TRENT W. ORR, State Bar No. 77656
GEORGE TORGUN, State Bar No. 222085
Earthjustice
50 California Street, Ste. 500
San Francisco, CA 94111
torr@earthjustice.org / gtorgun@earthjustice.org
Tel: 415-217-2000 / Fax: 415-217-2040

Attorneys for Defendant-Intervenors

KATHERINE S. POOLE, State Bar No. 195010
DOUG OBEGI, State Bar No. 246127
Natural Resources Defense Council
111 Sutter Street, 20th Floor
San Francisco, CA 94104
kpoole@nrdc.org / dobegi@nrdc.org
Tel: 415-875-6100 / Fax: 415-875-6161

Attorneys for Defendant-Intervenor NRDC

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

THE DELTA SMELT
CONSOLIDATED CASES

Case No: 1:09-cv-0407-LJO-BAM

DEFENDANT-INTERVENORS' OPPOSITION TO MOTION TO EXTEND REMAND SCHEDULE

Date: January 31, 2013
Time: 8:30 a.m.
Place: Courtroom 4
Judge: Hon. Lawrence J. O'Neill

INTRODUCTION

Federal Defendants and Plaintiff-Intervenor California Department of Water Resources ("DWR") (collectively, the "moving parties") have moved to add an additional three years to the existing remand schedule in this case and its companion case involving salmonid species (*The Consolidated Salmon Cases*, case no. 1:09-cv-1053 LJO-BAM). Doc. 1080 ("Motion"). The current remand schedule requires the Federal Defendants to complete a new consultation under section 7 of the Endangered Species Act ("ESA") and comply with the National Environmental Policy Act ("NEPA") regarding the effects of operations of the Central Valley Project ("CVP") and State Water Project ("SWP") on threatened delta smelt by December 1, 2013. Doc. 884. While the Court's judgment remands the existing biological opinions without vacatur, the Motion is ambiguous regarding compliance with the existing biological opinions during the requested three-year extension. *See* Motion at 4, 6. Indeed, several Plaintiff water contractors have joined the Motion, asserting that: "Under the Federal and State Proposal, these [Reasonable and Prudent Alternative] requirements for project operations [under the existing biological opinions] may be adjusted or modified." Doc. 1084 at 2. But weakening the protections of the biological opinions without complying with section 7 violates the ESA and is not consistent with this Court's prior rulings. Should modification of the existing biological opinions be justified based on the best available science, the lawful means to accomplish this is precisely what the Court ordered in its final judgment: completion of a new biological opinion, consistent with the procedural and substantive requirements of the ESA.

Moreover, extending the remand period is likely to increase the burden on the Court. Plaintiffs have indicated that the ability to seek injunctive relief is "vitally important" to their support for the Motion and have already filed several motions for injunctive relief in this proceeding. Extending the remand period for three years without any commitment to limit further litigation increases the duration of Court supervision over the operations of the CVP and SWP, which this Court has previously stated is "no way to operate a water system for the state of California."

Finally, the moving parties have failed to provide an adequate basis for modifying this Court's final judgment pursuant to Federal Rule of Civil Procedure 60. While the moving parties

allege that the Bay Delta Conservation Plan ("BDCP") constitutes a changed circumstance that justifies modification of the final judgment, BDCP was well underway when judgment was entered and constitutes a voluntary process that cannot support a three-year extension of the Court-ordered remand schedule. Moreover, there are numerous scientific reviews and collaborative scientific processes already underway, and the moving parties' decision to create a new "collaborative science-based process" is not a significant change in factual conditions or law that would allow relief from the Court's final judgment. While the moving parties essentially argue that limited financial resources supports modifying the judgment so that they can work on these processes instead of completing the remand, such resource issues cannot justify a Rule 60 motion under the ESA.

