY MELVYN RICHARDSON, STEPHANY HARRIS and KLAREE BOOSE, people interested in Plaintiffs' welfare, and file this, their First Amended Original Petition against Defendant PRIMARILY PRIMATES, INC. ("PPI") and for such respectfully state the following:

Discovery Control Plan

As provided by Rule 190 of the Texas Rules of Civil Procedure, discovery in this cause will be governed pursuant to Level 2.

Background

1. Plaintiffs are nonhuman primates who were formerly in the care and custody of The Ohio State University ("OSU"). While at OSU, Plaintiffs were utilized by Dr. Sarah Boysen in cognition research at the OSU Chimpanzee Cognition Center.
2. Plaintiffs were involved in various types of cognition research involving a number of task-oriented protocols requiring complex problem solving skills, classification of natural

objects, and representational insight with scale modeling. Plaintiffs were taught to use Arabic numerals and to perform simple arithmetic. Plaintiffs have the ability to count, add and subtract, and comprehend fractions. In addition, and to varying degrees, Plaintiffs were taught to communicate using American Sign Language and/or graphic symbols. Plaintiffs individually and collectively have demonstrated specifically what is known and understood about nonhuman primates in general, namely, that they possess sophisticated and complex intelligence and rich emotional lives.

3. Despite vigorous efforts, Dr. Boysen was not able to secure adequate external funding to continue her research. As a result, OSU announced its intention to permanently retire Plaintiffs from research and to find a suitable facility where Plaintiffs could live out the remainder of their lives.
4. PPI is an alleged non-profit organization that holds itself out as an “... unique non-profit animal protection organization that provides sanctuary, rehabilitation, lifetime care and shelter to various non-native species of primates, birds, mammals, and reptiles that otherwise would continue to suffer from abuse, neglect, or be killed as unwanted surplus.”¹ In actual fact, however, PPI seeks funding and donations from individuals as well as research facilities in order to collect and hoard primates and other species of animals.
5. Defendant PPI was chosen by OSU as “an appropriate retirement facility” after negotiations with at least two other facilities, Chimp Haven and the Great Ape Trust, were unsuccessful. (*See* Exhibit “B,” contract between OSU and PPI, at ¶ 2, p. 1, attached as an exhibit to Plaintiff’s Original Petition and is incorporated herein for all purposes).
6. On or about January 24, 2006, PPI entered into a written contract with OSU, in which PPI agreed to provide lifetime care to Plaintiffs. On that same date, OSU issued payment to PPI in the amount of \$236,483.00. (*See Shipping Schedule and Costs*, Attachment B of the contract between OSU and PPI, Exhibit “B” to Plaintiffs’ Original Petition and incorporated herein for all purposes).

¹ *See* defendant’s website, <http://www.primarilyprimates.org/>; visited 26 April 2006.

7. That contract was clearly written with the parties' intent to protect and care for Plaintiffs for the remainder of their lifetime;² as such Plaintiffs are unquestionably the Intended Beneficiaries of the contract. Thus far, however, their care has been at best neglectful and at worst abusive. (See Exhibit "C," Affidavit of April D. Truitt, Director and Founder of the "Primate Rescue Center" in Kentucky; Exhibit "D," Affidavit of Carole Noon, Director of Save the Chimps," a primate sanctuary in Florida; and Exhibit "E," Affidavit of Dr. Mel Richardson, DVM all of which are attached to Plaintiffs' Original Petition and are incorporated herein for all purposes.)
8. Plaintiffs bring this cause of action, seeking the Court to direct Defendant to specifically perform its contractual obligations and duties or declare the contract null and void as violative of Texas law. In the latter, in the alternative, Plaintiffs request the Court allow DR. MEL RICHARDSON, STEPHANY HARRIS and KLAREE BOOSE, people interested in Plaintiffs' welfare, to act on their behalf. In the event that PPI's deficiencies cannot be cured, Plaintiffs would then ask the Court to impose a trust with the contract proceeds so that Plaintiffs may be transferred to a suitable rescue facility.

