**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**ORLANDO DIVISION**

MARINELAND OF CANADA, INC.,

Plaintiff,

vs. **CASE NO. 6:11-cv-1664-orl-31-KRS**

SEAWORLD PARKS & ENTERTAINMENT LLC,

Defendant.
_____/

**PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**
**AND INCORPORATED MEMORANDUM OF LAW**

Plaintiff Marineland of Canada, Inc. ("Marineland"), pursuant to Federal Rules of Civil Procedure 65(a) and Local Rule 4.06, moves for a preliminary injunction against Defendant SeaWorld Parks & Entertainment LLC ("SeaWorld"), and states:

## I. INTRODUCTION

Marineland moves for a preliminary injunction to prevent SeaWorld from taking custody of Marineland's only male killer whale, "Ikaika" or "Ike." Ike is only one of 42 killer whales in captivity in the world. Six years ago, SeaWorld transferred Ike to Marineland pursuant to a breeding exchange agreement with SeaWorld. The purpose of transferring Ike to Marineland was to breed him when he became old enough. Now that Ike is capable of breeding, SeaWorld has begun its efforts to wrongfully take custody of Ike. Indeed, even SeaWorld's own representative, Brad Andrews, Chief Zoological Officer for SeaWorld, admits that "[t]he very purpose (i.e. breeding and propagation) for which Ikaika was loaned to Marineland under the Breeding Loan Agreement has not been accomplished."

Removing Ike from Marineland would put his health and wellbeing at serious risk. Additionally, separating Ike from his female companion, "Kiska," would put both whales' health and wellbeing in peril. If SeaWorld is permitted to take custody of Ike, Marineland also would suffer a substantial threat of irreparable injury. Ike is a major attraction at his home in Marineland, and he cannot simply be replaced. SeaWorld's actions constitute a violation of the covenant of good faith and fair dealings and a breach of the breeding exchange agreement, as reformed. Accordingly, Marineland moves for a preliminary injunction to maintain the status quo during the pendency of this lawsuit and prevent SeaWorld from taking Ike.

## II. BACKGROUND

### A. Breeding Exchange Agreement

Since the 1970's, Marineland and SeaWorld have had a very close relationship based on mutual trust and respect. (Exhibit A) (Declaration of John Holer at ¶ 4) ("Holer Dec."). During this time, Marineland and SeaWorld engaged in a number of transactions designed to enhance the genetic diversity of the marine mammal population at each institution. *Id.*

The discussion of breeding killer whales at Marineland began as early as May 2001 when Brad Andrews, the Vice President of Zoological Operations at SeaWorld, hosted John Holer, the founder of Marineland, at Busch Gardens in Williamsburg, Virginia. (Holer Dec. at ¶¶ 7-8). Mr. Andrews explained in an affidavit that "[t]he key focus of the discussions with Mr. Holer was the importance of breeding new marine animals, specifically whales, in our respective facilities." (Exhibit B at ¶ 22).

August Busch III, the principal of Busch Entertainment and Anheuser-Busch, which was SeaWorld's parent company at the time, also had several in-person meetings with Mr. Holer about breeding killer whales at Marineland and breeding beluga whales at SeaWorld. (Holer Dec. at ¶¶ 12-15.) In February 2005, Mssrs. Busch and Holer met to discuss the exchange of whales to further their breeding program. *Id*. at ¶ 14. During this meeting, Mr. Busch proposed that to start the breeding exchange process, he would deliver one adult female killer whale to Marineland in exchange for four beluga whales, for the life of the whale, unless the recipient was unable to care for the whale. *Id*. After considering the offer for a few days, Mr. Holer called Mr. Andrews and accepted. *Id*. at ¶ 15.

On March 29, 2005, Keith M. Kasen, the President and Chairman of the Board for Busch Entertainment, memorialized the terms of the breeding exchange agreement. (Holer Dec. at ¶ 16, exhibit B) (Busch Ent. letter, Mar. 29, 2005). In the letter, Mr. Kasen stated that he "was pleased to learn that you have agreed to the Mammal Support and Interchange Agreement that we discussed in Tampa and which is documented below . . . ." Mr. Kasen explained that the parties agreed to "[s]upport breeding and genetic diversity of mammal population for Marineland of Canada, Inc. ('Marineland') and Busch Entertainment Corporation ('BEC')." Mr. Kasen's letter also confirmed that the parties agreed to "[e]xchange[] mammals and offspring ***to be held for life*** and only returned to the donor if the recipient is no longer able to properly maintain the mammals." *Id*. (emphasis added).

**B. Implementation of the Breeding Exchange Agreement**

After Marineland received Mr. Kasen's letter, SeaWorld and Marineland exchanged drafts of what ultimately was executed on September 28, 2005, as the "Mammal Support and

Interchange Agreement" ("Interchange Agreement"). (Exhibit C at ¶ 19, exhibit A) (Declaration of Tracy Stewart) ("Stewart Dec."). During that time period, Mr. Holer and Ms. Stewart had further discussions with Mssrs. Steven Frein (Busch Entertainment's Senior Vice President of Planning and Development), Kasen, and Andrews, who each assured them that the Interchange Agreement was not intended to alter the breeding exchange agreement in any way and that structuring the exchange as a "loan" was necessary to facilitate the requisite governmental approvals and permits. *Id.* at ¶ 19; (Holer Dec. at ¶ 18).

