

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on
behalf of HERCULES and LEO,

Petitioner,

-against-

SAMUEL L. STANLEY JR., M.D. as President of
State University of New York at Stony Brook a/k/a
Stony Brook University and STATE UNIVERSITY
OF NEW YORK AT STONY BROOK a/k/a STONY
BROOK UNIVERSITY,

Respondents.

AFFIRMATION OF
ELIZABETH STEIN IN
OPPOSITION TO CROSS-
MOTION TO CHANGE VENUE
AND REPLY TO ANSWER TO
PETITION AND IN SUPPORT
OF PETITIONER’S MOTION
TO STRIKE AFFIDAVIT

Index No. 152736/15
Hon. Barbara Jaffe, J.S.C.

ELIZABETH STEIN, an attorney duly admitted to practice in the courts of this State,
affirms the following under penalty of perjury:

1. I am an attorney of record for Petitioner, the Nonhuman Rights Project, Inc. (“Petitioner”), in the above-captioned matter. I am fully familiar with the facts and questions of law involved in this case.
2. I submit this affirmation in reply to the “AFFIRMATION OF CHRISTOPHER COULSTON IN OPPOSITION TO PETITION AND IN SUPPORT OF CROSS-MOTION TO CHANGE VENUE” (“Affirmation”).
3. I submit this affirmation to provide the Court with true and accurate copies of the following documents relevant to the Petitioner’s reply to Respondents’ Affirmation.

4. A true and accurate copy of the “Memorandum in Support of Motion for Leave to Appeal to the Court of Appeals,” submitted to the Court of Appeals by Petitioner in People ex re. Nonhuman Rights v Lavery, (“Lavery”), Index No. 518336, is annexed hereto as Exhibit 1.

5. A true and accurate copy of the “Letter Brief of Amicus Curiae Laurence H. Tribe In Support of Motion for Leave to Appeal” submitted to the Court of Appeals by Laurence H. Tribe in People ex re. Nonhuman Rights v Lavery, (“Lavery”), Index No. 518336, Motion No. 2015-631, on May 15, 2015, is annexed hereto as Exhibit 2.

6. A true and accurate copy of the “Letter Brief of Amicus Curiae Justin Marceau, Habeas Corpus Scholar, In Support of Motion for Leave to Appeal” submitted to the Court of Appeals by Justin Marceau in Lavery, Index No. 518336, Motion No. 2015-517, on April 16, 2015, is annexed hereto as Exhibit 3.

7. A true and accurate copy of the Petitioner’s Memorandum in Support of Motion for Leave to Appeal to the Court of Appeals in the Matter of the Nonhuman Rights Project, Inc. on behalf of Kiko v. Carmen Presti (“Presti”), is annexed hereto as Exhibit 4.

8. I make this affirmation in support of Petitioner’s Motion to Strike Portions of Affidavit (“Affidavit”). This lay Affidavit of Stylianianna Tsirka (“Professor Tsirka”) is replete with (1) hearsay, (2) legal argument, (3) conclusory statements of fact, (4) unsupported expert opinions, and (5) facts as to which the affiant provides no foundation, and/or could not possibly have personal knowledge.

9. **Paragraph 4:** Petitioner moves to strike the underlined portion of Paragraph 4: “Hercules and Leo are currently housed at Stony Brook and have been there since November 30th, 2010. They are the subject of studies conducted by researchers such as Dr. Susan Larson, a professor of anatomical sciences at Stony Brook, whose long-running research on the locomotion

of chimpanzees and other primates is widely respected in the scientific community.” Respondents have failed to lay the foundation that Professor Tsirka is qualified to state that Dr. Susan Larson “is widely respected in the scientific community.” Professor Tsirka has not provided any source for her statement that would not be considered hearsay and she has not been qualified to give an expert opinion concerning the anatomical sciences. *Cf. Joachim v. Flanzig*, 3 Misc. 3d 371, 379 (N.Y. Sup. Ct. 2004) (“Before considering the opinion of an expert, the court must make a preliminary determination as to whether the person is an expert in the field in which the person is rendering an opinion. In determining if a person is an expert, the court must determine if the person has the requisite skill, training, education, knowledge and/or experience so that the opinion of the expert can be considered reliable.”).

10. **Paragraph 5.** Petitioner moves to strike the underlined passage of Paragraph 5: “The treatment of Hercules and Leo is governed by a host of regulations to ensure their well-being and that their living conditions are consistent with state and federal law.” This statement constitutes an impermissible expert legal opinion from a layperson. *See In re Taylor*, 265 A.D. 858, 858 (2d Dept. 1942) (“The practice of embodying argument on the facts and law in an affidavit, including the citation of authorities, is improper and is disapproved.”); *In re Matter of Lasdon*, 939 N.Y.S.2d 741, n.3 (N.Y. County Surr. Ct. 2011) (“The affidavit, which reads like a memorandum of law, is not designed to inform a factual question (the usual province of expert testimony), but *instead provides only case law analysis on the pure question of law* as to how damages are to be calculated in this instance. The expert's report accordingly is stricken from the record on these motions.”).