The Parties, Jurisdiction and Choice of Law

9. The Intended Beneficiaries of the contract between PPI and OSU are SARAH (age 46), SHEBA (age 24), DARRELL (age 22), IVY (age 9), KEELI (age 8), HARPER, (age 6), and EMMA (age 5). Plaintiffs currently reside at Defendant's facility in Bexar County at 26099 Dull Knife Trail, San Antonio, Texas, 78255. DR. HENRY MELVYN RICHARDSON is a D.V.M. and a person interested in Plaintiffs' welfare. STEPHANY HARRIS and KLAREE BOOSE are former OSU caretakers of Plaintiffs and are persons interested in Plaintiffs' welfare.
10. PPI holds itself out as a registered nonprofit corporation in the State of Texas with its principal place of business in Bexar County. Service may be made upon Wallace W. Swett Jr. ("Swett"), the President, Director, Treasurer, and as a Trustee of PPI. Mr. Swett resides at 26097 Boerne Stage Road in Bexar County, Texas, in a residential property owned by PPI.

² See Agreement, Ex. "A" at preamble ¶ 3, p.1.

11. Plaintiffs currently reside in Bexar County and are the Intended Beneficiaries of a contract between a Texas corporation and a foreign entity. The contract is performable in Texas and therefore jurisdiction and venue lie in Bexar County, Texas.
12. The contract is governed by and construed in accordance with the laws of the State of Ohio as set forth in the agreement. (See Exhibit B ¶ 10(a), p. 4.)

Events Giving Rise to the Filing of the Petition

13. Plaintiffs departed from OSU on February 27, 2006, and arrived at PPI on March 1, 2006, at approximately 10:00 a.m. PPI was ill-prepared for Plaintiffs' arrival and did not even have a plan in place to transfer Plaintiffs from their transport cages to their enclosures. In addition, PPI failed to ascertain whether the transport cages would fit into the enclosures prior to Plaintiffs' arrival and failed to ensure that a veterinarian would be available.
14. With the exception of EMMA and HARPER,³ Plaintiffs, who had already spent approximately sixty hours in cramped transport cages (which were so small that Plaintiffs could not make normal postural adjustments, *i.e.*, outstretched arms, or recumbent) were forced to remain in their cages for an additional twenty four to thirty six hours while PPI hastily made arrangements for a veterinarian to come to the property. That confinement is the equivalent of a human imprisoned in a small closet.
15. On the following day, March 2, 2006, Thomas Vice, D.V.M. responded to PPI's calls for assistance and arrived that morning prepared to sedate Plaintiffs so they could be moved into their enclosures. Sedation would not have been necessary had PPI exercised due diligence and made certain that the transport cages would fit inside the new enclosures prior to their arrival. Dr. Vice administered Ketamine (a commonly used veterinary sedative) with a jab-stick (a device used to inject an animal intramuscularly with a

³ EMMA and HARPER were immediately separated from the group and transferred, (without quarantine or precautionary measures of any kind), into a cage in Swett's backyard where two other young chimpanzees are confined. EMMA and HARPER were thus taken from their family, as that term applies to primates, and are likely to have suffered and continue to suffer from separation anxiety.

syringe attached to a metal pole from a safe distance) to both KERMIT and DARRELL in their transport cages.

16. KERMIT did not "go down" (succumb to the anesthesia) immediately, so Dr. Vice administered a second and then a third dose of the drug with injections spaced approximately three-four minutes apart. KERMIT, who was a large male weighing between 250-300 pounds, was transferred from OSU in a cage that was so small relative to his size that he was forced to remain in a seated position for the duration of the trip and subsequent to his arrival at PPI; KERMIT was forced to stay in this cramped position for over eighty hours.
17. When KERMIT did finally succumb to the Ketamine, his head tipped forward and pressed against the cage door. This position likely caused KERMIT's air supply to be compromised or cut off completely, making respiration laborious if not impossible. The weight of KERMIT's head pressing on the door made it difficult for PPI staff to open his cage. By the time the staff was able to open the cage and remove him, KERMIT was non-responsive and his gums had turned gray. He died shortly thereafter. Approximately thirty minutes had passed between KERMIT's initial injection of Ketamine and his death. KERMIT was only twenty five years old. Dr. Vice quickly departed, leaving DARRELL without medical supervision under the effects of the Ketamine that he had recently administered.
18. Sometime later that day, a team of workers from the Southwest Foundation for Biomedical Research traveled to PPI and facilitated the transfer of the remaining six Plaintiff chimpanzees. Five of the chimpanzees were transferred to a temporary group enclosure, while the remaining chimpanzee, DARRELL, was transferred to a partially constructed, windowless cinder block room where he remains today. DARRELL does not have access to the outdoors and is alone in a strange and frightening world that he cannot possibly understand. At PPI, DARRELL was supposed to be housed with KERMIT, his companion at OSU. KERMIT and DARRELL slept in the same area every night for the past twenty-three years.

