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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SHELBY PROIE; KAREN MUNRO;)
PATRICIA SYKES; ANIMAL LEGAL)
DEFENSE FUND, a non-profit)
corporation; and PEOPLE FOR THE)
ETHICAL TREATMENT OF ANIMALS,)
INC., a non-profit corporation,)

Plaintiffs,)

v.)

NATIONAL MARINE FISHERIES)
SERVICE; ERIC C. SCHWAAB, in his)
official capacity as Assistant Administrator)
for Fisheries of the National Marine)
Fisheries Service; and REBECCA M.)
BLANK, in her official capacity as the)
Acting Secretary of the United States)
Department of Commerce,)

Defendants.)

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

1. This case challenges a decision by the National Marine Fisheries Service (“NMFS”) to exclude from the listing of the Southern Resident killer whale population all captive members of that population and their progeny. By excluding the captive members from

1 the endangered species list under the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*,
2 without any explanation, NMFS has failed to protect these animals from being harmed, harassed,
3 and even killed, as otherwise prohibited under the ESA, and has acted in a manner that is
4 arbitrary and capricious, an abuse of discretion, and not in accordance with law, within the
5 meaning of the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2). As a consequence,
6 captive members of this species continue to be kept in conditions that cause them great harm and
7 suffering with absolute impunity under the ESA. Accordingly, Plaintiffs seek an order setting
8 aside the agency’s decision to exclude the captive members of this species from the list of
9 endangered species.
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12 JURISDICTION

13 2. This Court has jurisdiction over Plaintiffs’ claims pursuant to 28 U.S.C. § 1331,
14 the Declaratory Judgment Act, 28 U.S.C. § 2202, and the Administrative Procedure Act, 5
15 U.S.C. § 706(2).
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17 PARTIES

18 3. Plaintiff Shelby Proie lives in Olympia, Washington. She has studied and
19 observed orcas for many years and experiences great aesthetic pleasure from doing so. She has
20 observed the Southern Resident killer whales in the wild on many occasions, and will continue to
21 do so regularly in the future. Her ability to continue to observe this wildlife in the future is
22 impaired by NMFS’s decision to exclude the captive members of the population from the list of
23 endangered species. As the Fish and Wildlife Service (“FWS”) has recognized in the past,
24 protecting captive members of a listed species is necessary to ensure that the species will not
25 become extinct in the future and that it can eventually be recovered — *i.e.*, restored to the point
26 where it no longer needs the protections of the ESA. Thus, NMFS’s decision impairs Ms. Proie’s
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29 COMPLAINT - 2

1 ability to continue to enjoy this species in the future should captive members be needed to
2 prevent the species from further decline or to ensure its recovery.

3 4. Ms. Proie also has spent time studying and observing a captive member of the
4 Southern Resident killer whale population named Lolita, who, since she was captured from the
5 wild over forty years ago, has been maintained at an aquarium in Miami, Florida, called the
6 Miami Seaquarium (“MSQ”). At MSQ, Lolita is confined to an inadequate tank, which is
7 smaller than the minimum regulatory requirements, is without sufficient space, without any
8 companions of her own species, and without sufficient shelter from the sun. Ms. Proie has
9 observed and photographed Lolita many times in captivity, and she has formed a strong
10 emotional bond with Lolita. She has submitted materials to both MSQ and the federal
11 government in an effort to obtain more humane conditions for Lolita, but has been unable to
12 obtain any such relief. She would like to continue to visit Lolita to maintain and enjoy her
13 personal relationship with Lolita, but is aesthetically harmed whenever she does so because it
14 causes her great pain and anguish to see Lolita in her current living conditions. She also does not
15 want to provide any financial support to the facility that maintains Lolita in these conditions
16 through the cost of a ticket to see Lolita.

17 5. Ms. Proie is aesthetically and emotionally injured by having to make the choice
18 between paying MSQ to visit Lolita in these conditions and refraining from visiting Lolita, with
19 whom she has formed a strong emotional bond. Ms. Proie is also harmed by NMFS’s decision to
20 exclude Lolita from the endangered listing of the Southern Resident killer whale population
21 because it allows MSQ to keep Lolita in conditions that harm and harass her, and that otherwise
22 would be prohibited under the “take” prohibition of the ESA, 16 U.S.C. § 1538(a), if Lolita were
23 included as listed wildlife.

