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**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

ZOOLOGICAL SOCIETY OF  
CINCINNATI, D/B/A/ CINCINNATI ZOO  
& BOTANICAL GARDEN, an Ohio non-  
profit Corporation,

Plaintiff,

v.

THE GORILLA FOUNDATION, a  
California Corporation; and FRANCINE  
PATTERSON, an  
individual,

Defendants.

Civ. Case No.: 3:18-cv-06529-RGS

**[PROPOSED] BRIEF OF AMICUS  
CURIAE PEOPLE FOR THE  
ETHICAL TREATMENT OF  
ANIMALS, INC. IN SUPPORT OF  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT**

**STATEMENT OF INTEREST**

People for the Ethical Treatment of Animals, Inc. (PETA) is a Virginia non-stock corporation and a federally registered 501(c)(3) tax-exempt animal protection charity. Since its founding in 1980, PETA has worked to establish and protect the rights of all animals. With more than 6.5 million members and supporters, PETA is the largest animal rights organization in the world. PETA is guided by the principles that animals are not ours to eat, wear, experiment on, or use for entertainment.

One of PETA's primary goals is to end the exploitation of animals as entertainment, including the inhumane confinement of animals at shoddy unaccredited facilities. Great apes are of particular concern to PETA, given the voluminous evidence of their complex needs and how much they suffer when these needs, including the need for conspecific companionship, are not met. Accordingly, PETA has monitored and documented conditions at The Gorilla Foundation (TGF), for many years, and, in doing so, has grown increasingly concerned about Ndume.

PETA's interests in this matter are myriad. First and foremost, PETA is extremely concerned about Ndume's wellbeing at TGF given its lack of accreditation and transparency, its well-documented history of chronic animal welfare violations, and its solitary confinement of Ndume.<sup>1</sup> For more than three years PETA has been actively campaigning for Ndume's return to the accredited Cincinnati Zoo and Botanical Garden (CZBG), where he can have the company of a multi-generational gorilla family. It is in Ndume's best interest that he be removed from TGF without further delay.

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<sup>1</sup> Contrary to TGF's unsupported assertion that Ndume's isolation is "temporary . . . after Koko's recent death," Opp'n Br. 4 n.3, Dkt. 31, the record in fact makes clear that Ndume and Koko were not housed together during Koko's lifetime and that Ndume has been confined alone for years. *See* Ex. B to Verified Compl., Dkt. 1-3 at 2 (2015 agreement noting that Ndume and Koko "do not occupy the same space together"); Answer ¶ 24, Dkt. 18 (verifying the agreement).

PETA also has a more general but equally strong interest in the regulation and oversight of pseudo-sanctuaries like TGF. A significant obstacle to PETA's work to improve the lives and status of captive wild animals in the United States is the prevalence of facilities that bill themselves to the public as sanctuaries while in fact lacking meaningful accreditation, failing to prioritize the needs of animals, and often violating baseline animal protection laws. *See generally* Delcianna J. Winders, *Captive Wildlife at a Crossroads— Sanctuaries, Accreditation, and Humane-Washing*, 6 Animal Stud. J. (2017), <https://ro.uow.edu.au/cgi/viewcontent.cgi?article=1325&context=asj> (article by PETA Foundation vice president and deputy general counsel detailing this issue). TGF is an egregious example of such facilities, and its persistence in subjecting Ndume to substandard conditions that violate the federal Animal Welfare Act, *see infra* 7-11, while self-servingly calling itself a sanctuary to raise money off of unsuspecting donors not only harms Ndume but harms broader efforts to improve the status and wellbeing of captive wildlife.

As the primary organization leading the charge in enforcing the Endangered Species Act's (ESA) protections for captive wild animals, PETA also has a strong vested interest in ensuring proper application and interpretation of that law, which TGF has spuriously invoked in its defense. Counsel for PETA are leading experts on the ESA's application to captive wildlife and have literally written the book on this subject. *See* Delcianna J. Winders et al., *Captive Wildlife Under the Endangered Species Act*, in *Endangered Species Act* (Donald C. Baur & Ya-Wei Li eds., 3d ed. forthcoming 2019), <http://bit.ly/CaptiveWildlifeESA>; *see also* Ani B. Satz & Delcianna J. Winders, *Animal Welfare Act: Interaction with State Law and the Federal Endangered Species Act*, 24 Animal L. (forthcoming 2019), <http://bit.ly/AWAandESA>. Just in the past four years PETA has filed seven ESA citizen suits on behalf of captive wild animals.