Therefore, Defendant-Intervenors respectfully urge this Court to deny the motion.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 60 provides, in relevant part, that "[o]n motion and just terms, the court may relieve a party…from a final judgment, order, or proceeding" when "(5)… applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b). In order to modify the Court's final judgment, the moving parties bear the burden of showing "either a significant change… in factual conditions or in law" that warrants revision of the judgment. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383-84 (1992). Facts or events that existed at the time of the entry of judgment or injunction ordinarily may not be the basis for modifying the injunction. *Id*. at 385; *U.S. v. Asarco Inc.*, 430 F.3d 972, 979 (9th Cir. 2005). If the purportedly changed conditions were reasonably foreseeable or even anticipated by the defendants when the judgment was entered, the moving parties bear a "*heavy burden* to convince a court that [they] agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b)." *Rufo*, 502 U.S. at 385 (emphasis added). The Ninth Circuit calls this the "heavy burden standard." *Asarco*, 430 F.3d at 979.

Limited funding to complete remand obligations under the Endangered Species Act is not a valid basis for a Rule 60(b)(5) motion. *Ctr. for Biological Diversity v. Norton*, 304 F. Supp. 2d 1174, 1179-80 (D. Ariz. 2003). In *Center for Biological Diversity*, the district court rejected the federal government's motion under Rule 60(b)(5) to extend the court-ordered period of time for

completing the designation of critical habitat under the ESA based on insufficient funds and, citing numerous other cases that reached the same conclusion, held that:

> In short, regardless of budgetary constraints, Defendant shall comply with the deadlines set by this Court. Defendant may not avoid its mandatory duties under the ESA on the grounds that the budget and staff of the Department of Interior are inadequate.

Id. (citations and quotations omitted, emphasis added).

Finally, if the moving party has met its burden of proving a significant change in facts or law that warrants revision of the judgment, "the focus should be on whether the proposed modification is tailored to resolve the problems created by the change in circumstances." *Rufo*, 502 U.S. at 391.

ARGUMENT

I. THE FINAL JUDGMENT AFFORDS THE MOVING PARTIES ADEQUATE TIME TO COMPLETE THE REMAND, AND THE AGENCIES HAVE MADE SUBSTANTIAL PROGRESS.

In its amended judgment, the Court ordered that the biological opinion be remanded without vacatur with specific deadlines for completing a new biological opinion and complying with NEPA. Doc. 884. In doing so, the Court granted the Federal Defendants' Rule 59(e) motion to extend the remand period by several months from the deadlines in the Court's original judgment. *See* Docs. 851, 856. Plaintiffs, including Plaintiff-Intervenor DWR, opposed this extension, stating that:

> By their Motion, Federal Defendants ask the Court, Plaintiffs, and the public to wait three years, until 2014, for a full consideration of the status of the delta smelt and development of RPA actions that may impose lesser impacts on water supply interests while still satisfying the Endangered Species Act's ("ESA") mandate to avoid jeopardizing the delta smelt or adversely modifying its critical habitat. This is unreasonable and incompatible with the Court's prior rulings in these cases. For the reasons that follow, the Court should deny Federal Defendants' Motion in its entirety.

Doc. 864 at 1; *see id*. at 14 (proposing an alternative remand schedule "that both accomplishes the Court's and Plaintiffs' goal of reaching a final, legal BiOp as quickly as possible and allows Federal Defendants enough time to complete the required NEPA review"); Doc. 865 at 1 ("DWR does not oppose Plaintiffs' proposed time schedule for the preparation of the new Biological Opinion and an environmental impact statement" and "a 20 to 30 month time frame for the completion of an environmental impact statement would be a reasonable time frame.").

The Court was clearly troubled by the delay in completing the remand, finding that "[i]t is unquestioned that all parties and the water-consuming public urgently require and deserve some degree of predictability. The longer the work remains uncompleted, the greater the dislocation to all." Doc. 875 at 13-14. However, the Court granted the motion in part because the federal agencies had demonstrated that compliance with the 24-month remand schedule was "impossible" and had shown that a 30-month remand schedule could be achieved:

> Federal Defendants have demonstrated that the existing Final Judgment would cause manifest injustice, as it would require FWS and Reclamation to complete their duties on remand in a time frame impossible for them to achieve. Federal Defendants' schedule delays completion of a new BiOp, which extends uncertainty and increases the likelihood that court intervention in annual water allocations will be necessary.