24 COMPLAINT - 3

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1 6. Ms. Proie’s educational and aesthetic interests would be redressed if the captive
2 members of the species were included in the endangered listing of the Southern Resident killer
3 whale population. This would provide the wild population added protection by ensuring that the
4 captive members are preserved and protected for the future research, educational, biological,
5 management and other benefits they provide the wild population. It would also ensure that
6 Lolita could no longer be “taken” in violation of the statute, and thus ensure that she would be
7 treated humanely and possibly returned to the wild. If Lolita was protected by the ESA, treated
8 humanely, and her living conditions improved accordingly, Ms. Proie would visit and observe
9 her as often as possible.
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12 7. Plaintiff Karen Munro lives in Olympia, Washington. She has had an intense
13 interest for over thirty-five years in protecting orcas, including those in the wild and in captivity.
14 Ms. Munro has observed the wild members of the Southern Resident killer whale population
15 many times over the years and will continue to see them in the future. She experiences great
16 aesthetic pleasure from viewing these animals in the wild. Ms. Munro’s ability to continue to
17 observe this wildlife in the future is impaired by NMFS’s decision to exclude the captive
18 members of the population from the endangered listing because protecting captive members of a
19 listed species is necessary to ensure that the species will not become extinct in the future and that
20 it can eventually be recovered. Thus, NMFS’s decision impairs her ability to continue to enjoy
21 this species in the wild should captive members of the species be needed to prevent the species
22 from further decline or to ensure its recovery.
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24 8. Ms. Munro has seen young orcas captured in the wild by the exhibition industry
25 — an experience that caused her great anguish and stress and continues to haunt her to this day.
26 This experience has motivated her to do everything in her power to protect the wild populations
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28 COMPLAINT - 4
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1 and to help orcas that have been removed from the wild to be reunited with their families. It is
2 because of this experience that Ms. Munro has learned about and become dedicated to rescuing
3 Lolita. Ms. Munro has devoted a substantial amount of time over the years to helping improve
4 the conditions in which Lolita lives, and she has an intense interest in helping Lolita return to the
5 wild Southern Resident killer whale population from which she was captured and removed when
6 she was very young.
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8 9. Ms. Munro has helped organize protests in Miami concerning Lolita and has
9 stayed informed over the years about Lolita's condition and plight. She has read publications
10 about Lolita, talked to individuals with personal knowledge of Lolita's condition and the
11 conditions in which she is kept, and viewed videotape and photographs of Lolita. Through these
12 experiences and because of her personal experience in seeing young orcas torn from their
13 families in the wild, Ms. Munro has developed a strong emotional attachment to Lolita and
14 wants to help her. Ms. Munro would very much like to visit Lolita in person, but is unable to do
15 so without suffering great aesthetic and emotional injury and pain from seeing Lolita in her
16 current living conditions, in an inadequate tank, without companions of her own species, and
17 without appropriate protection from the sun. Ms. Munro also does not want to contribute
18 financially to the MSQ, which maintains Lolita in these conditions. Ms. Munro's aesthetic
19 interests in seeing Lolita in a humane setting are greatly impaired by NMFS's decision to
20 exclude Lolita from the endangered listing of the Southern Resident killer whale population
21 because it allows MSQ to keep Lolita in conditions that harm and harass her, and that would
22 otherwise be prohibited under the "take" prohibition of the ESA, 16 U.S.C. § 1538(a), if Lolita
23 were included as listed wildlife with the rest of her family and population.
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1 10. Ms. Munro's educational and aesthetic interests would be redressed if the captive
2 members of the species were included in the endangered listing of the Southern Resident killer
3 whale population. This would provide the wild population with added protection by ensuring that
4 the captive members are preserved and protected for the future research, educational, biological,
5 management and other benefits they provide the wild population. It would ensure that Lolita
6 could no longer be "taken" in violation of the statute, and thus ensure that she would be treated
7 humanely and possibly returned to the wild. If Lolita was protected by the ESA, treated
8 humanely and possibly returned to the wild, Ms. Munro would visit and observe her as often as
9 possible.
10 possible.

