

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHELBY PROIE *et al.*,

Plaintiffs-Appellants,

v.

NATIONAL MARINE FISHERIES
SERVICE, *et al.*,

Defendants-Appellees

and

MARINE EXHIBITION CORP.,

Intervenor-Defendant-
Appellee.

No. 12-35433

D.C. No. 3:11-cv-05955-BHS
Western District of Washington

JOINT MOTION TO HOLD APPEAL IN ABEYANCE
PURSUANT TO SETTLEMENT

Plaintiffs-Appellants Shelby Proie et al. (“Plaintiffs”), Defendants-Appellees the National Marine Fisheries Service (“NMFS”) et al., and Intervenor-Defendant-Appellee Marine Exhibition Corporation, doing business as the Miami Seaquarium (“Miami Seaquarium”), jointly move this Court to hold the pending appeal in abeyance in accordance with the terms of the attached Settlement Agreement (the “Settlement”) negotiated by the parties in consultation with the Circuit Mediator. Under the Settlement, the parties agree to hold the appeal in abeyance pending

administrative review of a petition to be filed by Plaintiffs with NMFS. *See* Settlement, ¶ 7. If NMFS renders a final decision on the petition not later than 12 months after the agency's receipt of the petition, the parties will jointly move for voluntary dismissal under Fed. R. App. P. 42(b). *See* Settlement, ¶¶ 9-12. For the forgoing reasons, the parties jointly ask this Court to hold the appeal in abeyance pending the administrative proceedings contemplated in the Settlement.

Respectfully submitted,

For Plaintiffs Shelby Proie, Karen Munro, Patricia Sykes, Animal Legal Defense Fund, and People for the Ethical Treatment of Animals

s/ Katherine Anne Meyer

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**For Plaintiff
Animal Legal Defense Fund**

s/ Ravinder Sandhu

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For Defendants NMFS et al.

s/ John L. Smeltzer

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**For Intervenor-Defendant
Miami Seaquarium**

s/ James H. Lister

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SETTLEMENT AGREEMENT

Recitals

1. The parties to this Settlement Agreement ("Settlement") are:
 - Plaintiffs-Appellants Shelby Proie, Karen Munro, Patricia Sykes, the Animal Legal Defense Fund, and People for the Ethical Treatment of Animals, Inc., (collectively, "Plaintiffs"),
 - Defendants-Appellees the National Marine Fisheries Service ("NMFS"), Samuel D. Rauch, III in his official capacity as Assistant

Administrator for Fisheries of the National Marine Fisheries Service, and Rebecca Blank¹ in her official capacity as Acting Secretary of the Department of Commerce (collectively, “NMFS”), and

- Intervenor-Defendant-Appellee Marine Exhibition Corporation, doing business as the Miami Seaquarium (hereinafter “Miami Seaquarium”).

2. On November 18, 2005, NMFS issued a final rule under the Endangered Species Act (“ESA”) listing the Southern Resident Killer Whale (“SRKW”) distinct population segment as endangered. 70 Fed. Reg. 69,903 (Nov. 18, 2005). The rule excluded individuals “placed in captivity prior to listing or their captive born progeny.” *Id.* at 69,912 (50 C.F.R. § 224.101(b)).

2. On November 17, 2011, Plaintiffs filed an action against NMFS in the District Court for the District of Washington (No. No. 3:11-cv-05955-BHS) to challenge the exclusion of captives from the SRKW listing.

3. The district court granted the Miami Seaquarium’s motion to intervene as defendant.

4. On May 2, 2012, the district court issued a final judgment dismissing the action on procedural grounds.

¹ Rebecca Blank succeeded former Secretary John Bryson and is automatically substituted as a party-defendant. Fed. R. App. P. 43(c)(2).

5. On May 30, the Plaintiffs timely filed a notice of appeal to the Ninth Circuit, docketed as No. 12-35433 (hereinafter, "the Appeal").

6. In addition to and notwithstanding the Appeal, Plaintiffs intend to file a petition under the Administrative Procedure Act (5 U.S.C. § 553(e)) and the Endangered Species Act (16 U.S.C. § 1553(b)(3)(A)) asking NMFS to include captives within the SRKW listing (hereinafter, "the Petition"). The Petition will be limited to the question of whales born into the J, K, and L Pods and in captivity on the date of the SRKW listing and their captive born progeny.

