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JAN 18 2012

Steven M. Wise (application for admission *pro hac vice* filed on January 6, 2012)

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 DEPUTY

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

TILIKUM, KATINA, CORKY,  
KASATKA, AND ULISES,  
five orcas,

Plaintiffs,

By their Next Friends, People for the Ethical  
Treatment of Animals, Inc., Richard "Ric"  
O' Barry, Ingrid N. Visser, Ph.D., Howard  
Garrett, Samantha Berg, and Carol Ray,

v.

SEAWORLD PARKS &  
ENTERTAINMENT, INC. AND  
SEAWORLD, LLC,

Defendants.

Case No. 11-CV-2476 JM WMC

(The Honorable Jeffrey T. Miller)

**MEMORANDUM OF AMICUS  
CURIAE CENTER FOR THE  
EXPANSION OF FUNDAMENTAL  
RIGHTS, INC.**

Date: February 6, 2012

Time: 10:30 a.m.

Courtroom: 5190

Action Filed: October 25, 2011

Trial Date: None Set

**I. INTRODUCTION**

The plaintiff orcas ask this Court to determine their rights under the Thirteenth Amendment to the United States Constitution. The defendants challenge the capacity of the plaintiff orcas to sue under Fed. R. Civ. Pro. 17. *Amicus* argues that this court should decline to reach the plaintiffs' Thirteenth Amendment claim until and unless it decides that the plaintiff orcas have the capacity to sue under Fed. R. Civ. Pro. 17. *Amicus* argues that each plaintiff orca's capacity to sue is to be decided under the law of his or her domicile, which is either Iceland or British Columbia.

**II. THIS COURT SHOULD DECIDE THIS CASE ON NONCONSTITUTIONAL GROUNDS**

"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such [questions are] unavoidable." *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944). The United States Supreme Court has long recognized that federal courts should not "decide questions of a constitutional nature unless absolutely necessary to a decision of the case," *Burton v. United States*, 196 U.S. 283, 295 (1905). While Justice Brandeis famously observed that the Supreme Court has developed, "for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Ashwander v. TVA*, 297 U.S. 288, 346 (1936)(Brandeis, J., concurring).

If a case can be decided on either a constitutional or nonconstitutional ground, the Court should decide the case on the nonconstitutional ground, especially if the constitutional issue is novel. *Id.* See also *Camreta v. Greene*, 131 S. Ct. 2020, 2031 (2011); *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450-51 (2008); *Nike, Inc. v. Kasky*, 539 U.S. 654, 663 (2003); *Slack v. McDaniel*, 529 U.S. 473, 485 (2000) (decided on procedural ground); *American Foreign Service Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445-46 (1988); *In re Snyder*, 472 U.S. 634, 642-43 (1985); *Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445, 453 (1985); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 157-58 (1984); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 295 (1982); *Califano v. Yamasaki*, 442 U.S. 682, 692 (1979).

As developed below, this case may be decided on Rule 17 grounds. If that is so, it is not necessary for this Court to reach the issue of whether the plaintiff orcas are protected by the Thirteenth Amendment in reaching its decision, and it should decline to do so.

**III. THE CAPACITY OF THESE PLAINTIFF ORCAS TO SUE IS DETERMINED BY FED. R. CIV. PRO. 17**

**A. Under Rule 17, the Capacity of These Plaintiff Orcas to Sue is Determined by the Law of Their Domiciles**

This suit is brought by five orcas through next friends. *Complaint*, para. #5. Defendants challenge the plaintiff orcas' capacity to sue under Fed. R. Civ. Pro. 17. *Defendants Seaworld Parks & Entertainment, Inc. and Sea World LLC's Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss the Complaint*, at 23 ("Seaworld Memorandum").

They raise two interrelated issues. First, do the plaintiffs have the capacity to sue under Rule 17(b)(1)? Second, are the plaintiffs “incompetent person(s)” under Rule 17(c), and therefore under Rule 17(b)(1)?

### 1. Fed. R. Civ. Pro. 17(b)

Capacity to sue is a threshold matter. *Estate of Garcia-Vasquez v. County of San Diego*, 2008 WL 4183913, at \*4 (S.D. Cal. 2008). See *Weissman v. Weiner*, 12 F. 3d 84, 85-85 (7<sup>th</sup> Cir. 1993)(trial court may raise issue *sua sponte*). Fed. R. Civ. Pro. 17(b)(1) provides that “for an individual who is not acting in a representative capacity,” as is the case with each plaintiff orca, the “capacity to sue or be sued is determined ... by the law of the individual’s domicile.”<sup>1</sup> “While (Rule 17(b)) generally addresses the capacity of corporations, partnerships, and other business entities to litigate, there is no indication that it does not apply to other non-human entities or forms of life.” *Citizens to End Animal Suffering and Exploitation v. The New England Aquarium*, 836 F. Supp. 45, 48 (D. Mass. 1993)(applying Fed. R. Civ. Pro. 17(b) to a dolphin).<sup>2</sup>