PETA currently has four such suits actively pending, two of which involve primates like Ndume. As a result of these lawsuits, PETA has been able to rehome dozens of animals from substandard conditions to reputable facilities and to end practices of abuse and neglect.

TGF's sloppy and inaccurate characterizations of the ESA's protections pose a threat to PETA's efforts to secure legitimate protections for animals suffering at substandard facilities. At detailed below, TGF itself appears to be in clear violation of the ESA, in addition to its chronic violations of the AWA. *See infra* 6-7.

Moreover, TGF's attempt to defeat a clear contractual obligation to rehome Ndume based on wildly speculative assertions about the risks of transport threatens a precedent that could undermine PETA's ongoing work to rehome captive wildlife from substandard to reputable facilities. Just in the past six years PETA has helped re-home more than 120 captive wild animals in the United States from substandard conditions to reputable facilities, including ten great apes and many other endangered animals. Notably, despite many of them having compromised health and/or being of advanced age, none of these animals suffered harm during transport. If any facility that, like TGF, is harming animals can manufacture speculative concerns about transport to thwart or delay the legally warranted rehoming of animals, many animals stand to suffer.

### **STATEMENT OF FACTS**

This case is about Ndume, a western lowland gorilla who, it is undisputed, is held by The Gorilla Foundation without the companionship of a single other gorilla. Verified Compl. ¶¶ 1, 45, Dkt. 1; Answer ¶¶ 1, 45, Dkt. 18.<sup>2</sup> It is also undisputed that gorillas "are social animals that

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<sup>2</sup> A verified complaint that is based on personal knowledge and sets forth specific facts admissible in evidence may be used as an affidavit for summary judgment purposes. *Schroeder* 18-cv-06529-RGS [PROPOSED] BRIEF OF AMICUS CURIAE PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC. IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

live in multigenerational groups and should not live isolated from other gorillas,” and, similarly, that “well-documented scientific research shows” that “regular[] interact[ion] with other gorillas in a social setting” is “necessary” for gorillas. Verified Compl. ¶¶ 1, 14, Dkt. 1; Answer ¶¶ 1, 14, Dkt. 18.

Precisely because of the fundamental importance of conspecific companionship to gorilla welfare, approximately three years ago TGF and the CZBG entered into an agreement allowing Ndume to remain at TGF “as a companion” to Koko. Verified Compl. ¶ 26, Dkt. 1; Ex. B to Verified Compl., Dkt. 1-3 at 3; Answer ¶¶ 24, 26, Dkt. 18.

Because the purpose of the agreement was to provide companionship to Koko, it provided unequivocally that “[u]pon the death of ‘Koko’, ‘Ndume’ will be placed at an AZA institution recommended by the Gorilla Species Survival Program (SSP) and the Cincinnati Zoo and Botanical Garden.” Ex. B to Verified Compl., Dkt. 1-3 at 3; Verified Compl. ¶ 1, Dkt. 1; Answer ¶ 1, Dkt. 18. TGF recognizes, as it must, that this contractual provision is plain and unequivocal. Verified Compl. ¶ 1, Dkt. 1; Answer ¶ 1, Dkt. 18.

And yet, nearly seven months since Koko’s death, TGF has refused to comply with its contractual obligations and confines Ndume without the company of a single other gorilla. Verified Compl. ¶¶ 1, 28, 45, Dkt. 1; Answer ¶¶ 1, 28, 45, Dkt. 18. CZBG seeks to return Ndume to the zoo where he was born because doing so provides “the best opportunity” for him “to begin the socialization process with other gorillas.” Verified Compl. ¶ 30, Dkt. 1; Answer ¶ 30, Dkt. 18.

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*v. McDonald*, 55 F.3d 454, 460 (9th Cir. 1995). Moreover, TGF has admitted these facts in its Answer.