11. **Paragraph 6.** Petitioner moves to strike Paragraph 6 in its entirety: The primary source of federal regulations for chimpanzees is the Animal Welfare Act ("AWA"), 7 U.S.C. §

2131 and the Animal Welfare Regulations promulgated thereunder. The Animal Welfare Regulations passed in accordance with the AWA have extensive regulations related to the housing and care of chimpanzees and other nonhuman primates. Rules 3.75-3.92 relate specifically to the humane handling, care and treatment of nonhuman primates. Among other regulations, the rules state that the housing facilities "must be kept in good repair" (9 C.F.R. §3.75(a)), hard surfaces must be "spot cleaned daily" (9 C.F.R. §3.75(c)(3)). There are regulations related to heating, ventilation and lighting. (9 C.F.R. §3.76) There is a calculation for the minimum size of an enclosure. (9 C.F.R. §3.80) Research facilities must also "develop, document, and follow an appropriate plan for environment enhancement adequate to promote the psychological well-being of nonhuman primates." (9 C.F.R. §3.81) The plan "must include specific provisions to address the social needs of nonhuman primates of species." (Id.) There are also regulations concerning the feeding of these chimpanzees. (9 C.F.R. §3.82). This entire paragraph constitutes an improper expert legal opinion from a layperson.

12. **Paragraph 7.** Petitioner moves to strike Paragraph 7 in its entirety: “Stony Brook complies with all of these regulations, and it is part of my responsibilities as Chair of IACUC to ensure that it does so.” Professor Tsirka has not laid a foundation to indicate that she knows what actions Stony Brook has taken to comply with these regulations. In addition, this statement constitutes an improper legal opinion from a layperson. *Cf. Caton v. Doug Urban Const. Co.*, 65 N.Y.2d 909, 911 (1985) (CPLR 4515 “does not . . . change the basic principle that an expert’s opinion not based on facts is worthless.”).

13. **Paragraph 8.** Petitioner moves to strike the underlined portions of Paragraph 8: “Stony Brook is also accredited by the Association for Assessment and Accreditation of Laboratory Animal Care ("AAALAC"). "[AAALAC] is a private, nonprofit organization that

promotes the humane treatment of animals in science through voluntary accreditation and assessment programs." AAALAC Website, available at <http://www.aaalac.org/about/inslex.cfm> (last visited, May 12, 2015). I am involved with the accreditation process in my role as chair of IACUC.” Petitioner moves to strike these portions because they: (1) are not based on personal knowledge; (2) constitute hearsay; and (3) the website links lack foundation and are not properly authenticated. “It is, of course, important that a party seeking to rely upon information found on a website provide the Court with an affidavit that would establish a proper evidentiary foundation.” *Tener Consulting Services, LLC v. FSA Main Street, LLC*, 2009 WL 1218891, at *6 (N.Y. Sup. 2009). The website citation is hearsay. *See Metro Medical Diagnostics, P.C. v. Allstate Ins. Co.*, 6 Misc.3d 1037(a), 800 N.Y.S.2d 350 (N.Y. City Civ. Ct. 2005) (court held website information was hearsay and insufficient to raise a question of fact as to the ownership of the plaintiff corporation).

14. **Paragraph 9.** Petitioner moves to strike all quoted portions of Paragraph 9, the website link, and the statement: “Accreditation by AAALAC requires submission of a "Program Description," which provides detailed information on Stony Brook's "Animal care and use program management and oversight; animal environment, housing and management; veterinary care; and physical plant." AAALAC Website, available at <http://www.aaalac.org/accreditation/steps.cfm> (last visited May 12, 2015). Stony Brook's Program Description includes this detailed information for Hercules and Leo, and I have taken part in drafting the Program Description that addresses the treatment of Hercules and Leo.” Petitioner moves to strike this paragraph because it is (1) not based on personal knowledge; (2) constitutes hearsay; and (3) the website links lack foundation and are not properly authenticated.

15. **Paragraph 10.** Petitioner moves to strike Paragraph 10: “AAALAC also conducts a site visit when first accrediting a research facility. To maintain its accreditation, Stony Brook submits an annual report, and additional site visits are conducted by AAALAC every three years. As part of these site visits, AAALAC visits with Hercules and Leo and evaluates their treatment and living conditions. AAALAC's next site visit is scheduled for June 2015.” Petitioner moves to strike this paragraph because Professor Tsirka fails to lay a foundation that she has personal knowledge that AAALAC conducted a site visit when Stony Brook was allegedly first accredited in 1973. She provides no foundation for how she knows that Stony Brook submits an annual report or that AAALAC has actually visited Hercules and Leo and evaluated their treatment and living conditions.

16. **Paragraph 11.** Petitioner moves to strike Paragraph 11: “Stony Brook has been accredited by AAALAC since October 23, 1973.” This paragraph constitutes hearsay and is not based on personal knowledge. Professor Tsirka states in para. #1 of her Affidavit that she was first appointed to Stony Brook in 1998. Insofar as her knowledge is based on information other than her personal knowledge, this statement constitutes impermissible hearsay.

17. WHEREFORE Petitioner requests that the Court strike those portions of the affidavit of the Respondents that fail to comply with New York law and not consider them in deciding Petitioner’s entitlement to Habeas Corpus relief.

Respectfully submitted,

Dated: May 26, 2015

BY: /s/ *Elizabeth Stein*

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