

ANIMAL LEGAL DEFENSE FUND FELLOWSHIP PLAN

I. Introduction

As a University of Chicago Public Interest Law Fellow, I will develop a marine mammal docket at the Animal Legal Defense Fund (“ALDF”). This fellowship lies at the nexus between my personal passions and ALDF’s long-term goals. For more than thirty years, ALDF has used the legal system to protect and improve the lives of animals. A small firm with a large footprint, ALDF places a premium on strategic impact litigation. Its attorneys study the field to identify pressure points and areas of momentum, pursuing those cases with strong precedential value. While participating in strategic planning sessions this summer, I proposed a number of cases that might create useful precedent while also helping marine mammals. The Chicago Public Interest Law Fellowship will allow me to turn these proposals into reality.

In addition to bringing smart litigation, ALDF increases awareness of animal issues. This part of ALDF’s mission adds an academic flavor to the firm. ALDF attorneys speak at conferences, workshops, and seminars. They publish journal articles and write blog entries. They provide amicus briefs and prepare model legislation. In support of the many Student Animal Legal Defense Fund (“SALDF”) chapters in law schools across the nation, ALDF attorneys judge moot court competitions and supervise student clerks. In 2011, ALDF created a two-year fellowship program to benefit recent graduates. The first two fellows are halfway through their terms. ALDF has secured funding for at least one new fellowship beginning in the fall of 2013.

Although it consists of only three full-time attorneys and the two new fellows, ALDF’s civil litigation department manages an unusually large docket. All cases originate in-house. Most are then litigated pro bono by local firms. ALDF attorneys retain especially sensitive cases and

any cases that fail to find pro bono sponsorship. They also commonly litigate cases brought within California.

Carter Dillard, ALDF's Director of Litigation, oversees the pro bono program and manages ALDF's attorneys, fellows, and student clerks. Naturally, Mr. Dillard will also supervise my postgraduate fellowship. Early in his career, Mr. Dillard worked for the U.S. Department of Justice, as an Honors Program attorney, and for the U.S. Department of Homeland Security, as a legal advisor. He began litigating animal cases with Compassion Over Killing, where he served as General Counsel, before moving on to the Humane Society of the United States, where he was Director of Farm Animal Litigation. Before coming to ALDF, Mr. Dillard spent two years as a research and teaching fellow at Loyola University New Orleans, College of Law. His combined skills as a litigator and educator make Mr. Dillard an especially gifted supervisor. Mr. Dillard can be reached by email at cdillard@aldf.org, by phone at (707) 795-2533, or by mail at 170 East Cotati Avenue, Cotati, CA, 94931.

Although Mr. Dillard will be my immediate supervisor, the hierarchy at ALDF is far from linear. All pleadings are reviewed by each attorney and fellow. Strategies are developed—and often vigorously debated—at weekly litigation team meetings. As a result, I will also receive significant input from both Joyce Tischler, the visionary who founded ALDF, and Matthew Liebman, who clerked for the Honorable Warren J. Ferguson of the United States Court of Appeals for the Ninth Circuit after graduating from Stanford Law School. In short, this fellowship opportunity will allow me to work on behalf of the animals I love, in an academic atmosphere of mutual respect, learning from giants in my field, and litigating potentially groundbreaking cases.

II. Project Overview

During my fellowship with ALDF, I will develop and litigate a marine mammal docket designed to create and exploit favorable precedent. This docket will concentrate on the captive orca industry, attacking it from four angles. First, I will use the Endangered Species Act (“ESA”) to assist a captive orca named Lolita. Second, I will demonstrate that Lolita and another orca are kept in conditions that violate the Animal Welfare Act (“AWA”). In conjunction with these cases, I will file a petition for rulemaking, urging the United States Department of Agriculture (“USDA”) to update the regulations that define the acceptable conditions of confinement. I will also develop a cause of action using the Convention on the International Trade of Endangered Species (“CITES”) to challenge the anticipated importation of an orca held in Spain. Finally, I will capitalize upon the recent Occupational Health and Safety Administration (“OSHA”) decision, which found orca training is unacceptably dangerous, to argue that the entire display industry should be shut down.

In each of these cases, I will test ALDF’s theory that psychological suffering could form a basis for standing. I will further develop this portion of my project into an academic article that examines a number of novel standing theories. For the legislative component of my project, I will draft model legislation to inspire states to ban captive breeding and other inhumane practices. Finally, to best develop my practical skills, I will litigate at least one local cruelty case.