Id. at 12-13. The district court later approved two joint all-party stipulations to extend the deadline for completion of the draft biological opinion until December 14, 2011. Docs. 1061, 1065.

Subsequent to the entry of the final amended judgment, the Fish and Wildlife Service ("FWS") transmitted its draft biological opinion to the Bureau of Reclamation ("Reclamation") on December 14, 2011. *See* Doc. 1069. On March 28, 2012, approximately one year after the issuance of the amended final judgment, Reclamation published in the Federal Register its Notice of Intent to Prepare an Environmental Impact Statement and Notice of Scoping Meetings for compliance with the remand order. 77 Fed. Reg. 18,858 (Mar. 28, 2012). In addition, Reclamation has convened a Remand Stakeholder Engagement Process to gather information from stakeholders for the remand process, *see* Doc. 1080-3, ¶ 6, and has held several meetings of that group.

In short, Federal Defendants are on track to meet the current schedule. The Federal Defendants have already prepared a draft biological opinion and the NEPA process is underway. As discussed below, Federal Defendants have not demonstrated any significant changed circumstances that would warrant modifying the existing remand schedule.

II. THE MOTION TO EXTEND THE REMAND SCHEDULE IS UNTIMELY.

Rule 60(c)(1) states that "[a] motion under Rule 60(b) must be made within a reasonable time." Fed. R. Civ. P. 60(c)(1). "What constitutes a reasonable time depends upon the facts of each case, taking into consideration the interest in finality, the reason for the delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to the other parties." *Lemoge v.*

U.S., 587 F.3d 1188, 1196 (9th Cir. 2009) (internal quotations and citation omitted). Here, the moving parties have cited no significant change in circumstances that has occurred since the entry of the Court's final judgment almost 20 months ago. *See* Doc. 884. As discussed below, the moving parties' decision to develop a new collaborative science program does not conflict with the Court-ordered remand schedule and does not override the compelling need to implement a lawful biological opinion for the operations of the CVP and SWP. Moreover, the BDCP process has been ongoing well before the Court's entry of final judgment in this case, and the proposed changes that were announced to the process last summer were reasonably foreseeable and do not support a finding that the Motion is timely. *See* Motion at 6.

Given the parties stated preference to have a "final, legal BiOp" in place as quickly as possible and the Court's interest in avoiding the "extend[ed] uncertainty" and increased likelihood of "intervention in annual water allocations," the Motion should be denied. *See, e.g., Hammer v. Drago*, 940 F.2d 524, 526 (9th Cir. 1991) (unexcused two-year delay unreasonable); *Truskoski v. ESPN, Inc.*, 60 F.3d 74, 77 (2d Cir. 1995) (Rule 60(b) motion made eighteen months after judgment was not made within a reasonable time); *Kagan v. Caterpillar Tractor Co.*, 795 F.2d 601, 610-11 (7th Cir. 1986) (delay of more than three months unreasonable); *Security Mut. Cas. Co. v. Century Cas. Co.*, 621 F.2d 1062, 1067-68 (10th Cir. 1980) (115-day delay unreasonable); *James v. United States*, 603 F. Supp. 2d 472, 479 (E.D. N.Y. 2009) (21 months unreasonable).

III. THE MOVING PARTIES HAVE NOT MET THEIR BURDEN OF PROVING A SIGNIFICANT CHANGE IN LAW OR FACTS UNDER RULE 60(b)(5) NECESSARY TO MODIFY THE REMAND SCHEDULE.

The moving parties have not shown that compliance with the existing remand schedule is impossible or will cause "manifest injustice." Although the moving parties invoke the Bay Delta Conservation Plan, their proposed collaborative science program, and the conservation of judicial resources as rationales for extending the remand schedule, none of these reasons constitutes a new or significant change that warrants modification of the remand schedule.

