No. S-175651
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA
In the Matter of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241

BETWEEN:

OCEAN WISE CONSERVATION ASSOCIATION

PETITIONER

AND:

VANCOUVER BOARD OF PARKS AND RECREATION and CITY OF VANCOUVER

RESPONDENTS

AND:

ANIMAL JUSTICE CANADA and ZOOCHECK

PROPOSED INTERVENERS

NOTICE OF APPLICATION

Name of Applicants: Animal Justice Canada and Zoocheck (the "**Applicants**" or "**Proposed Interveners**")

TO: **Ocean Wise Conservation Association** (the "**Petitioner**")
c/o Nathanson Schachter & Thompson LLP
Barristers & Solicitors
Suite 750, 900 Howe Street
Vancouver, BC Y6Z 2M4
Attn: Mr. R.J. Randall Hordo, Q.C.
Email: rhordo@nst.bc.ca

AND TO: **Vancouver Board of Parks and Recreation and City of Vancouver** (the "**Respondents**")
c/o JFK Law Corporation
Barristers & Solicitors
340 – 1122 Mainland Street

Vancouver BC V6B 5L1
Attn: Mr. Tim Dickson
Email: tdickson@jfklaw.ca

TAKE NOTICE that an application will be made by the Applicants to the presiding judge at the courthouse at 800 Smithe St, Vancouver, BC on 25/AUG/2017 at 9:45a.m. for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. That the Applicants be granted leave to intervene in this Petition;

2. That the Applicants be granted leave to make written arguments not to exceed 20 pages, and oral arguments not to exceed one hour, at the hearing of this Petition;

3. That no costs be ordered for or against the Applicants in respect of this application and, if this application is granted, that no costs be ordered for or against the Applicants at the hearing of the Petition; and

4. Such further and other relief as this Honourable Court deems just.

Part 2: FACTUAL BASIS

A. Animal Justice Canada

1. Animal Justice Canada ("Animal Justice") is the only animal advocacy organization in Canada focused on animal law, which concerns the status and treatment of animals in the legal system.

2. The objects of Animal Justice include the prevention of cruelty to animals through the enforcement of existing laws, advocating for greater legal protection for animals, and educating the public on legal issues concerning animals.

3. Animal Justice has approximately 32,000 supporters and donors from communities across Canada. Animal Justice has two full-time staff members, two part-time contractors, occasional summer and articling students, and a dedicated board of directors and advisors that direct its policies and priorities.

4. The advisors comprise a wide range of leading academics, experts in animal law, professionals, and laypersons with significant experience in animal protection work and other relevant areas. For example, three professors who are members of the Board of Advisors – Peter Sankoff, Vaughan Black, and Katie Sykes – recently published a book on animal law, entitled Canadian Perspectives on Animals and the Law (Irwin Law: Toronto, 2015).

5. Animal Justice is also supported by hundreds of volunteers, and receives pro bono legal assistance from a wide array of members in the Canadian legal community.

6. Animal Justice's work has been supported by grants from a number of well-established Canadian charitable foundations, including the Law Foundation of Ontario, the Donner Foundation, and the Animal Welfare Foundation of Canada.

7. Although Animal Justice advocates against all forms of animal cruelty, the organization has always maintained a strong focus on protecting individual animals from being held captive and displayed in aquariums, zoos, and circuses. Their captivity is often justified as being necessary for 'education' or 'entertainment' purposes.

8. Animal Justice is concerned that affording constitutional protection to the practice of keeping animals in captivity – as the Petitioner urges – will undermine its efforts to convince municipalities and provinces to restrict or ban circuses, zoos, aquariums, and other forms of entertainment or education in which animals are used.

9. Councillors and staff from municipalities in Ontario have expressed that they would like to see their own municipalities restrict or ban circuses, but are fearful of such laws being struck down on the basis that they violate freedom of expression in light of previous decisions finding that animal 'performances' are a form of constitutionally protected expression.