19. On March 1, 2006, the day Plaintiffs arrived at PPI, one of the three capuchins who were also transferred from OSU, believed to be Jane, escaped from her new enclosure at PPI through a hole in the enclosure's welded wire mesh. PPI staff chased Jane onto a neighboring property before losing sight of her. She remained in the general vicinity for approximately one or two days but has not been seen since. Her whereabouts and even whether or not she is even still alive are unknown. PPI did not report her disappearance to local law enforcement, animal control officials or PPI's residential neighbors.
20. On April 20, 2006, a second chimpanzee from OSU, BOBBY, was found dead in his cage at PPI. The circumstances and cause of death are unknown. BOBBY appeared ill and looked as though he had lost weight in the week leading up to his death and refused to come out of his sleeping area. No veterinarian was called to PPI to assess BOBBY despite his clearly observable state of physical decline and overt and unexplained behavioral change. BOBBY was only sixteen years old.
21. Sometime mid-April 2006, another chimpanzee, LYNN, died. In the days leading up to her death, LYNN had clear, physically observable symptoms of distress. Her body was partially paralyzed and she had to drag herself into her sleeping area where she later died. Her body remained inside the sleeping area for two days after her death because PPI staff was unable to "lock down" the cage and safely segregate the body from the other chimpanzees in the enclosure.
22. Plaintiffs' current living conditions are reprehensible and they remain in intolerable living conditions, each of which is a violation of their contract. Plaintiffs have been placed in harm's way in at least the following particulars:
 - a. PPI fails to sanitize living areas and fails to dispose of untreated fecal material in a safe manner;
 - b. PPI further fails to adequately secure cage doors with functioning locks; instead, Plaintiffs are housed in cages that cannot safely lock down; because chimpanzees are five times as strong as humans, the risk of escape and endangerment to staff and neighbors is significant;

- c. PPI refuses to provide bedding materials of any kind; and
- d. Plaintiffs are housed at a facility that does not provide adequate shelter, including shade, and are thus forced to suffer the deplorable Texas heat without relief.

COUNT I: Breach of Contract

23. PPI has repeatedly and materially breached its contract to provide Plaintiffs with care and sanctuary; PPI's willful failure and flagrant refusal to perform its contractual obligations constitute breach of contract. The deaths and disappearance of the individuals described above evidence that PPI has no intention of complying with the terms of the contract specifically intended to benefit Plaintiffs. Plaintiffs have suffered harm as a direct result of the intentional breach of their contract and will continue to suffer until and unless PPI is forced into compliance with the terms of their obligations.

COUNT II: Declaratory Judgment

24. In the alternative, Plaintiffs seek the Court's determination that their contract is void because it violates Texas law. As such, Plaintiffs seek their eventual removal from PPI and transfer to an appropriate sanctuary that will provide them with the appropriate care described in their contract.
25. TEX. HEALTH & SAFETY CODE § 822.113(b) provides that any person who "knowingly sells or otherwise transfers ownership of a dangerous wild animal to a person who does not have a certificate of registration for that animal" is guilty of a Class C misdemeanor. Chimpanzees are "dangerous wild animals" within the meaning of the statute and PPI does not have the registration that is required to "own, harbor, or have custody or control of a dangerous wild animal" in the state of Texas. TEX. HEALTH & SAFETY § 822.101(4)(Q) (defining "dangerous wild animal").
26. Texas state law gives each county the option of completely prohibiting the keeping of dangerous wild animals. TEX. LOC. GOV'T § 240.002(a) (providing that "[t]he commissioners court of a county by order may prohibit or regulate the keeping of a wild animal in the county."). Citing a "risk to the public welfare created by the keeping of dangerous wild animals," on August 28, 2001, the Bexar County Commissioners Court

adopted a ban “prohibit[ing] the keeping of a dangerous wild animal within the unincorporated areas of Bexar County.”⁴

27. PPI not only fails to meet the requirement of TEX. HEALTH & SAFETY § 822.103(a) that it have a certificate of registration to own or harbor the animals it obtained from OSU, but it is also located in a jurisdiction that has banned the keeping of dangerous wild animals. With respect to each of the nine chimpanzees who were transferred to PPI by OSU, the transfer appears to constitute a separate violation of TEX. HEALTH & SAFETY § 822.113(b) and a flagrant violation of the Bexar County Order.