11 11. Plaintiff Patricia Sykes lives in Denver Colorado. She was employed at MSQ in
12 1970 when Lolita was first captured from the wild and brought to MSQ to be placed on exhibit,
13 and was part of the staff responsible for Lolita's husbandry and transition to a life in captivity.
14 Ms. Sykes personally observed Lolita endure great suffering caused by her capture and the
15 unnatural living conditions in captivity. Ms. Sykes formed a strong emotional bond with Lolita
16 and wants to do everything in her power to help her. Ms. Sykes can no longer bear to visit Lolita
17 in her current conditions without suffering great aesthetic and emotional harm. Ms. Sykes is
18 aesthetically and emotionally injured by having to make the choice between paying MSQ the
19 cost of admission to visit Lolita in these conditions and refraining from visiting Lolita, with
20 whom she has formed a strong emotional bond. She is also harmed by NMFS's decision to
21 exclude Lolita from the endangered listing of the Southern Resident killer whale population,
22 which allows MSQ to keep Lolita in conditions that harm and harass her, and that would
23 otherwise be prohibited under the "take" prohibition of the ESA, 16 U.S.C. § 1538(a), if Lolita
24 were included as listed wildlife.
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1 12. Ms. Sykes's educational and aesthetic interests would be redressed if the captive
2 members of the species were included in the endangered listing of the Southern Resident killer
3 whale population. This would ensure that Lolita could no longer be "taken" in violation of the
4 statute. If Lolita was protected by the ESA, treated humanely and her living conditions improved
5 accordingly, Ms. Sykes would visit and observe her as often as possible.
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7 13. Plaintiff Animal Legal Defense Fund ("ALDF") is a non-profit corporation
8 founded in 1979 to protect the lives and interests of animals through the enforcement of laws
9 enacted to protect animals. Based in Cotati, California, ALDF has approximately 100,000
10 members nationwide. It brings this case on behalf of its members who have aesthetic and
11 educational interests in preserving and recovering the Southern Resident killer whales, make
12 efforts to see them in the wild, and wish to continue to see them in the future. ALDF's members'
13 ability to continue to observe the Southern Resident killer whales in the future is impaired by
14 NMFS's decision to exclude the captive members of the population from the list of endangered
15 species because protecting captive members of a listed species is necessary to ensure that the
16 species will not become extinct in the future and can eventually be recovered.
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19 14. ALDF also brings this case on behalf of members who have aesthetic interests in
20 Lolita. ALDF's members have seen her in captivity, have grown fond of her, and are
21 aesthetically harmed by seeing her confined to an inadequate tank without shelter from the
22 Miami sun or companions of her own species. These members' aesthetic and emotional interests
23 are harmed by NMFS's decision to exclude Lolita from the endangered listing of the Southern
24 Resident killer whale population, allowing MSQ to keep Lolita in conditions that harm and
25 harass her, and that would otherwise be prohibited under the "take" prohibition of the ESA, 16
26 U.S.C. § 1538(a), if Lolita were included as listed wildlife.
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1 15. ALDF's members' educational and aesthetic interest would be redressed if the
2 captive members of the species were included in the endangered listing of the Southern Resident
3 killer whale population. This would provide the wild population with added protection by
4 ensuring that the captive members are preserved and protected for the future research,
5 educational, biological, management, and other benefits they provide the wild population, and
6 would also ensure that Lolita could no longer be "taken" in violation of the statute. If Lolita was
7 protected by the ESA, treated humanely and her living conditions improved accordingly,
8 ALDF's members would visit and observe her as often as possible.
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10 16. Plaintiff People for the Ethical Treatment of Animals ("PETA") is a non-profit
11 organization dedicated to protecting animals from abuse, neglect, and cruelty, and undertakes
12 these efforts through public education, cruelty investigations, research, animal rescue,
13 legislation, special events, celebrity involvement, protest campaigns, and lawsuits to enforce
14 laws enacted to protect animals. PETA brings this case on behalf of its members, some of whom
15 have aesthetic and educational interests in preserving and recovering the Southern Resident
16 killer whale population, make efforts to see these animals in the wild, and wish to continue to
17 have those opportunities in the future to the fullest extent possible. PETA's members' ability to
18 continue to observe this wildlife in the future is impaired by NMFS's decision to exclude the
19 captive members of the population from the list of endangered species because protecting captive
20 members of a listed species is necessary to ensure that the species will not become extinct in the
21 future and can eventually be recovered.
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23 17. PETA also brings this case on behalf of its members who have aesthetic interests
24 in Lolita — they have seen her in captivity, have grown fond of her, and are aesthetically harmed
25 by seeing Lolita living in an inadequate tank, which is smaller than the minimum regulatory
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1 requirements, without sufficient shelter from the sun or any companions of her own species.
2 These members' aesthetic and emotional interests are harmed by NMFS's decision to exclude
3 Lolita from the endangered listing of the Southern Resident killer whale population because it
4 allows MSQ to continue to keep Lolita in conditions that harm and harass her, and that would
5 otherwise be prohibited under the "take" prohibition of the ESA, 16 U.S.C. § 1538(a), if she
6 were included as listed wildlife with the rest of her family and population.
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8 18. PETA's members' educational and aesthetic interests would be redressed if the
9 captive members of the species were included in the endangered listing of the Southern Resident
10 killer whale population. This would provide the wild population with added protection, by
11 ensuring that the captive members are preserved and protected for the future research,
12 educational, biological, management, and other benefits they provide the wild population, and it
13 would also ensure that Lolita could no longer be "taken" in violation of the statute. If Lolita was
14 protected by the ESA, treated humanely, and placed in more humane conditions accordingly,
15 PETA's members would visit and observe her as often as possible.
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18 19. Defendant NMFS is the agency responsible for the unlawful decision at issue in
19 this case.
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21 20. Defendant Eric Schwaab is the Assistant Administrator for Fisheries at NMFS
22 and thus is the agency official responsible for the unlawful decision at issue here.