III. Statement of Need

Half of the world’s forty-three captive orcas are held in American aquariums. Capable of travelling up to one hundred miles a day in the wild, orcas may legally be kept in tanks that are only forty-eight feet wide. These highly social creatures are frequently moved between parks to

facilitate captive breeding. More than half of all captive orcas have journeyed at least 2,000 miles by air. Some were up to nine months pregnant at the time. Miscarriages are common. Pregnancy is induced prematurely and the captive gene pool is shallow. While wild orcas can live into their nineties, captive orcas generally do not survive past their early twenties. As a result, these forty-three existing orcas represent just sixteen percent of the total number of orcas held in captivity over the last fifty years.

Although the cetacean display industry is incredibly wasteful and inhumane, it has largely escaped scrutiny. Litigating orca cases is a luxury that most firms cannot afford. Instead, animal protection organizations focus largely on farmed animals, wildlife, or companion animal cases, as these issues are pressing and appealing to mainstream donors. Few can justify diverting precious resources to improve the lives of forty-three captive orcas when nine billion animals perish on factory farms each year.

ALDF recognizes that captive cetaceans and farmed animals suffer similar harms. Both endure intensive confinement and reckless breeding. Both suffer solely for the sake of profit. Successful litigation on behalf of one could serve as useful precedent for the other. Even without such precedent, ALDF considers the cause worth fighting, because it is a battle that might actually be won. Dedicated to ending animal cruelty of all sorts, ALDF welcomes the opportunity to pluck this low-lying fruit.

Although willing to adopt a marine mammal docket, ALDF lacks the manpower and in-house expertise to properly execute the project. With my extensive research in the area, I can deliver the expertise. With the generous funding of the Chicago Public Interest Law Fellowship, I can also deliver the manpower.

IV. Project Goals

My project goals fall into four categories: (1) litigation, (2) legislation, (3) academic advocacy, and (4) skills development. Although my primary focus is on the first category, developing litigation that directly benefits captive orcas, given the delay inherent in administrative litigation, I expect to spend the majority of my time working within the other three categories.

A. Litigation Goals

My litigation goals include developing five cases, using four different causes of action. First, I will develop the follow up litigation to Proie v. National Marine Fisheries Service, the case I discovered this summer. In Proie, we argue that the exclusion of captive members of the Southern Resident orca population from protection under the ESA was arbitrary and capricious. Written as a blanket exception, this decision affected only one animal, Lolita, who is kept in the smallest orca tank in North America. If our suit is successful, the government will either extend ESA protections or explain why they excluded her. If she remains excluded, we will file a petition for rulemaking to encourage her listing or we will bring a lawsuit alleging that the government's reasoning remains unsound. In anticipation of our ultimate success, I will develop the case that argues that the conditions of Lolita's confinement violate the ESA's Section 9 prohibition against taking protected animals. This case will build upon a 2009 decision, which stated clearly for the first time that this provision applies to captive animals.

Lolita's ESA case may be slow to ripen. In the meanwhile, I will develop a case arguing that the conditions of her confinement violate the regulations promulgated under the AWA. Because ALDF is pursuing the Lolita case in conjunction with the People for the Ethical

Treatment of Animals (“PETA”), our shared pro bono attorneys will likely continue to handle the actual litigation. Once I develop the case, I will serve as an advisor and case manager.

I also plan to bring a second AWA case, on behalf of Shouka, the only other solitary orca in America. Because Shouka is held in California, I will be able to directly investigate and document the conditions of her confinement, identifying AWA violations. Since the case will be brand new, I will also need to locate and recruit at least one individual plaintiff to enhance ALDF’s organizational standing. Given its similarities with our other AWA claim, it is likely that the actual litigation will be performed by the same pro bono firm working on Lolita’s case.

My fourth litigation goal involves developing a cause of action under CITES, hoping to prevent the importation of Morgan, an orca held in Spain. My initial consultation with a CITES expert suggests this case will be difficult to make. In Morgan’s case, I am comfortable with defeat, as she suffers more in Spain than she would in America. Because no one knows when SeaWorld will move to transfer Morgan, I will approach this case in two ways. First, I will write a memo identifying the strongest claim available to argue that a shipment is inhumane in violation of CITES. Next, I will write a model brief for use in other CITES case. The memo and the brief will each be written to apply also to the shipment of primates for research.

Finally, I will develop a case on behalf of Tilikum, the orca who has been deprived of all physical contact since the death of his trainer in 2010. Because Tilikum’s saga has garnered significant media attention, it is likely that attorneys with another animal protection organization have already looked into his case. I will begin by networking with other professionals to identify opportunities for collaboration. I will then look to capitalize upon the recent fine levied against SeaWorld by the Occupational Health and Safety Administration (“OSHA”). If I can show that

orcas are too dangerous to train while simultaneously showing that the failure to train them is cruel, I may be able to establish that the entire industry is inhumane.