1 TGF attempts to justify its blatant defiance of its legal obligations by spuriously  
 2 asserting—based on facts that were known to it in 2015 when it agreed to return Ndume to  
 3 CBZG after Koko’s death—that transferring Ndume would violate state and federal law and  
 4 public policy, with no discussion whatsoever of the robust body of case law contouring what  
 5 constitutes of a violation of these laws and policy. *See* Opp’n Br. 11-20, Dkt. 31.<sup>3</sup>

### 6 **ARGUMENT**

7 The Gorilla Foundation would have this Court believe that Ndume lives an idyllic life at  
 8 its so-called sanctuary—indeed, it uses the term “sanctuary” twenty-eight times in its twenty-  
 9 five-page brief—and that rehoming him to a more appropriate setting, with critically important  
 10 social companionship, would somehow violate the law. Opp’n Br. 5, Dkt. 31. In fact the opposite  
 11 is true: Not only is TGF in violation of its contractual obligation to release Ndume so that he can  
 12 enjoy the company of other gorillas, but the conditions in which TGF maintains Ndume  
 13 indisputably violate laws intended to protect him. Because of this, it is critically important that  
 14 Ndume be removed from TGF without further delay.

#### 16 **I. TGF’s Solitary Confinement of Ndume Violates the ESA**

17 TGF admits that gorillas “are social animals that live in multigenerational groups and  
 18 should not live isolated from other gorillas,” that “well-documented scientific research shows”  
 19 that “regular[] interact[ion] with other gorillas in a social setting” is “necessary” for gorillas, and  
 20 that Ndume is living isolated from other gorillas, Verified Compl. ¶¶ 1, 14, 45, Dkt 1; Answer ¶¶  
 21 1, 14, 45, Dkt. 18.

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23  
 24 <sup>3</sup> Having reviewed the evidence in its own files and conferred with veterinary and primatology  
 25 experts on the factual assertions made by Defendants in support of these legal arguments, PETA  
 26 can also confirm that many of these assertions overstate, distort, and even misstate the truth.  
 However, because Defendants fail as a matter of law to justify their contract violations, it is not  
 necessary to delve into these issues.

Depriving a highly social primate like Ndume of conspecific companionship violates the ESA. Among other things the ESA makes it unlawful to “harass” a member of a protected species, 16 U.S.C. § 1538(a)(1)(B) (prohibiting “take” of a protected species); *id.* § 1532(19) (defining “take” to include “harass”), including gorillas, 50 C.F.R. § 17.11(h). “Harass” is defined by regulation as “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” *Id.* § 17.3. Numerous federal courts have recognized that depriving highly social primates of the opportunity to socialize with conspecifics in captivity disrupts their normal behavioral patterns and thus constitutes an unlawful taking. *See Kuehl v. Sellner*, 161 F. Supp. 3d 678, 711 (N.D. Iowa 2016), *aff’d*, 887 F.3d 845 (8th Cir. 2018); *see also People for the Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park of W. Md., Inc.*, No. CV MJG-17-2148, 2018 WL 434229, at \*7 (D. Md. Jan. 16, 2018); *Mo. Primate Found. v. People for Ethical Treatment of Animals, Inc.*, No. 4:16 CV 2163 CDP, 2018 WL 1420239, at \*4 (E.D. Mo. Mar. 22, 2018).

## **II. TGF Is a Chronic Violator of the Animal Welfare Act**

The federal Animal Welfare Act (AWA) regulations set forth “minimum requirements” for the humane handling, care, treatment and transportation of animals. 7 U.S.C. § 2143(a)(1)–(2). In other words, these regulatory standards are what the U.S. Department of Agriculture (USDA), the agency tasked with implementing the AWA, deems the bare minimum necessary to ensure the humane care and treatment of animals. The USDA underscores that facilities holding animals are encouraged to exceed these standards. *See, e.g.*, U.S. Dep’t of Agric., Animal and Plant Health Inspection Service, *Animal Care Factsheet* at 1 (Nov. 2012), [https://www.aphis.usda.gov/publications/animal\\_welfare/2012/animal\\_welfare\\_act\\_english.pdf](https://www.aphis.usda.gov/publications/animal_welfare/2012/animal_welfare_act_english.pdf) (“Although Federal



requirements establish basic standards, regulated businesses are encouraged to exceed these standards.”). The AWA is separate from, and complementary to, the ESA. *See People for the Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park of W. Md., Inc.*, 2018 WL 434229, at \*6; *Mo. Primate Found. v. People for Ethical Treatment of Animals, Inc.*, 2018 WL 1420239, at \*3.