B. Zoocheck

10. Zoocheck is a federally incorporated and national animal protection charity established to protect wildlife in captivity and in the wild. Zoocheck accomplishes its objectives through investigation and research, public educational and awareness programs, advocacy, and animal rescue. Zoocheck's staff and board has advised both governmental and non-governmental

organizations on wildlife issues worldwide and regularly works with or provides input to Canadian government agencies at the municipal, provincial, and federal levels to develop meaningful laws and regulations for wildlife.

11. Zoocheck has approximately 30,000 supporters across Canada.

12. Zoocheck has been involved in campaigns opposing cetacean captivity since the mid 1980s. It has participated in a number of initiatives in jurisdictions across the country to prevent the keeping of cetaceans in captivity, including campaigns to stop the Montreal Biodome, Calgary Zoo, and Granby Zoo from acquiring whales, and attempts to persuade the West Edmonton Mall to relocate its last remaining dolphin to a more humane environment.

13. In April 2017, Zoocheck's Executive Director, Rob Laidlaw was invited to give a deputation to the Standing Senate Committee on Fisheries and Oceans regarding Bill S-203 Ending the Captivity of Whales and Dolphins Act, which if passed would ban the keeping of cetaceans in Canadian aquariums.

14. In November 2016, Zoocheck and the Vancouver Humane Society jointly produced a report entitled "A Crumbling Case for Cetacean Captivity? A review of several key education and conservation research factors". The report found that little published research has been conducted using cetaceans at the Vancouver Aquarium as subjects, and that what does exist has not been widely cited. It further concluded that the basic information conveyed to the public during cetacean shows at the Vancouver Aquarium could easily be conveyed without keeping cetaceans in captivity.

15. In January 2017, Zoocheck and the Vancouver Humane Society sent a joint letter to each Vancouver Park Board Commissioner encouraging them to pass a bylaw ending cetacean captivity in Stanley Park. The letter enclosed supporting documentation, including the report produced by Zoocheck and the Vancouver Humane Society, referenced above, as well as other relevant materials.

16. Zoocheck is concerned that the Petitioner's assertion that the recent Park Board bylaw amendment violates the Petitioner's right to free expression could (a) undermine Zoocheck's participation in the national debate concerning cetacean captivity by predetermining the result of

that debate by granting constitutional protection to the very practice under scrutiny, and (b) lead to other harmful uses of animals for 'entertainment' and/or 'education' purposes being granted constitutional protection.

17. Given Zoocheck's long record of advocating against the captivity of animals, it considers that the Petitioner's submission in this regard seriously affects its interests as an organization, as well as the interests of animals that it is devoted to protecting.

C. Proposed Argument if granted leave to intervene

18. If granted leave to intervene, the Applicants propose to make the following submissions, subject to revision based on the intended arguments of the parties and any orders of this Court:

(a) Section 2(b) of the *Charter* protects expressive activities that convey or attempt to convey meaning, with the exception of violence, threats of violence, and conduct intimately connected to violence. The essential purpose of section 2(b) is to ensure "that we can convey our thoughts and feelings in non-violent ways without fear of censure".[1]

(b) If granted leave to intervene, the Proposed Interveners intend to submit that the capture, captivity, and confinement of cetaceans is not 'expression' as that term has been understood in the context of section 2(b) of the *Charter*, because

(i) the conduct regulated is not itself an attempt to convey or communicate ideas or meaning;

(ii) such conduct is a form of violence, or is intimately connected with violence, bringing it outside of the scope of section 2(b); and

(iii) constitutionalizing the proposed policy outcome of permitting the captivity of cetaceans would undermine the purposes underlying section 2(b) by predetermining the outcome of the very debate under consideration.

(c) First, the activity of capturing and confining animals outside of their natural habitat does not itself express or attempt to communicate a thought or idea.

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[1] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 968; *R. v. Khawaja*, [2012] 3 SCR 555, 2012 SCC 69 at paras 70-74.

(d) The Petitioner alleges that, by keeping cetaceans in captivity, it "expresses one viewpoint" in a debate, on the basis that engaging in the activity demonstrates that the activity is capable of being done in an "ethical manner".[2]

(e) But engaging in *any* conceivable activity or course of conduct might be said to "express the viewpoint" that such activity is capable of being done in the manner in which it is being done, and it is clear that not every course of conduct or activity is therefore constitutionally protected under section 2(b).