On September 7, 2005, Mssrs. Andrews and Kasen personally visited Marineland to discuss the Interchange Agreement. (Stewart Dec. at ¶ 21.) In the course of their visit, they again confirmed that the Interchange Agreement was intended to memorialize the breeding exchange agreement made between Mssrs. Busch and Holer. *Id.*

On September 28, 2005, the parties executed the Interchange Agreement:

> Marineland of Canada, Inc. ("Marineland") and Busch Entertainment Corporation ("BEC") have agreed to collaborate on a number of on-going projects relating to the care and maintenance of marine mammals and other marine life. The terms and conditions of each agreement will vary, depending on the individual circumstances, but will be guided by the following principles:
>
> Both parties support breeding and genetic diversity of mammal populations at their respective parks;
>
> Both parties intend to maintain long-term care of marine mammal attractions and exhibitions;
>
> Both parties are willing to loan animals to each other for the foregoing purposes, and continue such loans on a regular basis until either party is unable to properly maintain the mammals or requests their return;
>
> . . . .

(Stewart Dec. at exhibit A).

**C. SeaWorld Proposes a Young Male Killer Whale**

Pursuant to the breeding exchange agreement, the parties originally discussed that Marineland would receive an adult female killer whale for the purpose of breeding with Marineland's adult male killer whale named "Kandu." (Stewart Dec. at ¶ 23); (Holer Dec. at ¶ 19). Unfortunately, however, Kandu passed away in December 2005. (Stewart Dec. at ¶ 23); (Holer Dec. at ¶ 19). In March 2006, SeaWorld representatives visited Marineland and proposed that since Marineland no longer had a male killer whale, Marineland should accept a male killer whale to breed with Marineland's adult female killer whales, named "Kiska" and "Nootka." *Id*. at ¶ 23-24; (Holer Dec. at ¶ 19).

Marineland agreed to accept a male killer whale and began examining the health records of male killer whales at SeaWorld's various facilities around the United States. (Stewart Dec. at ¶ 24); (Exhibit D at ¶¶ 14-16) (Declaration of Dr. Lanny Cornell) ("Cornell Dec."). Marineland rejected the first few adult male killer whales that SeaWorld proposed because they were believed to be not sufficiently healthy. (Cornell Dec. at ¶¶ 14-15).

In August 2006, SeaWorld proposed a young, male killer whale, who Marineland also rejected for health reasons. (Stewart Dec. at ¶ 25.) Marineland ultimately agreed to accept Ike, who was only four years old at the time and not yet old enough to breed. *Id*. at ¶ 25; (Holer Dec. at ¶ 20); (Cornell Dec. at ¶ 16-17). Although Marineland wanted an adult male because breeding was paramount to developing its breeding program, Ike was selected because he was in good health and could mature alongside Marineland's young female killer whale named "Athena." (Holer Dec. at ¶ 20). Unfortunately, Athena passed away in March 2009, before Ike ever became capable of breeding. (Stewart Dec. at ¶ 26). Athena's passing

followed the passing of one of Marineland's adult female killer whales, named Nootka. *Id.* Because of this, it was decided that Ike would breed with Kiska. *Id.*

**D. Breeding Loan Agreement**

On November 16, 2006, the parties executed the Breeding Loan Agreement ("BLA"), which confirmed the parties' intention that both parties are "concerned with the preservation and propagation of life." *Id.* at ¶ 28. The BLA was based on a template agreement that SeaWorld has entered into numerous times in the past for breeding purposes. *Id.* at ¶ 27.

Notably, the only significant difference between the standard language in the BLA and the template that SeaWorld normally uses is in paragraph 7 regarding the "YOUNG PRODUCED (PROGENY)" by the whales. The standard SeaWorld breeding loan template provides that "[a]ny viable young produced by such breeding . . . will be shared equally by the Receiving Institution and the Loaning Institution . . . ." (Stewart Dec. at exhibit C, ¶ 7.) In contrast, the BLA executed by Marineland and SeaWorld provides that "[a]ny viable young produced by such breeding shall be owned by the Receiving Institution." (Stewart Dec. at exhibit D, ¶ 7.) This difference was specifically provided in the executed BLA because of the intent of the parties that the whales being traded would begin the breeding program at each respective institution for each type of whale. (Stewart Dec. at ¶ 32.)

SeaWorld representatives already have confirmed in affidavits that the purpose of transferring Ike to Marineland was to breed:

i. Christopher Dold, the Vice President of Veterinary Services for SeaWorld, has explained that "Ikaika was delivered to Marineland with the goal that he would breed with one of two adult female killer whales, named Kiska and Nootka . . . ." (Exhibit E at ¶ 16) (Affidavit of Christopher Dold).

ii. Chuck D. Tompkins, Corporate Curator of Zoological Operations for SeaWorld, explained that the BLA "is a common agreement that Sea World has entered into numerous times in the past for breeding purposes to ensure the continuity and diversification of certain species including killer whales." (Exhibit F at ¶ 17) (Affidavit of Chuck D. Tompkins)

iii. Brad Andrews, Chief Zoological Officer for SeaWorld, explained that "[t]he key focus of the discussions with Mr. Holer was the importance of breeding new marine animals, specifically whales, in our respective facilities. The breeding program, and specifically developing genetic diversity for these breeding programs, is extremely important for zoological facilities like SeaWorld and Marineland, and is one of the primary reasons for cooperation between our facilities and others." (Exhibit B at ¶¶ 22-23.)