23 21. Defendant Rebecca Blank is the Acting Secretary of Commerce, the agency with
24 authority over NMFS, and therefore has ultimate authority for the unlawful decision at issue in
25 this case.
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FACTS GIVING RISE TO PLAINTIFFS' CLAIMS

A. The Relevant Statutory Scheme

22. The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *TVA v. Hill*, 437 U.S. 153, 180 (1978).

23. Section 9 of the ESA makes it unlawful to “take” any endangered species within the United States. 16 U.S.C. § 1538(a)(1)(B). The term “take” is broadly defined to include “harass, harm, pursue, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19). It is to be construed “in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.” *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Or.*, 515 U.S. 687, 704 (1995).

24. The Secretary of Commerce is responsible for administering the ESA with respect to marine animals; the Secretary of the Interior is responsible for administering the statute with respect to terrestrial animals. These responsibilities have been delegated to NMFS and FWS, respectively. 50 C.F.R. § 402.01(b).

25. The overall purpose of the ESA is to “conserve” endangered and threatened species and the ecosystems upon which they depend. 16 U.S.C. §§ 1531(b) – (c). The term “conserve” means “to use . . . all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided by [the ESA] . . . are no longer necessary.” *Id.* § 1532(3).

26. The Act defines “species” as “any subspecies of fish or wildlife . . . and any distinct population segment of any species or vertebrate fish or wildlife which interbreeds when mature.” *Id.* § 1532(16). An “endangered species” is a species that is “in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6).

1 27. Once a species is listed as “endangered” under the statute, it may not be “taken”
2 without permission from either NMFS or the FWS. *Id.* § 1538(a)(1)(B).

3 28. The “take” and other provisions of the ESA apply to captive members of listed
4 species as well as to those in the wild. As the FWS long ago explained, the statute “applies to
5 both wild and captive populations of a species,” because “[c]aptive propagation and other uses of
6 captive wildlife can benefit wild populations” by (1) “[i]ncreasing the likelihood that captive
7 breeding populations will be established as a source of known genetic stock to bolster or
8 replenish populations in the wild;” (2) “[r]educing the need to take stock from the wild for
9 scientific or other purposes;” and (3) “[p]roviding opportunities for research that can lead to
10 improved management of wild populations.” 44 Fed. Reg. 20044-45 (May 23, 1979); *see also* 63
11 Fed. Reg. 48634, 48636 (Sept. 11, 1998) (explaining that the term “take” in the ESA was defined
12 by Congress to apply to endangered or threatened wildlife “whether wild or captive”).

13 29. The statute does not allow a wholesale exemption from the prohibitions of the Act
14 for all captive members of a listed species. Rather, Section 9 provides that, while certain
15 prohibitions that otherwise apply to listed species—such as a ban on their import and export—do
16 not apply to wildlife “held in captivity . . . on December 28, 1973 [the date the ESA was
17 enacted],” 16 U.S.C. § 1538(b), this exemption does not apply to other enumerated prohibitions,
18 including the prohibition on the “take” of such species. *Id.* § 1538(a)(1)(B).

19 30. In addition, even the limited exception for wildlife held in captivity when the
20 statute was enacted in 1973 does not apply where the holding of such wildlife is done in “the
21 course of a commercial activity.” *Id.* § 1538(b)(1).