(f) While the breach of any law, ordinance, bylaw, or other legal prohibition could be said to express, at least, the idea that the actor does not agree with the restriction imposed, there must be something more than an illegal act to bring the conduct within the scope of section 2(b), otherwise every person would presumptively have a constitutional right to violate any law.

(g) Therefore, in recognition of the "apparently limitless variety of conduct"[3] that can be labelled "expressive" and the risk of subjecting every law on the books to constitutional scrutiny, Canadian and American courts have properly restricted what constitutes expression to those acts which themselves have expressive content.

(h) For instance, while *advertising* on tobacco products is expression, the *sale* of tobacco products is not itself expressive and therefore can be regulated;[4] while placing bets may involve forms of communication, the *betting itself* is not 'expression' as understood under section 2(b);[5] and while advocating for the decriminalization of marijuana is protected expression, the possession or sale of marijuana itself is not 'expressive activity'.[6]

(i) If granted leave to intervene, the Proposed Interveners will submit that a careful review of the jurisprudence distinguishing between expressive and non-expressive activities demonstrates that the Bylaw does not restrict expression in purpose or effect.

(j) Second, the Courts have been clear that expression that takes the form of violence, or an activity intimately connected with violence, is not protected by section 2(b). Such activities are antithetical to the values underlying section 2(b), which involve the free communication of thoughts, ideas, and beliefs, not the freedom to inflict physical or psychological harm or suffering.

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[2] Petition to the Court, dated June 14, 2017, at para 123.

[3] *United States v. O'Brien*, 391 U.S. 367.

[4] *Rosen v. Ontario (Attorney General)*, [1996] O.J. No. 100; see also e.g. *R. v. Ludacka*, 28 O.R. (3d) 19, [1996] O.J. No. 743; *Stenzler v. Ontario College of Pharmacists*, [1998] O.J. No. 681.

[5] *R. v. Hair*, [2016] O.J. No. 709.

[6] *R. v. Normore*, [2005] A.J. No. 543.

(k) While the precise contours of the violence exception under section 2(b) have not been conclusively established, the exception extends beyond overt violence and threats of violence to include "intentionally interfer[ing] with essential infrastructure" and other activities that may threaten public health, as well as "the destruction of property... or other clearly unlawful conduct."[7]

(l) The capture and confinement of cetaceans constitutes a form of violence, in the same way that the capture and confinement of human beings constitutes violence; both activities involve the coercion and involuntary captivity of living beings with the capacity for self-determination, complex thought, and the ability to suffer.

(m) The capture and captivity of cetaceans is also intimately connected with violence, as it has been demonstrated to occasion significant physical and psychological harms to cetaceans, as set out in the evidence before the Park Board.

(n) Therefore, even if the capture, captivity, and confinement of cetaceans is found to constitute 'expressive' activity, the Proposed Interveners intend to submit that the activity is properly considered a form of violence which should not find protection under section 2(b).

(o) Third, the proposed interpretation of section 2(b) advanced by the Petitioner actively undermines, rather than advances, the purposes of section 2(b), because it would effectively shut down the ongoing debate over the ethics of holding complex mammals in isolated captivity.

(p) The Petitioner's proposed interpretation of section 2(b) would render meaningless the expression of the other participants in the "many-sided public — and now political — debate about the ethics of keeping cetaceans in captivity", because the outcome of the debate would be a constitutional right held by the Petitioner to engage in precisely the conduct that is the subject of that ongoing ethical debate.[8]

(q) As a result, the interpretation of section 2(b) proposed by the Petitioner would obstruct "the *meaningful* exercise of free expression on matters of public or political interest", and is therefore antithetical to the purposes of section 2(b).[9]

(r) The Petitioner remains free to express its viewpoint on the ethics of cetacean captivity through all conceivable peaceful and expressive means, and to educate people on cetaceans and their views in relation to cetaceans, none of which requires the ability to hold them in closely confined spaces occasioning physical and psychological harm.