**E. Ike Has Only Recently Become Capable of Breeding**

Since Ike arrived at Marineland in 2006, Dr. Cornell has been actively involved in his care and treatment. (Cornell Dec. at ¶ 18.) As Dr. Cornell explains in his declaration, "Ike is just now reaching sexual maturity, appearing to be capable of breeding, as indicated by his blood work and sexual interest in his female companion, Kiska." *Id.* at ¶ 19. "In fact, since approximately February 2011, there has been, for the first time, considerable sexual activity between the two." *Id.* at ¶ 13.

SeaWorld representatives have admitted that the intended purpose of transferring Ike to Marineland has not been achieved, and yet SeaWorld seeks to retake custody of Ike. Mr. Andrews, Chief Zoological Officer for SeaWorld, stated in an affidavit that "[t]he very purpose (i.e. breeding and propagation) for which Ikaika was loaned to Marineland under the Breeding Loan Agreement has not been accomplished." (Exhibit B at ¶ 45).

**F. SeaWorld Undergoes Corporate Change in 2008**

In July 2008, SeaWorld underwent a corporate change in ownership. (Stewart Dec. at ¶ 35-36.) Mr. Busch no longer was the head of SeaWorld. Instead, the new SeaWorld

representatives included Jim Atchison, President and CEO, who replaced Mr. Kasen; Howard Demsky, Corporate Vice-President of Planning and Development; Chuck Tompkins, Corporate Curator of Zoological Operations; and Dr. Christopher Dold, Vice President of Veterinary Services. *Id.* at ¶ 36.

On August 11, 2008, and again in June 2009, Mr. Holer and Ms. Stewart met with the new SeaWorld executives and Mr. Andrews, who also was with the predecessor administration and was key to the agreement between Mssrs. Busch and Holer. *Id.* at ¶ 37. During these meetings, these SeaWorld representatives assured Marineland that nothing would change and it would be "business as usual." *Id.*

**G. SeaWorld Attempts to Frustrate the Purpose of the BLA**

In late 2010, just as Ike became capable of breeding, SeaWorld began its efforts to wrongfully take custody of Ike. On December 1, 2010, SeaWorld sent a letter to Marineland stating that it was giving "Marineland notice that it is terminating the BEC/Marineland Breeding Loan Agreement effective December 31, 2010" and that they wanted to take immediate possession of Ike. (Stewart Dec. at ¶ 39.)

Immediately after receiving SeaWorld's letter, Mr. Holer and Ms. Stewart spoke with Mssrs. Busch and Kasen, both of whom confirmed that their intent in entering the breeding agreement with Marineland was to trade whales for the life of the whale, subject only to the recipient's ability to care for the whale. *Id.* at ¶¶ 40, 42. Mssrs. Busch and Kasen explained this intention to Mr. Atchison, president and CEO of SeaWorld, who asserted that SeaWorld only took steps to obtain custody of Ike because of "health concerns." *Id.* at ¶¶ 41-46. This excuse, however, was inaccurate as Ike was in good health.

On December 7, 2010, Mr. Holer and Ms. Stewart had a conference call with Mr. Atchison. *Id.* at ¶ 44. Mr. Atchison stated that SeaWorld was concerned that Ike was isolated, but when Mr. Holer and Ms. Stewart explained that Ike was not isolated and was actually doing quite well with Kiska, Mr. Atchison stated that he would like to replace Ike with another killer whale. *Id.* Marineland rejected this offer and explained that Ike was only now capable of breeding and that the purpose of the breeding agreement would be frustrated if SeaWorld took custody of Ike. *Id.* Additionally, Mr. Holer and Ms. Stewart explained that SeaWorld could not take Ike because the trade had been for life, subject only to Marineland's ability to care for Ike.

When asked whether his true intention was to replace the adult male killer whale that died three months earlier in SeaWorld's San Diego facility, now that Ike was becoming capable of breeding, Mr. Atchison denied that as the reason. *Id.* at ¶ 45. As it turns out, Mr. Atchison's representation appears to be untrue. SeaWorld recently confirmed that it actually does intend to send Ike to San Diego, where he can replace the male killer whale that died in that facility. *Id.* at ¶ 49.

In contrast to SeaWorld's attempt to take Ike prior to his successful breeding at Marineland, the belugas that Marineland traded for Ike have assisted SeaWorld in the formation of its successful captive-born beluga interaction program. (Holer Dec. at ¶ 23.)

**H. SeaWorld Files an Application in Canadian Court**

On February 22, 2011, SeaWorld filed an "Application" with the Superior Court of Justice in Ontario, Canada. (Exhibit G) ("Application"). In the Application, SeaWorld sought relief only pursuant to the Breeding Loan Agreement. *Id.* at 3. SeaWorld did not rely on

concerns of Ike's wellbeing as an issue or a reason for termination. *Id.* In fact, SeaWorld's position was that the BLA did not require it to give any reason for termination. *Id.* at 5.