22 31. In making listing decisions under Section 4 of the statute, 16 U.S.C. § 1533, the
23 agencies are to consider only “the best available scientific and commercial data available”

1 concerning the biological status of the species, *id.* § 1533(b)(1)(A), and are precluded from
2 taking into account any economic considerations, such as whether listing the species would
3 cause the holder of any member of the species any economic harm. *Id.*; S. Rep. No. 418, 97th
4 Cong., 2d Sess. 12 (1982).

5
6 **B. NMFS's Unlawful Decision to Exclude the Captive Members from**
7 **the Listing of the Southern Resident Killer Whale Population**

8 32. On November 18, 2005, NMFS issued a final rule listing as endangered the
9 Southern Resident killer whale population, which the agency found to be a distinct population
10 segment of orcas in danger of extinction. 70 Fed. Reg. 69903 (Nov. 18, 2005). Among the
11 reasons provided by the agency for the listing decision was that “[t]he capture of killer whales
12 for public display during the 1970s likely depressed their population size and altered the
13 population characteristics sufficiently to severely affect their reproduction and persistence.” *Id.*
14 at 69908.

15
16 33. The Southern Resident killer whale population consists of three pods—or
17 families—the “J pod,” “K pod,” and “L pod.” *Id.* at 69905. Their range during the spring,
18 summer, and fall includes the inland waterways of Puget Sound, Strait of Juan de Fuca, and
19 Southern Georgia Strait. *Id.*

20
21 34. Lolita was a member of the L pod when she was captured in 1970 for public
22 display and exhibition.

23
24 35. MSQ is a for-profit corporation. It charges the public admission to see Lolita
25 perform tricks.

26
27 36. Upon information and belief, over the years, MSQ has made tens of millions of
28 dollars from displaying Lolita to the public.

1 37. Orcas can live to be 80-90 years in the wild.

2 38. Lolita has family members who are still living in the wild.

3 39. When NMFS made its final decision to list the Southern Resident killer whale
4 population as endangered, it excluded from the listing “[r]esident killer whales placed in
5 captivity prior to listing or their captive born progeny.” 70 Fed. at 69912; 50 C.F.R. § 244.01(b).
6

7 40. In its final listing decision, NMFS provided no explanation for its decision to
8 exclude all of the captive members of the Southern Resident killer whale population from the
9 listing of that population as endangered.

10 41. Because of its final listing decision, NMFS has excluded Lolita from the
11 protections of the ESA, thereby allowing her to be kept in conditions that harm and harass her,
12 and that would otherwise be prohibited under the “take” prohibition of the ESA, 16 U.S.C. §
13 1538(a), including, but not limited to, being kept in an inadequate tank, without companions of
14 her own species or adequate protection from the sun.
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17 **PLAINTIFFS’ CLAIMS FOR RELIEF**

18 **Violations of the Administrative Procedure Act**

19 42. NMFS’s decision to exclude from the list of endangered species the captive
20 members of the Southern Resident killer whale population, without any explanation, was
21 arbitrary and capricious, an abuse of discretion, and not in accordance with law, within the
22 meaning of the APA, 5 U.S.C. § 706(2).
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24 43. NMFS’s decision to exclude from the list of endangered species the captive
25 members of the Southern Resident killer whale population, and thereby to deny such wildlife all
26 of the protections of the ESA, including the prohibition against the “take” of an endangered
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1 species, was arbitrary and capricious, an abuse of discretion, and in violation of Section 9 of the
2 ESA, 16 U.S.C. § 1538(b)(1), and hence violates the APA.

3 44. NMFS's decision to exclude from the list of endangered species the captive
4 members of the Southern Resident killer whale population, regardless of whether such wildlife is
5 used in the course of a commercial activity, was arbitrary and capricious, an abuse of discretion,
6 and in violation of Section 9 of the ESA, 16 U.S.C. § 1538(b)(1), and hence violates the APA, 5
7 U.S.C. § 706(2).
8

9 **WHEREFORE**, Plaintiffs pray that this Court enter an order:
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11 1. Declaring that Defendants' decision to exclude from the list of endangered
12 species the captive members of the Southern Resident killer whale population was arbitrary and
13 capricious, an abuse of discretion, and not in accordance with law;

14 2. Setting aside that part of Defendants' final listing decision, 50 C.F.R. §
15 244.101(b), that excludes from the list of endangered species the captive members of the
16 Southern Resident killer whale population;

17 3. Granting Plaintiffs their attorneys' fees and costs associated with bringing this
18 action; and
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20 4. Granting Plaintiffs such further relief as may be appropriate.
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22 **RESPECTFULLY SUBMITTED** this 17th day of November, 2011.
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**Admission pro hac vice pending*