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[7] *R. v. Khawaja*, [2012] 3 SCR 555, 2012 SCC 69 at paras 73-74; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at 588, aff'd in *Khawaja*, at para 70.

[8] Petition to the Court, dated June 14, 2017, at para 123.

[9] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 at para 36. [Emphasis added]

(s) If granted leave to intervene, the Proposed Interveners will therefore submit that the Bylaw does not infringe section 2(b) of the *Charter*, and that no section 1 analysis is necessary.

Part 3: LEGAL BASIS

A. The Test for Leave to Intervene

19. The Supreme Court of British Columbia has inherent jurisdiction to grant leave to intervene, which it will exercise more readily in cases raising public law issues.[10]

20. The test for leave to intervene has been set out by the BC Court of Appeal as follows:

(a) the applicant must have a direct interest in the matter; or

(b) the applicant must have a public interest in a public law issue in question, and

(c) the applicant can make a valuable contribution or bring a different perspective to a consideration of the issues advanced by the parties.[11]

21. The Proposed Interveners have a unique perspective and genuine interest in the Petition as animal protection organizations that oppose the captivity of cetaceans.

22. The relief sought by the Petitioner would be a significant step backwards from the perspective of the Proposed Interveners and their supporters, who believe that it is critical for the physical and psychological wellbeing of cetaceans that they not be enclosed in tanks that, among other things, are a small fraction of the size of their natural habitat and deprive them of the social connection with other members of their species required to live a fulfilling life.

23. Further, the Proposed Interveners' interest in this Petition is broader than the question of whether keeping cetaceans in captivity is constitutionally protected conduct. The expansion of freedom of expression urged by the Petitioner could, if accepted by the Court, result in constitutional protection for conduct that harms other animals in other contexts, and could effectively shut down democratic debate and deliberation with respect to the treatment of those

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[10] *International Forest Products v. Kern*, 2000 BCSC 1087 at para 20; *Choi v. Brook at the Village on False Creek Developments Corp.*, 2013 BCSC 1535 at para 7.

[11] *Halalt First Nation v. British Columbia (Environment)*, 2012 BCCA 191 at para 5; *EGALE Canada Inc. v. Canada (Attorney General)*, 2002 BCCA 396 at para 7; *Carter v. Canada (Attorney General)*, 2012 BCCA 502 at para 13.

other animals, which would significantly and directly undermine the Proposed Interveners' mandates, interests, and activities.

B. The Petition Raises Important Public Law Issues

24. The Proposed Interveners have a legitimate interest in the public law issues raised by the Petitioner's claim, which involves the expansion of section 2(b) beyond expressive activities to physical conduct that the Proposed Interveners – as well as, notably, the Respondents – consider to be harmful to animals.

25. The Respondent has passed no bylaw regulating the content of expression, and the Petitioner has not been prevented from engaging in expressive activity in any particular location or through any traditional medium, such as in any public forums or meetings, speaking or performing venues, radio, newspapers, magazines, televisions, or any form of online communication. Rather, the Petitioner submits that the capture and ongoing captivity of animals is somehow necessary to, or facilitative of, constitutionally protected expressive activity regarding the capture and ongoing captivity of animals.

26. The Petitioner's interpretation of section 2(b) would effectively expand it to include any use of animals in furtherance of education or entertainment purposes, including circumstances where those animals were harmed or caused to suffer in the course of that activity. If the Petitioner is successful in advancing this position, it could have wide-ranging implications.

27. The novelty of the Petitioner's argument with respect to freedom of expression raises a number of important public law issues, including:

(a) When does conduct – such as the capture and captivity of animals – have sufficient expressive content to constitute 'expression' under section 2(b)?

(b) What is the scope of the 'violence' exception to protected expression, and how does it apply to conduct that harms animals?

(c) Should the section 2(b) purpose of facilitating public debate be interpreted in a manner that effectively constitutionalizes a policy outcome that is the very subject of an ongoing debate?