It is a well-settled principle of law that a valid contract cannot be formed if the underlying purpose or the performance of the agreement is contrary to statute. A contract that cannot be performed without violating a statute is presumptively unlawful and void. As such, Plaintiffs respectfully request that the Court determine that their contract is invalid.

COUNT III. In the Alternative, Recognize a Trust

Plaintiffs seek the appointment of DR. MEL RICHARDSON, STEPHANY HARRIS and KLAREE BOOSE, people with interest in the Plaintiffs’ welfare, to act in this litigation to enforce the terms of the contract at issue. Plaintiffs request that DR. MEL RICHARDSON STEPHANY HARRIS and KLAREE BOOSE, be the subject of the Court’s additional orders as described below.

In the alternative, in the unlikely event that the court does not order specific performance, Plaintiffs request an award of damages in the amount of \$236,483.00 (the shelter contract price) to be held in trust and applied towards the acquisition of shelter and care at a suitable facility.

⁴ Bexar County, Texas, ORDER AUTHORIZING THE PROHIBITION OF WILD ANIMALS WITHIN THE UNINCORPORATED AREAS OF BEXAR COUNTY, TEXAS, PURSUANT TO H.B. 1362 (77TH LEGISLATURE), SECTION 240 OF THE TEXAS LOCAL GOVERNMENT CODE, AND CHAPTER 822 TEXAS HEALTH AND SAFETY CODE (Aug. 28, 2001), Vol. 544 at 092, 095-096. The Order became effective on November 30, 2001, and prohibits the keeping of dangerous wild animals “unless otherwise provided by law” Section 5 of the Order adopts the limited exemptions set forth in TEX. HEALTH & SAFETY § 822.102(a). Neither the animals at issue nor the facility itself satisfy the criteria that would exempt PPI from the state law or the county Order.

**COUNT IV. Injunctive Relief and Application for
Temporary Restraining Order and Temporary Injunction**

Plaintiffs seek to preserve the status quo in this matter until a final trial on the merits. Unless Defendant is temporarily restrained during the pendency of this litigation, Defendant will accept additional primates/animals into its facility which is already overtaxed, understaffed and overwhelmed and Defendant may spend funds designated for the use and benefit of Plaintiffs for other purposes and Plaintiffs' care will further deteriorate. The continued improper and inhumane care of Plaintiffs is causing irreparable injury for which there is no adequate remedy at law.

Plaintiffs seek to enjoin Defendant from further actions and/or inaction in breach of its contract and the constructive trust established to properly provide "a humane environment that complies with all relevant state and federal regulations." Plaintiffs are likely to succeed on the merits of its lawsuit because the affidavits and testimony clearly show that PPI has failed to provide care to even the minimum standards.

Unless this Honorable Court temporarily restrains the Defendant until a final trial or the merits of Plaintiffs case, the Plaintiffs will suffer irreparable injury for which there is no adequate remedy at law to give Plaintiffs complete, final and equal relief. More specifically, Plaintiffs will show the court the following:

A. the harm to Plaintiffs is imminent because PPI continues to accept/acquire new animals draining precious resources and resulting in reduced staff, care and funds available to care for Plaintiffs.

B. this imminent harm will cause Plaintiffs irreparable injury in that they will become ill and/or die as indicated by the death of three primates within the last two months.

C. there is no adequate remedy at law which will give Plaintiffs complete, final and equal relief because PPI is depleting funds designated for care of Plaintiffs and the injury and damage to Plaintiffs cannot be calculated.

Furthermore, Plaintiffs should be granted a temporary injunction because the above described actions/inactions of Defendant relates to the subject of the pending litigation are in complete violation of the rights of the Plaintiffs, and those actions/inactions if allowed to continue, would render a judgment in this litigation against Defendant ineffectual.

Plaintiffs are willing to post a reasonable temporary restraining order bond and requests the court to set such bond.

Plaintiffs have met Plaintiffs' burden by establishing each element that must be present before injunctive relief can be granted by this court, therefore Plaintiffs are entitled to the requested temporary injunction order.