In Canada, an "Application" is different from an "Action." (Exhibit H at ¶ 5.) (Declaration of Mark J. Freiman) ("Freiman Dec."). A Canadian Application is a limited procedure in which the only pleading that defines the issue is a Notice of Application, which is delivered by the initiating party, in this case SeaWorld. *Id.* at ¶ 6. Notably, "there is no ability for a Respondent to bring a counterclaim, a cross-claim or third party claim within the proceeding. The only pleading that defines the issues in the proceeding is the notice of application served by the applicant." *Id.*

Additionally, the evidence available on an Application is subject to a number of significant constraints, including the fact that "[t]here is no requirement for documentary production and there is no examination for discovery of the parties." *Id.* at ¶ 15. Moreover, evidence is generally given by way of affidavit with an opportunity for the parties adverse in interest to cross-examine, but the court has no opportunity to evaluate the credibility of the affiants. *Id.* In short, in the limited Application proceedings in Canada, Marineland was not afforded the opportunity to fully pursue its own claims or to even defend itself with all the relevant evidence as it would have been entitled to do in a full Action.

In contrast, in an "Action" in Canada, a defendant is permitted to interpose counterclaims, pleadings are exchanged, and oral and written discovery is available. *Id.* at ¶ 14-15. A court may convert an Application into an Action at the insistence of a party or on its own motion. *Id.* at ¶ 18. In fact, Marineland sought to convert the Application into an Action, but that relief was denied.

By bringing an Application, as opposed to an Action, SeaWorld was able to limit the question presented solely to the language in the BLA. *Id.* at ¶ 6. Indeed, the Canadian Court held that the question presented was "[d]id the Breeding Loan Agreement permit SeaWorld to terminate the agreement?" (Exhibit I) (Superior Court of Justice, July 5, 2011). The Canadian Court ruled that the language of the BLA was clear and unambiguous and that SeaWorld could demand Ike's return without reason. *Id.*; *see also* Exhibit J (Judgment, July 15, 2011). On appeal, the Court affirmed. (Exhibit K) (Appellate Order, Sept. 28, 2011).

Notably absent from any discussion in both Canadian Courts' decisions is any discussion of the claims presented in this action. Also missing is any mention about the wellbeing of Ike or Kiska or the irreparable harm to Marineland that will occur if Ike is taken by SeaWorld. As will be discussed in section IV(a)(1) below, the Canadian court's decision does not control and thus comity does not bar Marineland's claims.

## III. STANDARD OF REVIEW

As previously stated by this Court:

> To obtain a preliminary injunction, a party must clearly establish: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not granted; (3) that the threatened injury to the movant outweighs the harm an injunction may cause the nonmovant (i.e., the balance of the equities tips in the movant's favor); and (4) that granting the injunction is not adverse to the public interest.

*Vacation Club Servs., Inc. v. Rodriguez*, No. 6:10-cv-247-Orl-31GJK, 2010 WL 716497, at *2 (M.D. Fla. Feb. 24, 2010) (citations omitted) (Presnell, J.); *see also* Local Rule 4.05(b)(4). Moreover, although an injunction is "an extraordinary and drastic remedy not to be granted unless the movant clearly establish[es] the 'burden of persuasion' as to each of the . . . prerequisites," "the Court need not find that the 'evidence positively guarantees a final

verdict' in the movant's favor." *Vacation Club*, 2010 WL 716497, at *2 (citation omitted). Indeed, as this Court has explained, at "the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is 'appropriate given the character and objectives of the injunctive proceeding.'" *Id.* (citation omitted). "The decision to grant or deny a preliminary injunction is within the discretion of the district court." *Godwin Pumps of Am., Inc. v. Ramer*, No. 8:11–cv–580–T–24 AEP, 2011 WL 2670191, at *2 (M.D. Fla. July 8, 2011).

Additionally, Federal Rules of Civil Procedure 65(c) requires the movant to post security "in an amount that the court considers proper."

## IV. ANALYSIS

### A. Substantial Likelihood of Success on the Merits

Marineland's complaint raises two counts: breach of the covenant of good faith and fair dealings (Count I), and breach of the Interchange Agreement and BLA (Count II), as reformed. Before discussing the substantial likelihood of success on the merits of both claims, Marineland will address why principles of comity regarding the Canadian proceedings do not apply in this case.

#### 1. The Canadian Proceedings Do Not Control

This Court has explained that "[c]omity is discretionary; it is not a rule of law, but a rule of practice, convenience, and expediency." *Daewoo Motor Am. v. Gen. Motors Corp.*, 315 B.R. 148, 157 (M.D. Fla. 2004) (Presnell, J.). "Analyzing whether comity applies to a foreign judgment bears similarity to analyzing whether *res judicata* applies to a domestic judgment." *Id.* (citation omitted). "Essentially, once the parties have had an opportunity to

present their cases fully and fairly before a court of competent jurisdiction, the results of the litigation process should be final." *Id*. (citation omitted).

Initially, Marineland notes the principle of law that *res judicata* does not bar permissive counterclaims. *Akin v. Pafec Ltd.*, 991 F.2d 1550, 1558 (11th Cir. 1993) ("Because the claims were not compulsory counterclaims, *res judicata* does not apply to these claims.").[1] Accordingly, if *res judicata* does not bar permissive counterclaims, it surely cannot bar counterclaims that are prohibited altogether under local procedure.