AWA citations are rare—the U.S. Department of Agriculture (USDA) touts an AWA substantial compliance rate of 96%. USDA, Animal & Plant Health Inspection Service, 2017 AC Accomplishments Report, [https://www.aphis.usda.gov/publications/animal\\_welfare/report-2017-accomplishments.pdf](https://www.aphis.usda.gov/publications/animal_welfare/report-2017-accomplishments.pdf). Yet since September 2012 the USDA has cited TGF at least *two dozen* violations of the AWA,<sup>4</sup> including seventeen repeat violations. *See* Ex. A.<sup>5</sup>

Even rarer than citations are AWA enforcement actions, which are reserved for the worst violations. The USDA’s own Office of Inspector General has repeatedly condemned the agency for its inadequate enforcement of the AWA. *See* Office of Inspector Gen., U.S. Dep’t of Agric.,

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<sup>4</sup> The USDA “synonymously use[s] the terms violations, alleged violations, and noncompliant items in its documents.” Office of Inspector Gen., U.S. Dep’t of Agric., *Animal and Plant Health Inspection Service Animal Care Program Inspections of Problematic Dealers*, Audit No. 33002-4-SF, at 1 n.5 (May 2010), <https://www.usda.gov/oig/webdocs/33002-4-SF.pdf>.

<sup>5</sup> It seems that TGF would prefer to keep its voluminous history of AWA violations from the Court, baselessly suggesting that they are hearsay. Opp’n Br. 2 n.1, Dkt. 31. To the contrary, the USDA’s reports fall squarely within Fed. R. Evid. 803(8)’s explicit exclusion of public records and reports from the hearsay rule. Fed. Rule Evid. 803(8) (“The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: . . . A record or statement of a public office if: (A) it sets out: (i) the office’s activities; (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and (B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.”); *see also, e.g., Higgenbottom v. Noreen*, 586 F.2d 719, 722 (9th Cir. 1978) (admitting federal agency inspection reports under this exception); *Augustson v. Holder*, 728 F. Supp. 2d 1279, 1284 (D.N.M. 2010) (federal agency inspection reports fell within hearsay exception for public records and reports and accordingly were admissible on motion for summary judgment).



1 *Animal and Plant Health Inspection Service Oversight of Research Facilities*, Audit No. 33601-  
 2 0001-41, at 1–3 (Dec. 2014), <https://www.usda.gov/oig/webdocs/33601-0001-41.pdf>  
 3 (summarizing a series of audit findings on AWA enforcement). Despite the overall paucity of  
 4 AWA enforcement actions, TGF’s chronic noncompliance has earned it *three* enforcement  
 5 actions over the course of just four years. *See* Ex. B.<sup>6</sup>

6 During its most recent inspection, on September 21, 2018, the USDA cited TGF for a  
 7 repeat violation for failing to adequately maintain the trailers that serve as Ndume’s primary  
 8 enclosure. Ex. A at 1. Prior to this most recent citation, the USDA had cited TGF *more than a*  
 9 *dozen times* for failing to maintain Ndume’s enclosure including at least once—and sometimes  
 10 as many as three times—every year for several years. *See* Ex. A at 5 (Apr. 6, 2017); *id.* at 7 (Dec.  
 11 13, 2016); *id.* at 9 (Sept. 15, 2016); *id.* at 11 (June 10, 2016); *id.* at 12 (Dec. 04, 2015); *id.* at 13  
 12 (June 17, 2015); *id.* at 14 (Mar. 26, 2015); *id.* at 15 (Dec. 18, 2014); *id.* at 16-17 (Aug. 20, 2014);  
 13 *id.* at 18 (Mar. 11, 2014); *id.* at 20 (Dec. 17, 2010, also noting that TGF was also previously cited  
 14 for this exact violation in 2010 and 2011). TGF has also faced three enforcement actions for its  
 15  
 16  
 17

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18 <sup>6</sup> These actions were warnings (two official warnings and one informal warning, or “letter of  
 19 information”), the USDA’s primary preferred means of enforcing the AWA, *see* Delcianna J.  
 20 Winders, *Administrative Law Enforcement, Warnings, and Transparency*, 79 Ohio St. L. J. 451,  
 21 487 (2018) (“Warnings are by far the most commonly utilized enforcement action under the  
 22 AWA, consistently comprising more than half of all AWA enforcement actions. In fiscal year  
 2017, more than 90% of all enforcement actions taken under the AWA were warnings.” (citation  
 omitted)); *see also id.* at 490 (noting that TGF exemplifies the failure of USDA warnings to  
 incentivize compliance).