If a plaintiff orca is competent, the legal determination is straightforward: this court first determines that orca’s domicile, then decide whether he or she possesses the capacity to sue

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<sup>1</sup>“Individual” means “party.” See *Fong Sik Leung v. Dulles*, 226 F.2d 74, 81 (9th Cir. 1955)(in its “broadest meaning the word ‘party’ includes one concerned with, conducting, or taking part in any matter or proceeding, whether he is named or participates as a formal party or not”); *Nicely v. Wyeth, Inc.*, 2011 WL 2462060, at \*5 (E.D. Mo. 2011)(“capacity to be sued ... is governed by law of the party’s domicile”); *Brandl v. Ace USA*, 2011 WL 129422, at \*8 (E.D. Pa. 2011)(“ Rule 17(b) of the Federal Rules of Civil Procedure sets the standard for a party’s capacity to be sued”); *Zimmerman v. Nolker*, 2008 WL 5432286, at \*4 (W.D. Mo. 2008); *Richards v. Duke Univ.*, 166 Fed. Appx. 595, 598 (3d Cir. 2006); *Fabricius v. Maricopa County*, 2008 WL 2001264, at \*3 (D. Ariz. 2008); *Masood v. Saleemi*, 2007 WL 2069853, at \*3 (W.D. Wash. 2007).

<sup>2</sup>Wise was plaintiff’s counsel nineteen years ago in the *Citizens to End Animal Suffering and Exploitation* case.

under the law of his or her domicile. The conclusion could differ depending upon the law of each orca's domicile.

## 2. Fed. R. Civ. Pro. 17(c)

Defendants argue that the plaintiff orcas may not litigate through next friends under Fed. R. Civ. Pro. 17(c)(2), as this subsection applies only to a "minor or incompetent person." "Orcas," the defendants simply assert, "are not persons." *SeaWorld Memorandum, supra* at 23. "Not persons" within the meaning of the law of what jurisdiction, the Defendants do not say. But that must be determined.

There is no inherent reason why an orca cannot be a "person" within the meaning of Rule 17(c). Confronted with the related legal issue of standing, the Ninth Circuit Court of Appeals Court stated that Article III does not compel the conclusion that a statutorily authorized suit in the name of a nonhuman animal is not a "case or controversy." *Cetacean Community v. Bush*, 386 F. 3d 1169, 1175 (9<sup>th</sup> Cir. 2004)("As commentators have observed, nothing in the text of Article III explicitly limits the ability to bring a claim in federal court to humans. See U.S. Const. art. III; see also Cass R. Sunstein, *Standing for Animals (With Notes on Animal Rights)*, 47 UCLA L. REV. 1333 (2000)(arguing that Congress could grant standing to animals, but has not); Katherine A. Burke, *Can We Stand For It? Amending the Endangered Species Act with an Animal-Suit Provision*, 75 U. COLO. L. REV. 633 (2004)(same)").

"Personhood" is perhaps law's most protean term. "The objects of dominion or property are things, as contradistinguished from persons." 2 William Blackstone, *Commentaries on the Laws of England* \*16 (1765-1769). "The technical legal meaning of a 'person' is a subject of

legal rights and duties.” John Chipman Gray, *The Nature and Sources of the Law* 27 (Columbia University Press 1909). In 1997, the Louisiana Supreme Court, noting that the state's legislature had characterized a fetus born dead as “never to have existed as a person, except for purposes of actions resulting from its wrongful death” correctly stated that this “classification of ‘person’ is made solely for the purpose of facilitating determinations about the attachment of legal rights and duties. ‘Person’ is a term of art ....” *Wartelle v. Womens' & Children's Hospital*, 704 So. 2d 778, 780-81 (La. 1997).

Personhood is not a biological concept and it is independent of being human. *See Ex Parte Boylston*, 33 S.C.L. 41, 43 (Ct. of App. of Law of S.C. 1847); *Jarman v. Patterson*, 23 Ky. 644, 645-46 (1828)(human slaves' personhood has nothing to do with their being human). A Hindu idol was held by a colonial Indian Court to be a person with the capacity to sue, *Pramath Nath Mullick v. Pradyunna Nath Mullick*, 52 Indian Appeals 245, 264 (1925). As recently as 2000, the Indian Supreme Court held that the Sri Guru Granth Sahib, the sacred text of Sikhism. *Shiromani Gurdwara Parbandhak Committee Amritsar v. Som Nath Dass*, had the capacity to sue and be sued, A.I.R. 2000 S.C. 421.