Here, Marineland did not have an opportunity to present its case fully and fairly in the Canadian Application proceeding because Marineland was prohibited from raising *any* counterclaims against SeaWorld. Mark J. Freiman is Marineland's expert on Canadian law. Mr. Freiman explains that in a proceeding "commenced by Notice of Application, there is no ability for a Respondent [Marineland] to bring a counterclaim, a cross-claim or third party claim within the proceeding. The only pleading that defines the issues in the proceeding is the notice of application served by the applicant." (Freiman Dec. at ¶ 6.)

Additionally, even under Canadian law, the Canadian decision on an Application would have limited *res judicata* effect. In *Ventas, Inc. v. HCP, Inc.*, 647 F.3d 291, 305 n.7 (6th Cir. 2011), the Sixth Circuit noted that in the context of a Canadian Application, "even if Ontario law so governed, it appears that Ontario law would not give the prior action

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1 *See also Cousins v. Duane St. Assocs.*, 7 F. App'x 85, 2001 WL 327084, at *2 (2d Cir. 2001) ("Only compulsory, and not permissive, counterclaims are subject to *res judicata*."); *Sands v. Reimers*, 50 F.3d 16, (9th Cir. 1995) ("If Reimers's breach of contract claim was a permissive counterclaim in the Virginia action, *res judicata* does not bar the claim in this suit-otherwise the 'permissive' counterclaim would have been effectively compulsory.") (citing *Painter v. Harvey*, 863 F.2d 329, 333 (4th Cir.1988); 6 C. Wright & A. Miller, *Federal Practice & Procedure*, at § 1410 (3d ed. 2011) ("[A]bsent a compulsory counterclaim rule, a pleader is *never* barred by res judicata from suing independently on a claim that he refrained from pleading as a counterclaim in a prior action.") (emphasis added).

preclusive effect." The court cited the plaintiff's Canadian law expert, John W. Morden, former Associate Chief Justice of Ontario, who opined that "[t]he courts of Ontario, and the courts elsewhere in Canada, have been cautious about applying the cause of action estoppel branch of the doctrine of *res judicata* in circumstances in which the prior proceeding was an application . . . rather than an action." *Id.* Similarly, Mr. Freiman opines that "a subsequent action should not be barred by *res judicata* where specific issues in the subsequent proceeding were not argued in the original application or where specific relief sought in a subsequent proceeding was not available in the original application." (Freiman Dec. at ¶ 29.)

In applying *res judicata*, this Court has explained that "there must be identity of: 1) the thing sued for; 2) the cause of action; 3) the persons or parties to the action; and 4) the quality or capacity of the person for or against whom the claim is made." *See Modern, Inc. v. Dep. of Trans.*, 381 F. Supp. 2d 1331, 1343 (M.D. Fla. 2004) (Presnell, J.). "If the second suit is based upon the same parties but different causes of action, then 'the prior judgment will not serve as an estoppel except as to those issues actually litigated and determined in it.'" *Id.* (citation omitted). "To determine whether the cause of action is the same, a court must ask whether 'the facts or evidence necessary to maintain the suit are the same in both actions.'" *Id.*

Here, Marineland's causes of action are different and will require different facts and evidence to maintain the suit. For example, Marineland's claim for breach of the covenant of good faith and fair dealings (Count I) will require proof of SeaWorld's intent and motives in terminating the BLA and seeking custody of Ike, which were not directly at issue in SeaWorld's Application. Additionally, Marineland's breach of the Interchange Agreement

and BLA, as reformed (Count II), will require proof that because of a mutual mistake, the agreements fail to reflect the parties' intent. By definition, a claim to reform a contract is a suit on the language of a contract that was not at issue in SeaWorld's Application.

To fully develop these claims, Marineland will require discovery, which it was prohibited from conducting in Canada and means that this case will inevitably involve facts and evidence that were not only unnecessary to maintain SeaWorld's Application but were beyond Marineland's access altogether. For example, Marineland was prohibited from accessing discovery on SeaWorld's internal communications regarding the termination of the BLA, which likely would reveal SeaWorld's true motives in seeking custody of Ike. Additionally, Marineland only recently learned that SeaWorld intends to use Ike to replace a male killer whale that passed away suddenly in SeaWorld's San Diego facilities. (Stewart Dec. at ¶ 49.) Apparently, this plan is not a coincidence, since SeaWorld's whale was a breedable male and it died three months before SeaWorld started this custody battle. *Id.* Finally, a clear example of facts and evidence that Marineland has been prohibited from accessing is SeaWorld's court-ordered report on Ike's health that was authored in May 2011 by its own veterinary consultant, Jim McBain. (Cornell Dec. at ¶ 26.) Marineland believes that this report will directly refute SeaWorld's after-the-fact excuse for trying to take Ike.

In contrast to Marineland's claims here, SeaWorld's Application in Canada was limited solely to the language of the BLA, and the *only* evidence necessary to maintain SeaWorld's suit was the BLA. SeaWorld's motives and intent were not relevant to the Application and were therefore not necessary to maintain its suit.