Wherefore, the parties stipulate and agree as follows:

Terms of Settlement

7. Upon the execution of this Settlement, the parties shall jointly move to suspend the briefing schedule and hold the Appeal in abeyance in accordance with the terms of this Settlement. This Settlement may be filed with any motion to hold the Appeal in abeyance.

8. If Plaintiffs file the Petition described in paragraph 6 (*supra*), NMFS will process the Petition in accordance with 16 U.S.C. § 1533(b)(3) and the following terms.

9. If, within ninety (90) days of receiving the Petition, NMFS publishes, in the Federal Register, a final determination that the petitioned action is not

warranted, the Plaintiffs will move to voluntarily dismiss the Appeal in accordance with paragraph 12 of this Settlement and Fed. R. App. P. 42(b).

10. If, within ninety (90) days of receiving the Petition, NMFS publishes in the Federal Register, a determination that the petitioned action may be warranted, NMFS shall commence a review of the status of whales born into the J, K, and L Pods and in captivity on the date of the SRKW listing and their captive born progeny and the Appeal shall remain in abeyance.

11. If, while the Appeal is held in abeyance under paragraph 10 and within twelve (12) months of receiving the Petition, NMFS publishes in the Federal Register:

- A final determination, under 16 U.S.C. § 1533(b)(3)(B)(i), that the petitioned action is not warranted, or
- A final determination, under 16 U.S.C. § 1533(b)(3)(B)(ii), that the petitioned action is warranted and a proposed regulation to implement the petitioned action, or
- A final determination, under 16 U.S.C. § 1533(b)(3)(B)(iii), that the petitioned action is warranted, but that such action is precluded because of the presence of the circumstances set forth in § 1533(b)(3)(B)(iii)(I) and 1533(b)(3)(B)(iii)(II),

Plaintiffs will move to voluntarily dismiss the Appeal in accordance with paragraph 12 of this Settlement and Fed. R. App. P. 42(b).

12. A motion for voluntary dismissal under this Settlement shall be with prejudice as to the pending litigation and without any claim for costs or attorneys' fees. This Settlement may be filed with any dismissal motion.

13. The parties agree to meet and confer on potential modifications to the Settlement upon a showing of good cause.

Reservations

14. Nothing in this Settlement shall be construed to limit Plaintiffs' ability to challenge future action of NMFS, including action contemplated under this Settlement. Plaintiffs remain free to prosecute the Appeal except as otherwise agreed herein. If NMFS does not take action required to trigger voluntary dismissal or continued stay under the terms of paragraphs 9 to 11 of this Settlement, Plaintiffs may take any steps necessary to reinstate a briefing schedule and to pursue any remedies available through the Appeal.

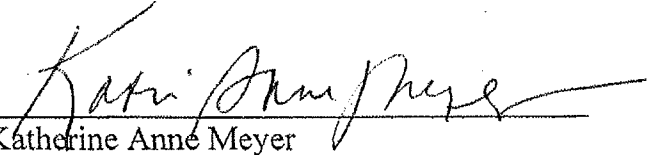
15. Nothing in this Settlement shall be construed to limit any claims or defenses that NMFS or the Miami Seaquarium might assert in this Appeal or any future litigation.

16. Nothing in this Settlement shall be construed as requiring NMFS to take action in contravention of the ESA, APA, or any other law or regulation,

either substantive or procedural, or to limit NMFS' discretion under the ESA and principles of administrative law. No provision of this Agreement shall be interpreted as constituting an obligation by the United States to pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other provision of law.

SO AGREED

**For Plaintiffs Shelby Proie, Karen Munro, Patricia Sykes,
Animal Legal Defense Fund, and People for the Ethical Treatment of
Animals**



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October 10, 2012
Date

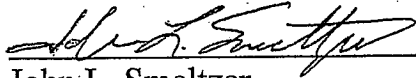
For Plaintiff Animal Legal Defense Fund



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October 11, 2012
Date

For Defendants NMFS et al.

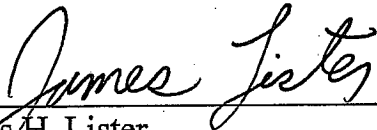


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October 11, 2012

Date