28. These public law issues are of central importance to the Proposed Interveners, and go well beyond the interests of the parties in this particular case.

29. To use an example, proponents of dog fighting could argue that the activity of dog fighting, however cruel and harmful, is an expressive 'performance', or otherwise necessary to express the idea that dog fighting is an entertaining activity, or to educate the public that dogs are not always killed in these encounters.

30. Indeed, as set out in the proposed submissions above, an interpretation of section 2(b) that would essentially capture any prohibited conduct about which a person may want to express an opinion, or conduct which they believe would advance their proposed policy position, could have implications across the legal system.

C. The Proposed Interveners' Unique Perspective and Interests

31. The Proposed Interveners oppose the use of animals for recreational and entertainment purposes, and both Applicants have a history of engaging in various educational campaigns, advocacy initiatives, and legal proceedings on behalf of animals and those who support their protection. On this basis alone, the Proposed Interveners have a unique interest that is not likely to be represented in these proceedings by the parties, but which is important to a wide segment of the public.

32. In addition, the Proposed Interveners have a unique perspective on the issue of freedom of expression in this context, as they depend entirely on the ability to engage in constitutionally protected expression to persuade the public and governments to take seriously the interests of animals.

33. The Proposed Interveners take the position that, by and large, current laws – at the federal, provincial and municipal levels – are insufficiently protective of animals or can and should be interpreted so as to better protect animal interests. As such, the Proposed Interveners depend on their ability to campaign and advocate, to share their views widely, to disseminate images and information with respect to the mistreatment of animals, and to educate the population about the importance of greater protection for animals. This expressive activity is essential in order to marshal public support, and ultimately political support, in favour of greater protections for animals.

34. The Proposed Interveners' mandates and primary activities are therefore at the core of section 2(b): to seek truth and engage in democratic deliberation, in the hopes of persuading fellow citizens and governments to take action.

35. The Petitioner has the very same expressive tools at its disposal. It is free to attempt convince the public of the merits of its position with respect to the isolated captivity of cetaceans, to lobby the government to change the law to permit such captivity, or to engage in any other form of expressive activity pertaining to its preferred policy outcome.

36. However, the interpretation of section 2(b) offered by the Petitioner would not ensure robust public deliberation and discussion on this issue; rather it would shut down the ongoing debate as it would result in constitutional protection for the very activity that is the subject of that debate.

37. Beyond its broader impact on the scope of freedom of expression, the Petitioner's proposed interpretation of section 2(b) would have a serious and harmful impact on the interests of the Proposed Interveners as organizations. If conduct that harms animals is constitutionally protected on the basis that it is required in order to engage in a debate over the ethics of that conduct, then constitutional protection could be extended to a whole range of harmful activities that the Proposed Interveners are devoted to preventing.

38. This would, in turn, render meaningless the Proposed Interveners' attempts to educate the public and convince governments to take steps to afford greater legal protection to animals, which are among the Proposed Interveners' core activities. It would constitutionalize policy outcomes that the Proposed Interveners and their thousands of supporters find harmful or abhorrent, purportedly in order to ensure ongoing debate about those very practices.

39. This concern is far from theoretical. For example, in *Xentel DM Inc. v. Windsor (City)*,[12] the Superior Court of Ontario struck down a bylaw enacted by the City of Windsor that banned circus performances. Among other grounds, the court accepted that circus performances are a protected form of expression.

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[12] 2004 CanLII 22084

40. Many elected councillors and staff from municipalities in Ontario subsequently took the position that while they would like to see their own municipalities restrict or ban circuses, they were fearful of such laws being struck down on the basis that they violate freedom of expression. As such, Animal Justice's efforts to protect animals from captivity have already been directly affected by a finding that animal performances are protected as expression.

D. The Proposed Submissions Will be of Assistance to the Court

41. As set out above, the Applicants' proposed submissions would address a number of important public law issues raised by this Petition relating to the distinction between expression and conduct, the violence exception under section 2(b), and the underlying purposes of freedom of expression.