Plaintiffs request the court to enjoin Defendant from: (a) accepting any additional animals/primates, and (b) spending funds designated for the use and benefit of Plaintiffs for any other purpose. Plaintiffs ask that the Court immediately issue the following additional orders: (a) permitting DR. MEL RICHARDSON, STEPHANY HARRIS and KLAREE BOOSE and a team of independent primate caretakers immediate inspection of the facilities and evaluation of the Plaintiffs, (b) permitting DR. MEL RICHARDSON, STEPHANY HARRIS and KLAREE BOOSE and their team to remedy any deficiencies and, at this time, award Plaintiffs and DR. MEL RICHARDSON, STEPHANY HARRIS and KLAREE BOOSE the obligation to fund such deficiencies, without waiver of the right to seek reimbursement for any such reasonable expenditure; (c) requiring PPI to produce any and all veterinarian records including autopsy and necropsy reports and records pertaining to inspection by veterinarians or other officials and (d) requiring PPI to produce all books and records required for production by the Texas Non-Profit Corporation Act.

It is essential that the Court temporarily enjoin Defendant herein from these acts until final trial on the merits of Plaintiffs case. In order to preserve the status quo during the pendency of this action, the Plaintiffs should be cited to appear and show cause why they should not be temporarily enjoined from the acts enumerated above.

On final trial on the merits, that the Court permanently enjoin Defendant herein from continuing to violate the terms and conditions of the contract to humanely care for them.

WHEREFORE, PREMISES CONSIDERED, PLAINTIFFS respectfully request the Court grant them the following relief:

- a. PPI be cited to appear and answer herein;
- b. after notice and hearing, a temporary injunction to issue, enjoining and restraining Defendant, its officers, agents, servants, employees, successors and assigns, and attorneys from (i) directly or indirectly accepting additional animals/primates, (ii) spending funds received in trust and designated for the use and benefit of Plaintiffs for other purposes; and to comply with additional requirements to (1) permitting DR. MEL RICHARDSON, STEPHANY HARRIS and KLAREE BOOSE and a team of independent primate caretakers an immediate inspection and evaluation of the PPI facility and Plaintiffs, (2) provide an immediate access to all veterinarian records including autopsy/necropsy reports, (3) permitting DR. MEL RICHARDSON, STEPHANY HARRIS and KLAREE BOOSE and their team to remedy any deficiencies and, at this time, award Plaintiffs and DR. MEL RICHARDSON, STEPHANY HARRIS and KLAREE BOOSE the obligation to fund such deficiencies without waiver of the right to seek reimbursement for any such reasonable expenditure; (4) requiring PPI to produce any and all veterinarian records including autopsy and necropsy reports and records pertaining to inspection by veterinarians or other officials and (5) requiring PPI to produce all books and records required for production by the Texas Non-Profit Corporation Act;
- c. set a reasonable bond for the temporary injunction;
- d. after trial on the merits, the Court permanently enjoin Defendant's officers, agents, servants, employees, successors and assigns, and attorneys from directly or indirectly;
- e. require PPI and its agents to specifically perform their obligations under the contract;

- f. if the court finds that PPI is unable to perform its obligations, Plaintiffs request that they be placed in protective custody *in situ* until transfer to a reputable facility can be effectuated;
- g. in the alternative, and in the unlikely event that the court does not order specific performance, Plaintiffs request an award of damages in the amount of \$236,483.00 (the full contract price) to be held in trust and applied towards the acquisition of shelter and care at a suitable facility;
- h. declare the rights and responsibilities of OSU and PPI under the contract in light of the fact that the underlying purpose may be unlawful in the State of Texas; and
- i. for such other and further relief to which Plaintiffs may be entitled, either at law or in equity.

Respectfully submitted,

VANCE & SAILORS, P.C.
Law Offices
334 W. Mistletoe Avenue
San Antonio, Texas 78212
Telephone: (210) 582-5887
Telecopier: (210) 582-5878

By: _____

LISA A. VANCE
State Bar of Texas No. 20476500
MICHAEL L. GAYLER
State Bar of Texas No. 00795809
ANN MEGEE
State Bar of Texas No. 13902700

ATTORNEYS FOR PLAINTIFFS, SARAH,
KEELI, IVY, SHEBA, DARRELL, HARPER,
EMMA, RAIN, ULYSSES, DR. MEL
RICHARDSON, STEPHANY HARRIS and
KLAREE BOOSE

CERTIFICATE OF SERVICE

I do hereby certify that the foregoing document has been forwarded in accordance with the Texas Rules of Civil Procedure to all counsel of record as set out below, on this the 4th day of May, 2006 to:

Eric Turton
Law Offices of Oscar C. Gonzalez, Inc.
Tower Life Building, Suite 2200
310 S. St Mary's Street
San Antonio, Texas 78205

LISA A. VANCE