Additionally, although the Canadian Court order requires Marineland to "cooperate in any way reasonably necessary to allow the safe and expeditious transport of Ikaika from Canada to the United States," (Exhibit J), an order from this Court preliminarily enjoining SeaWorld from taking Ike would not conflict with the Canadian Court Order. Instead, a preliminary injunction would only maintain the status quo and delay the transfer until Marineland's claims are resolved.[2]

Accordingly, since Marineland's causes of action were not at issue in the Canadian Application proceeding, principles of comity and *res judicata* do not bar Marineland's complaint. *See Ray v. Ten. Valley Auth.*, 677 F.2d 818, 821 (11th Cir. 1982) ("For a prior judgment to bar a subsequent action, it is firmly established . . . that the same cause of action must be involved in both suits").[3]

**2. Breach of the Covenant of Good Faith and Fair Dealings**

"In order to assert a claim for breach of a duty of good faith and fair dealing, a plaintiff must allege that a specific contractual provision has been breached, causing it damages." *Bookworld Trade, Inc. v. Daughters of St. Paul, Inc.*, 532 F. Supp. 2d 1350, 1359 (M.D. Fla. 2007) (citations omitted).[4] "Moreover, the failure to perform must not be 'by an

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2 SeaWorld likely will argue that this Court should defer any rulings while SeaWorld attempts to ask a Canadian Court to consider sanctions against Marineland for having pursued the claims in this action. As Marineland is well within its rights to pursue judicial relief in the U.S. against a U.S. company under Florida law, SeaWorld's misguided attempt for sanctions in Canada should have no bearing on these proceedings.

3 For the same reasons discussed in this section, the related principle of "collateral estoppel" does not bar Marineland's claims. This Court has explained that "[c]ollateral estoppel prevents the same parties from relitigating issues that have previously been litigated and determined." *Modern, Inc.*, 381 F. Supp. 2d at 1343. The issues regarding SeaWorld's motives for terminating the contract (Count I) and whether it breached the Interchange Agreement and BLA, as reformed (Count II), have not been litigated.

4 Florida law applies here. *See* Stewart Dec. at exhibit D ¶ 20 (BLA) ("GOVERNING LAW. This Agreement shall be governed by and construed in accordance with the federal laws of the United States of America, and where not preempted by federal law, by the laws of State of Florida without regard to the conflict of laws thereof."); Exhibit G (Application at 4(2)(c)) (noting that Florida law controls.

honest mistake, bad judgment or negligence; but, rather by a conscious and deliberate act, which unfairly frustrates the agreed common purpose and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement.'" *Id.* (citations omitted).

As explained in the Interchange Agreement, the *purpose* of entering into the Interchange Agreement and future breeding loan agreements was to "support breeding and genetic diversity of mammal populations at their respective parks." (Stewart Dec. at exhibit A.) The Interchange Agreement further provides that "[b]oth parties are willing to loan animals to each other for the foregoing purposes, and continue such loans on a regular basis until either party is unable to properly maintain the mammals or requests their return." *Id.* The BLA confirms that the parties were "concerned with the preservation and propagation of life." (Stewart Dec. at exhibit D.) In fact, unlike the standard template that SeaWorld normally uses in its breeding loan agreements, the BLA contemplates that "[a]ny young produced by such breeding shall be owned" by Marineland. *Id.*

The parties' pre- and post-contractual representations confirm that the purpose of entering the Interchange Agreement and the BLA, which was to breed Ike at Marineland. SeaWorld representatives have admitted this purpose in their own affidavits. *See* Exhibits B, E-F. SeaWorld knew that Ike was not capable of breeding until approximately the end of 2010, and yet, when Ike became capable of breeding, SeaWorld began its efforts to seek custody of Ike and frustrate the purpose of the Interchange Agreement and BLA. When SeaWorld requested Ike's return and purportedly terminated the BLA, it did so in violation of the breeding provisions of the Interchange Agreement and BLA.

SeaWorld's breach was a conscious and deliberate act to frustrate the agreed common purpose of the breeding exchange agreement. In fact, SeaWorld's own representative admits that "[t]he very purpose (i.e. breeding and propagation) for which Ikaika was loaned to Marineland under the Breeding Loan Agreement has not been accomplished." In contrast, Marineland's understanding is that the belugas that were traded for Ike and transferred to SeaWorld have assisted in the formation of SeaWorld's successful captive-born beluga interaction program. Thus, SeaWorld has enjoyed the benefit of the bargain while at the same unfairly frustrating Marineland of the same.

Accordingly, Marineland has established a substantial likelihood of success that SeaWorld breached the covenant of good faith and fair dealings when it terminated the Interchange Agreement and the BLA and frustrated the breeding purpose of the agreements.

**3. Breach of the Interchange Agreement and BLA, as Reformed**

"A court of equity has the power to reform a written instrument where, due to a mutual mistake, the instrument as drawn does not accurately express the true intention or agreement of the parties to the instrument." *Goodall v. Whispering Woods Ctr., L.L.C.*, 990 So. 2d 695, 699 (Fla. 4th DCA 2008) (citing cases). In reforming an agreement, "an equity court in no way alters the agreement of the parties. Instead, the reformation only corrects the defective instrument so that it accurately reflects the true terms of the agreement actually reached." *Id.* (citation omitted).