An entity may be a legal person for only some purposes. *Summerfield v. Superior Court, Maricopa County*, 698 P.2d 712, 723 (Ariz. 1985)(*en banc*); *O'Grady v. Brown*, 654 S.W.2d 904, 909 (Mo. 1983)(*en banc*). Unborn humans have been characterized as persons within the meaning of the Due Process Clause of a state constitution, *Mallison v. Pomeroy*, 291 P.2d 225, 228 (Ore. 1955), but not of the United States Constitution. *Roe v. Wade*, 410 U.S. 113, 158 (1973). Human unborn may be persons within the meaning of one state's wrongful death statute, *Stidam v. Ashmore*, 167 N.E.2d 106 (Ohio Ct. App. 1959), but not within the meaning of that same state's vehicular homicide statute. *State v. Dickinson*, 28 Ohio St. 2d 65, 69-71, 275 N.E.2d

599, 602 (Ohio 1971). They may be persons in equity, *Wallis v. Hodson*, 26 Eng. Rep. 472, 473 (Ch. 1740), but not common law. *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884). Corporations have been held to be legal persons within the meaning of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, *Smyth v. Ames*, 169 U.S. 466, 522 (1898), but not under the Fifth Amendment's Self-Incrimination Clause. *Bellis v. United States*, 417 U.S. 85 (1974). In short, the struggles over the personhood of such entities as human fetuses, African-American slaves, and corporations have not been contests over whether they are human, but whether they are the kinds of entities that ought to have legal rights, and therefore inherent value under civil law and, if so, what rights, including the capacity to sue, they should have. See generally David Fagundes, Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARVARD LAW REVIEW 1745 (2001).

Rule 17 makes clear that the answer both to whether a plaintiff has the capacity to sue and whether that plaintiff is an incompetent person is to be found in the law of his or her domicile. 6A Wright, Miller, Kane, and Marcus, *Federal Practice and Procedure*, sec. 1570 (2011). See also *Ferrelli v. River Manor Health Care Center*, 323 F.3d 196, 203 (2nd Cir. 2003); *Thomas v. Humfield*, 916 F.2d 1032, 1034 (5<sup>th</sup> Cir. 1990). In carrying out this analysis, this Court should be careful that its "power of appointment under Rule 17(c)(2) should not be used as a vehicle for circumventing the mandate in Rule 17(b) to employ state law to determine capacity in specified contexts." Wright, Miller, Kane, and Marcus, *supra* at sec. 1570 (citing *Chrissy F. by Medley v. Mississippi Department of Public Welfare*, 883 F.2d 25, 27 (5<sup>th</sup> Cir. 1989)); see also *Brimhall v. Simmons*, 338 F.2d 702, 706 (6th Cir. 1964); *Citizens to End Animal Suffering and Exploitation, supra* at 48 (court sought to determine dolphin's domicile); *Castillo-Ramirez v. County of Sonoma*, 2010 WL 1460142, 1 (N.D. Cal. 2010)("[i]n determining whether

an unrepresented minor may bring a civil action, courts normally look to both Rule 17(b) and 17(c)”) (citing *Johns v. County of San Diego*, 114 F.3d 874, 877-78 (9th Cir.1997)) (emphasis added).

Orcas are potential legal persons under Rule 17(c). Whether they are incompetent persons depends upon the law of their domiciles. “No universally recognized measure determines a civil litigant's competency. *Thomas v. Humfield*, 916 F.2d 1032, 1034 (5<sup>th</sup> Cir. 1990). When determining competency under Rule 17(c), courts have followed Rule 17(b)'s direction to apply the law of the party's domicile. *See e.g. Scannavino v. Florida Dept. of Corrections*, 242 F.R.D. 662, 663 (M.D. Fla. 2007) (“Although Rule 17(c) provides no standard for determining a party's competency, Rule 17(b) states that the capacity of a party to sue or be sued ‘shall be determined by the law of the party's domicile.’”); *Richards v. Duke University*, 166 Fed. Appx. 595, 598 (3<sup>rd</sup> Cir. 2006) (same).

The domicile of any claimed next friend is irrelevant. Because these plaintiff orcas bring this action by next friends and not by duly authorized representatives, their capacities to sue are determined by their domiciles and not the domiciles of their claimed next friends. *Masood v. Saleemi*, 309 Fed. Appx. 150, 152 n. 3 (9<sup>th</sup> Cir. 2009) (district court must apply the law of the domicile of the individual and not the claimed representative). The citizenship, for example, of an infant or incompetent, rather than that of his next friend, is generally controlling for the purpose of determining federal jurisdiction. *Ziady v. Curley*, 396 F.2d 873, 874 (4th Cir. 1968) (no dispute that the citizenship of the infant and not of the next friend determines whether diversity jurisdiction exists). *See also Appelt v. Whitty*, 286 F.2d 135, 136 (7th Cir. 1961); *Blumenthal v. Craig*, 81 F.1d 320, 322 (3<sup>rd</sup> Cir. 1897); *Woolridge v. McKenna*, 8 F. 650, 668-69 (C.C.W.D.Tenn.1881).