42. These proposed arguments relate directly to an issue raised by the parties, namely, whether laws that restrict the isolated captivity of cetaceans constitute an infringement of section 2(b) of the Charter. The proposed intervention therefore will not expand the issues between the parties. At the same time, the Proposed Interveners have a unique perspective on the freedom of expression issue, which will directly impact their interests, and propose to make unique submissions to the Court.

43. The Applicants submit that, given the forgoing, it is clear that they intend to present arguments that "will illuminate a facet of the issue before the Court that might otherwise be ignored", namely, the potential impact of the Petition on the scope of protected expression, particularly in the context of debates concering the ethical treatment of animals.[13]

44. This proposed intervention resembles *B.C. Freedom of Information and Privacy Association*, where the Court granted a public interest organization leave to intervene on an issue involving freedom of expression because the proposed intervener took "a different approach to the s. 1 analysis by raising distinct issues from those raised by the appellant".[14]

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[13] *Equustek Solutions Inc. v. Google Inc.*, 2014 BCCA 448 at para 22.

[14] *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, 2014 BCCA 520 at para 20.

45. By reviewing the case law and jurisprudence in both Canada and the United States with respect to the distinction between conduct and expression, the violence exception under 2(b), and the importance of ensuring meaningful expression for all participants in an important public debate, these submissions will be of assistance to the Court.

46. The Applicants will not file additional evidence or seek to participate in the evidentiary or procedural aspects of this Petition. They will take the evidentiary record as compiled by the parties, and limit their submissions to the broader legal issues at stake as informed by their unique perspective on those issues.

47. The Applicants will avoid duplicating the parties' submissions and impermissibly expanding the issues, and will work with the parties and any other interveners to ensure there is no duplication of submissions.

48. And while it is respectfully submitted that the proposed submissions summarized above are entirely suitable to an intervener, any concerns relating to improperly expanding the issues on appeal or duplication can be addressed by the Court in terms of the order granted, rather than denying intervener status altogether.[15]

49. For all of these reasons, the Proposed Intervenors respectfully submit that intervener status should be granted on the terms set out in the orders sought.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Camille Labchuk, affirmed August 11, 2017.

2. Affidavit #1 of Julie Woodyer, affirmed August 10, 2017.

3. Such further and other material as counsel may advise and this Honourable Court permit.

The Applicants estimate that the application will take one hour.

☐ This matter is within the jurisdiction of a master.

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[15] *Garcia v. Tahoe Resources Inc.*, 2016 BCCA 320 at para 18.

☒ This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to the application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

(a) file an application response in Form 33,

(b) file the original of every affidavit, and of every other document, that

(i) you intend to refer to at the hearing of this application, and

(ii) has not already been filed in the proceeding, and

(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

(i) a copy of the filed application response;

(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated: 11/AUG/2017

Signature

☐ Applicant ☒ Lawyer for Applicants

Arden Beddoes

THIS NOTICE OF APPLICATION is prepared and delivered by Arden Beddoes of the firm Farris, Vaughan, Wills & Murphy LLP, Barristers & Solicitors, whose place of business and address for service is 2500 – 700 West Georgia Street, Vancouver, British Columbia, V7Y 1B3. Telephone: (604) 684-9151. Facsimile: (604) 661-9349. **Attention: Arden Beddoes.**

To be completed by the court only: **Order made** ☐ in the terms requested in paragraphs of Part 1 of this notice of application ☐ with the following variations and additional terms: _____ _____ _____ _____	
Dated:	**Signature of** ☐ **Judge** ☐ **Master**

Appendix

[The following information is provided for data collection purposes only and is of no legal effect.]

THIS APPLICATION INVOLVES THE FOLLOWING:

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ other matters concerning document discovery
- ☐ extend oral discovery
- ☐ other matter concerning oral discovery
- ☐ amend pleadings
- ☒ add/change parties
- ☐ summary judgment
- ☐ summary trial
- ☐ service
- ☐ mediation
- ☐ adjournments
- ☐ proceedings at trial
- ☐ case plan orders: amend
- ☐ case plan orders: other
- ☐ experts
- ☐ other