Reformation is appropriate in one of two circumstances. First, the party seeking reformation must establish that there was a "mutual mistake." *Id.* The Florida Supreme Court has defined mutual mistake as "when the parties agree to one thing and then due to

either a scrivener's error or inadvertence, express something different in the contract." *Providence Square Ass., Inc. v. Biancardi*, 507 So. 2d 1366, 1372 (Fla. 1987). Second, if the mistake was not "mutual," a party may seek to reform the contract by establishing that there was a mistake by one party and inequitable conduct by the other. *Id.* at 1372 n.3 ("Reformation is proper when there is a mistake on the part of one side of the transaction, and inequitable conduct on the part of the other side.").

In this case, the parties intended that the exchange of the whales was for the purpose of breeding. Indeed, SeaWorld representatives already have confirmed this intent in affidavits. However, Ike was not biologically capable of breeding until late 2010. This is entirely inconsistent with the termination provision in the BLA, which provides that it "shall remain in force, except as otherwise provided, for a term ending December 31, 2010." Indeed, "since approximately February 2011, there has been, for the first time, considerable sexual activity between the two [Ike and Kiska]." (Cornell Dec. at ¶ 13.) Additionally, the parties intended that the exchange was "for life" unless the recipient was unable to care for the mammal, which also is inconsistent with the termination provision.

While the Interchange Agreement and the BLA both contained merger clauses, *see* ¶¶ 5, 6, respectively, the doctrine of merger "is inapplicable in an action seeking the equitable remedy of reformation." *Goodall*, 990 So. 2d at 700.

Additionally, "a party's negligence in failing to read the writing does not preclude reformation if the writing does not correctly express the prior agreement." *Id.* (quoting Restatement (Second) of Contracts § 157). Indeed, "[i]t would eviscerate reformation to hold that the failure to carefully read the final instrument bars the remedy." *Id.* "While some

level of negligence will bar a reformation claim based on mutual mistake," *id*., the evidence in this case establishes that SeaWorld representatives repeatedly assured Mr. Holer and Ms. Stewart that the Interchange Agreement and the BLA reflected the terms of the breeding exchange agreement that Mssrs. Holer and Busch agreed upon. For example, in the summer of 2005, Mr. Holer and Ms. Stewart asked Mssrs. Kasen, Frein, and Andrews what SeaWorld intended by the wording of the Interchange Agreement, and they repeatedly assured Mr. Holer and Ms. Stewart not to worry because the whales were being exchanged for life, and that SeaWorld would not seek custody of the killer whale unless Marineland was going out of business or was no longer caring for marine mammals. (Stewart Dec. ¶ 20.) At no time did anyone from SeaWorld suggest that the breeding purpose of the agreement had changed from what had been agreed to by Mssrs Busch and Holer. *Id*. Whether the mistake was made by both parties or the mistake was made by Marineland together with inequitable conduct by SeaWorld, the evidence supports both theories.

Regardless of the method of mistake, the termination provision does not reflect the parties' agreement and should therefore be reformed to be consistent with the parties' intent that was clearly stated in Mr. Kasen's letter on March 29, 2005. As stated by Mr. Kasen, the parties agreed to "[e]xchange[] mammals and offspring ***to be held for life*** and only returned to the donor if the recipient is no longer able to properly maintain the mammals." (Holer Dec. at exhibit B). Accordingly, Marineland has established a substantial likelihood of success that SeaWorld breached the Interchange Agreement and the BLA, as reformed.

**B. Substantial Threat of Irreparable Injury if the Injunction is Not Granted**

Marineland's killer whale exhibit features Ike and Kiska, the only two killer whales at Marineland. (Stewart Dec. at ¶ 4.) This exhibit is one of Marineland's core attractions and a main draw of the park. *Id.* It is advertised prominently on Marineland's website, on its television commercials, and on its advertising brochures and other marketing materials. *Id.* The loss of Ike would cause significant disruption to one of Marineland's core attractions, would lessen customer satisfaction, and harm Marineland's image. *Id.* at ¶ 5. This type of harm would be very difficult or impossible to calculate in terms of money damages. *Id.*

Indeed, killer whales are very rare and nearly impossible to replace. If Ike is transferred to SeaWorld, there is no readily available market for killer whales for Marineland to procure a replacement for Ike. There are only approximately 42 captive killer whales in the world, and of those 42, SeaWorld is the registered owner of 24 killer whales, 18 of which are currently in SeaWorld's custody in the United States. *Id.* at ¶ 6. In contrast, Marineland only has two killer whales in its possession, Ike and Kiska. *Id.* at ¶ 26.

Additionally, removing Ike from Marineland would put Ike's and Kiska's health in serious jeopardy. (Cornell Dec. at ¶¶ 9-13.) Dr. Lanny Cornell, veterinary consultant for Marineland, explains that "Ike has been attempting to breed with Kiska, has shown her a great deal of attention, and appears to care for her a great deal. Separating the two whales would, in my opinion, be very upsetting, unsettling, and stressful for Ike." *Id.* at ¶ 9. In addition, "Ike's absence would have a similarly negative impact on Kiska." *Id.* at ¶ 10.