**B. The domicile of the plaintiff orcas is either Iceland or British Columbia**

The orcas' capacity to sue in this case is governed by the law of their domicile, whether that is Iceland or British Columbia. For purposes of Rule 17(b) the word "domicile" means the place where a party has a true, fixed, and permanent home. *Stine v. Moore*, 213 F.2d 446, 447 (5th Cir. 1954). "Domicile" is one's permanent home, where one resides with intention to remain. *In re Donald*, 328 B.R. 192, 202 (B.A.P. 9th Cir. 2005). Domicile is "premised upon intent." *Id.* at 196. When a party's domicile is in doubt, "question is usually whether the individual had the requisite subjective intent." *Id.* at 203.

"A domicile once existing continues until another is acquired. ... Where a change of domicile is alleged, the burden of proof rests upon the party making the allegation." *Desmare v. U.S.*, 93 U.S. 605, 610 (1877). Since domicile is a voluntary status, a forcible change in a party's state of residence does not alter his domicile. "A prisoner forcibly removed from the state where he has been living and wants to continue to live and to which he intends to return when he is released from prison has no significant contact with or commitment to the state of his imprisonment, a strictly transient and undesired abode," *Dakuras v. Edwards*, 312 F. 3d 256, 258 (7<sup>th</sup> Cir. 2022). *See e.g., Johnson v. Corrections Corp. of America*, 26 Fed. Appx. 386, 388 (6<sup>th</sup> Cir. 2001)(preincarceration domicile of a prisoner remains unchanged in prison); *Denlinger v. Brennan*, 87 F.3d 214, 216 (7th Cir. 1996)(same); *Cloyce v. Macy's Dept. Store*, 2006 WL 983931, at \*2 (S.D.N.Y. 2006)("it is 'well established' that a prisoner 'retains his preincarceration domicile,' and the Court must therefore look to that state of domicile")(quoting *Poucher v. Intercounty Appliance Corp.*, 336 F. Supp. 2d 251, 253 (E.D.N.Y. 2004)). Moreover,

a party who is otherwise incompetent to conduct his or her own affairs is presumed to be incapable of forming the intention necessary to change domicile. 13E Wright, Miller, Kane, and Marcus, *Federal Practice and Procedure*, sec. 3616 (2011). See also *Coppedge v. Clinton*, 72 F.2d 531, 533 (10th Cir. 1934). A mental incompetent's last-acquired domicile prior to the onset of the incapacity is usually preserved until that party has the capacity to make a reasoned decision as to where he desires to live. *Bethesda Lutheran Homes and Services, Inc. v. Leean*, 122 F. 3d 443, 449 (7<sup>th</sup> Cir. 1997); *Long v. Sasser*, 91 F.3d 645, 647 (4th Cir. 1996).

The domiciles of the plaintiff orcas in this case are Iceland or British Columbia, as that is where the Complaint alleges these orcas were domiciled before they were captured and forcibly removed. Plaintiff Tilikum, it is alleged, "was taken from his home and family as a two-year-old baby off the coast of Iceland in November 1983." *Complaint*, para. 32. In October 1978, "two-year-old baby Plaintiff Katina and her one-year-old podmate, Plaintiff Kasatka, were captured by orca hunters off the coast of Iceland." *Id.* at ¶ 47. Plaintiff Corky "was seized from her pod-known as the A5 pod-off of Vancouver, British Columbia in 1969 as a three-year-old baby." *Id.* at ¶56. Ulises "was a three-year-old baby when he was seized off the coast of Iceland in November 1980." *Id.* at ¶63. The plaintiff orcas retain their pre-captivity domicile of Iceland (for four of the plaintiff orcas) and British Columbia (for one of the plaintiff orcas) and this court must look to the laws of those jurisdictions in order to determine capacity to sue.

#### **IV. Conclusion**

The answers to the questions of whether the plaintiff orcas have the capacity to sue under Rule 17(b)(1) and whether each plaintiff orca is an incompetent person under Rule 17(c) are both

determined by the law of their domiciles before they were captured and forcibly removed. For Tilikum, Katina, Kasatka, and Ulises, this is the law of Iceland. For Corky, this is the law of British Columbia.

DATED: January 17, 2012

Respectfully submitted:

s/ Steven M. Wise

Steven M. Wise (application for admission *pro hac vice*  
filed on January 6, 2012)

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing motion was served upon all counsel of record by placing a copy of the same in the United States Mail, postage prepaid, and sent to their last known address as follows:

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DATED: January 17, 2012

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