B. Legislative Goals

After I lay the foundation for my lawsuits, I will address my three legislative goals. First, I will file a petition for rulemaking urging the USDA to update the regulations that define the acceptable conditions of confinements for cetaceans. Before filing, I will consult with experts to identify acceptable alternative standards. Here I will use my relationship with the Marine Mammal Center, the world's largest marine mammal hospital, to gain access to leaders in the field, including former TMMC veterinarian, Dr. Marty Haulena, who now works with captive cetaceans at the Vancouver Aquarium, and current TMMC senior scientist, Dr. Frances Gulland, who also serves on the U.S. Marine Mammal Commission.

At the same time, I will draft model legislation opposing various issues including captive breeding; cetacean shipment, particularly for the purpose of captive breeding; dolphinariums, generally; and swim-with-the-dolphin programs specifically. Drafting these bills with California, Texas, and Florida in mind, I will also identify a smaller state in which to begin my campaign.

C. Academic Goals

While I will incorporate ALDF's theory that psychological suffering forms a basis for standing into all of my aforementioned lawsuits, I will primarily approach the standing issue as an academic project. I will identify other cases where psychological suffering might be pleaded, and I will propose other novel forms of standing that might apply to suffering animals generally. After writing and editing this article, I will submit it for publication with one of the four existing journals of animal law.

D. Skills Development

Finally, to fully develop my professional skills, I will accept and personally litigate a standard cruelty case. Most likely this case will involve a violation of California's Hayden Law, which was passed to increase accountability within the state's animal shelters.

In the alternative, I will lobby for the opportunity to hone my skills while bringing a case against the Morro Bay Aquarium. Although the Aquarium does not confine cetaceans, it keeps sea lions and harbor seals in deplorable, crowded conditions. For decades, local officials have turned a blind eye to the Aquarium's blatant violation of federal standards. As a former neighbor of this facility, I am haunted by the incessant barking of the sea lions trapped within. While I will understand if this is not the right starter case for my career, I will definitely begin building the case against the Aquarium in my spare time.

V. Project Timeline

Months 1 – 3

- Research ESA, AWA cases.
- Identify others who may be developing the Tilikum case.
- Research psychological suffering as a basis for standing.
- Prepare preliminary filings for cruelty case.

Months 4 – 6

- Identify plaintiffs for AWA and Tilikum cases.
- Research CITES case.
- Begin writing standing article.
- Draft model legislation.

- Begin research on improved AWA regulations.
- Defend against motion to dismiss in cruelty case.

Months 7 – 9

- File ESA and AWA cases.
- Draft petition for rulemaking.
- Draft CITES model brief.
- Finish standing article.
- Distribute model legislation to target states.
- Continue to litigate cruelty case.

Months 10 – 12

- File petition for rulemaking.
- Defend ESA and AWA cases against motion to dismiss.
- Submit standing article for publication.
- Write transitional memos to hand off cases if I have not secured the ALDF fellowship.

VI. Anticipated Obstacles and Responses

I expect to encounter two common obstacles when I litigate my marine mammal docket. In particular, I am concerned that my cases may be dismissed for lack of standing. Although I will incorporate psychological suffering as a novel basis for standing, I will also present plaintiffs who demonstrate traditional injuries in fact. My first obstacle, then, will be to identify these plaintiffs. Luckily, the ALDF communications department is poised to help me overcome this obstacle. With over 100,000 members nationwide, ALDF frequently recruits plaintiffs

through member outreach and social media. My role will be interviewing interested parties and securing their cooperation.

While I am confident I will find ALDF members who suffer classic aesthetic harms, I am also troubled by the question of redressability. Because Shouka and Tilikum are both captive born, they will never truly be free. This means that I can only improve the conditions of their captivity, a reality that may leave my plaintiffs dissatisfied, and thus technically still injured. To this end, I hope to find plaintiffs that already participate in the captive cetacean industry. Not only are these people more likely to have strong bonds with these individual orcas, but they are more likely to recognize that any improvement is worthwhile. Luckily, redressability is unlikely to pose a significant hurdle in Lolita's case, since she was born in the wild to a pod that is studied extensively. Activists have already drafted a plan for her release.

Even with the perfect plaintiff, I will face the significant hurdles of administrative delay and agency discretion. There is little I can do about either. In the face of delay, I will draft anticipatory pleadings and memos explaining alternative approaches. In the face of discretion, I will argue vigorously that the statute is not ambiguous, hoping to end the matter at Chevron's step one. Ultimately, my best defense to delay and discretion is to secure a full-time position with ALDF. This way, I will certainly be around to see my cases to fruition. To this end, I will do everything in my power to secure the 2013 fellowship.

VII. Conclusion

Driven to law school by a desire to help marine mammals, I never actually imagined I could make a career out of my passion. Now, as I face the possibility of doing just that, I cannot imagine settling for anything less. My dream can become a reality thanks to the generosity of the University of Chicago Public Interest Fellowship program.