"Whales are social creatures and require companionship." *Id.* In his affidavit, SeaWorld representative Chuck D. Tompkins has agreed, stating that "[k]iller whales are

social animals and it is important to their psychological and behavioral health for them to live in a community that is stimulating and involves interactions with other whales and trainers." (Exhibit F at ¶ 25.) If Ike were removed from Marineland, Kiska would remain in solitude. (Stewart Dec. at ¶ 11).

Additionally, each transfer of a killer whale puts the whale at risk of physical injury. (Cornell Dec. at ¶ 11-13). Both their sensitivity to the environment and their large girth makes them vulnerable to any such movement. Ike is a large marine mammal, measuring 17.7 feet long and weighing 4,700 pounds. *Id*. at ¶ 12. As Dr. Cornell explains, "the most likely and serious risk of physical harm during the transportation process is that Ike can contract pneumonia." *Id*. at ¶ 11. In fact, when Ike was transferred from SeaWorld to Marineland in 2006, he arrived at Marineland with a mild case of pneumonia. *Id*.

The risk of infection or injury will again exist should Ike be transferred to SeaWorld in San Diego. Worse yet, not granting this injunction and allowing Ike to be transferred now while Marineland's substantial claims have not been resolved, puts Ike at further risk that he will be moved twice should Marineland prevail on its claims. Each of those moves also carries with it the risk that some physical harm can come to Ike while being transported from place to place to place. In short, maintaining the status quo now and until all of the legal and factual issues are resolved between the parties is certainly in Ike's best interest and also prevents irreparable harm to Marineland.

**C. Threatened Injury Outweighs Any Harm to SeaWorld**

The threat of injury to Marineland, Ike, and Kiska if Ike were removed from Marineland outweighs any harm to SeaWorld. As discussed above, Ike is central to

Marineland's core attractions, customer satisfaction, and image. He is only one of two killer whales in Marineland's facilities. In contrast, SeaWorld has 18 killer whales in its custody throughout the United States. Additionally, Ike has been at Marineland for more than half of his life, and maintaining the status quo would not harm SeaWorld at all.

Moreover, the threat of injury to Ike and Kiska's wellbeing outweighs any harm to SeaWorld. Ike is currently in excellent mental and physical health. (Cornell Dec. at ¶ 19.) He is surrounded by an experienced team of trainers and staff, several of whom have over 25 years of experience working with killer whales and other large marine mammals. *Id*. at ¶ 30. Indeed, as Dr. Cornell has stated, "Ike is receiving excellent care, the type that meets the highest of standards." (Cornell Dec. at ¶ 34.) Ike and Kiska are currently maintained in Marineland's Friendship Cove, which is among the best facilities in the world for killer whales. (Stewart Dec. at ¶ 7.) When they are together, as they usually are, they are able to swim comfortably in the same pool or between two pools. *Id*. at ¶ 9; (Cornell Dec. at ¶ 35). "Certainly, the Marineland pools are as good as, if not better, than the pools used at SeaWorld to house killer whales." *Id*.

**D. Granting the Injunction is Not Adverse to the Public Interest.**

An injunction would not be adverse to the public interest. Indeed, in 1972, Congress enacted the Marine Mammal Protection Act ("MMPA") to protect all marine mammals. Generally, the act prohibits, with certain exceptions, the "take" of marine mammals in United States waters and by United States citizens on the high seas, and the importation of marine mammals and marine mammal products into the United States. *See* 16 U.S.C. §§ 1361 *et seq*. Indeed, as Ms. Stewart explained, the transfer of marine mammals is complex and

involves "dealing with a number of governmental agencies and non-governmental organizations." (Stewart Dec. at ¶ 17.) The public has an interest in making sure that protected marine mammals do not endure unnecessary physical and psychological harm. Finally, the public has an interest in captive breeding to enhance the population of killer whales.

**E. No Bond Amount Should be Required**

"The burden of establishing a rational basis for the amount of a proposed bond rests with the party seeking security." *Exchange Intern., Inc. v. Vacation Ownership Relief, LLC*, No. 6:10-cv-1273-ORL-35DAB, 2010 WL 4983668, at *2 (M.D. Fla. Dec. 2, 2010). "Notwithstanding the seemingly mandatory language of [Rule 65(c)]," a district court "has the discretion to issue a preliminary injunction without requiring Plaintiffs to give security." *Tancogne v. Tomjai Enterprises Corp.*, 408 F. Supp. 2d 1237, 1252 (S.D. Fla. 2005).

Notwithstanding that the burden for establishing a bond rests with SeaWorld, no bond amount should be required in this case. As described above in section IV(C), Ike has been with Marineland for more than half of his life, and SeaWorld has never asserted that it has suffered economic injury by not having Ike in its possession. Thus, an injunction here merely would maintain the parties' status quo since Ike arrived in Marineland in 2006, with no harm to SeaWorld.

## V. CONCLUSION

For the reasons stated above, Marineland requests that the Court enter a preliminary injunction prohibiting SeaWorld from attempting to take custody of Ikaika until there is a final judgment in this action. A draft Order granting this relief is attached as Exhibit L.

Respectfully submitted, October 24, 2011,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing has been filed with the Clerk of the Court using CM/ECF and has been served on Defendant's registered agent by hand delivery on October 24, 2011, at: C T Corporation System, 1200 South Pine Island Road, Plantation, FL 33324.

By: __/s/ Daniel González _____
Daniel E. González