23 Like the USDA’s inspection reports, the agency’s warnings to TGF also fall within the hearsay  
 24 exception for public records and reports. *See* Fed. R. Evid. 803(8); *supra* note 5; *see, e.g., In re*  
 25 *Bard IVC Filters Prod. Liab. Litig.*, No. CV-16-00474-PHX-DGC, 2018 WL 1109554, at \*4 (D.  
 26 Ariz. Mar. 1, 2018) (noting that numerous courts have recognized that federal agency warning  
 letters fall within the public records hearsay exception); *accord Guthrie v. Ball*, No. 1:11-CV-  
 333-SKL, 2014 WL 5314576, at \*4 (E.D. Tenn. Oct. 17, 2014).

1 failure to adequately maintain Ndume's enclosure, *see* Ex. B, yet persists in this failure, *see* Ex.  
2 A.

3 TGF's other documented AWA violations include serious veterinary care failings,  
4 including a direct violation—the most serious category of violations, defined as one that is, at the  
5 time of the inspection, “**having a serious or severe adverse** effect on the health and well-being  
6 of the animal,” U.S. Dep't of Agric., *AWA Inspection Guide* at 2-11, 2.4.8 (Nov. 2018),  
7 [https://www.aphis.usda.gov/animal\\_welfare/downloads/Animal-Care-Inspection-Guide.pdf](https://www.aphis.usda.gov/animal_welfare/downloads/Animal-Care-Inspection-Guide.pdf)  
8 (emphasis in original)—in 2017. According to the USDA's inspection report, TGF refused to  
9 follow its own veterinarian's instructions for Koko, who was lethargic, depressed, and suffering  
10 inappetence, muscle atrophy, and unexplained episodes of twitching and stupor. Ex. A at 3.

12 This is only the most recent documented example of TGF's negligent veterinary care.  
13 TGF also failed to have Koko examined by a veterinarian after the gorilla's legs stopped  
14 functioning, the functioning of her left arm was reduced, and she was lethargic, barely moving,  
15 and not eating. Ex. A at 16. Ndume has also suffered from TGF's veterinary neglect, including  
16 its repeated failure to follow basic standards put in place by its veterinarian. *Id.* at 22. According  
17 to a USDA's inspection report, TGF's vet had recommended tuberculosis testing at least  
18 annually, yet TGF went more than a decade without having Ndume tested. *Id.* Similarly, the  
19 program of veterinary care required weighing Ndume at least monthly, yet TGF's documentation  
20 indicated that it allowed *fourteen years* to pass between weighings. *Id.* Fecal analyses for  
21 intestinal parasites called for by the veterinary plan were also apparently routinely not  
22 performed. *Id.*

24 TGF has also been cited for a host of sanitation-related violations, including storing  
25 gorilla food alongside a pork loin that was more than five years old. *Id.* at 18 .

**CONCLUSION**

TGF's assertions that transferring Ndume from its unaccredited facility to the accredited CZBG, where he can have the companionship of other gorillas, would somehow be illegal and contrary to public policy are at best misguided. In fact, the polar opposite is true: TGF is in ongoing violation not just of its contractual obligations but of multiple animal protection laws so long as it continues to hold Ndume. To ensure the wellbeing of Ndume and other similarly situated captive wild animals, it is important that the Court see through these maneuverings. At its core, this case is exceedingly straightforward: TGF is undisputedly in violation of its agreement to return Ndume to the CBZG, and it is in Ndume's best interest to return to the CZBG as soon as possible.

For all of the foregoing reasons, this Court should grant Plaintiff's Motion for Summary Judgment.

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Respectfully submitted,

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