A. The Proposed Collaborative Science Program Does Not Warrant Modification of the Remand Schedule.

The moving parties argue that delaying completion of the remand for three years is justified to establish a collaborative science program. Motion at 2, 4-5. However, the agencies must complete their consultations based on the best scientific information currently available. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8). It is unlawful to delay consultation in order to seek additional studies or information. As this court concluded in 2011, "[a] decision about jeopardy must be made based on the best science available at the time of the decision; the agency cannot wait for or promise future studies." *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 871 (E.D. Cal. 2010) (citing *Ctr. for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1156 (D. Ariz. 2002) (emphasis added)); *see also NRDC v. Kempthorne*, 506 F. Supp. 2d 322, 359 (E.D. Cal. 2007). While a collaborative science program could eventually improve our scientific understanding, the goal of improved scientific understanding and consensus is not a valid basis for delaying completion of a lawful biological opinion. As the court noted in *Rumsfeld*, the best available science standard "recognizes that better scientific evidence will most likely always be available in the future." 198 F. Supp. 2d at 1156. This is why there are specific regulations authorizing reinitiation of consultation based on new scientific information. *See* 50 C.F.R. § 402.16(b).

Furthermore, this collaborative science program developed by the moving parties does not constitute a significant change in factual conditions for purposes of a Rule 60(b) motion. In particular, the expanded remand stakeholder process is not a new fact, but instead was explicitly contemplated in earlier filings with the Court. *See* Doc. 1060, ¶ 5 ("Federal Defendants and some of the parties have discussed greater participation in the consultation process for a new delta smelt BiOp"). Numerous other scientific review and collaborative stakeholder processes are already underway, including the Remand Stakeholder Engagement Process. Doc. 1080-3, ¶ 6. Finally, to the extent that the moving parties argue that they lack adequate resources to complete the remand on schedule and implement this collaborative scientific process, the law is clear that the lack of adequate financial resources does not justify a motion to extend the remand timeline under Rule 60(b)(5). *See Ctr. for Biological Diversity*, 304 F. Supp. 2d at 1179-80.

B. The Bay Delta Conservation Plan Does Not Constitute Changed Circumstances and Does Not Justify a Three-Year Extension of the Remand Schedule.

The moving parties also argue that their ongoing work on BDCP justifies extending the remand period. Motion at 3, 6-7. However, work on the BDCP began several years before the Court ordered final judgment, so that program is by no means a new initiative. *See, e.g.*, 73 Fed. Reg. 4,178 (Jan. 24, 2008) (notice of intent to conduct public scoping and prepare an EIS/EIR on the BDCP); 73 Fed. Reg. 20,326 (Apr. 15, 2008) (notice of intent to prepare an EIS/EIR on the BDCP); 59 Fed. Reg. 7,257 (Feb. 13, 2009) (revised notice of intent to prepare EIS/EIR on BDCP).

At the January 4, 2011 status conference held prior to the issuance of final judgment in this case, counsel for several of the Plaintiffs similarly argued that work on BDCP should not justify operating under a "legally defective" biological opinion:

> And then finally I'd like to make a point that I'm quite concerned about the suggestion that because of the Bay Delta Conservation planning process we have to essentially operate under a biological opinion that's been deemed legally defective for this -- for effectively this entire water year, it seems is what's being suggested.
>
> While my clients are supportive of the BDCP, they are not willing to forego what could be a very substantial quantity of water during the year in order to allow that to proceed perhaps slightly quicker. Often these processes, the BDCP is what's called a habitat conservation plan, can take many years, and while we hope that it moves expeditiously we don't want to wait for that process to be completed, for example, to be able to seek relief.

Tr. of Status Conf. (Jan. 4, 2011) at 22:11-22:24. In addition, Plaintiffs have previously argued that the Court should not "improperly conflate[] a new delta smelt biological opinion with the BDCP process" because "[t]he BDCP process is not the subject of this action." Doc. 850 at 2.

The moving parties' attempt to cast various changes to the design of the BDCP as justifying a modification of the remand schedule is unavailing. *See* Motion at 5-6. All of those changes—including a reduction in the overall capacity of the alternative conveyance mechanism and improvements in energy efficiency and environmental impacts—were reasonably foreseeable possibilities when judgment was entered in this case. Changes to the scope and design of that voluntary project do not justify abandoning the Federal Defendants' mandatory legal duty to comply with the final judgment in this case.

Finally, as the moving parties acknowledge, the BDCP is a voluntary process initiated by DWR to develop a habitat conservation plan and obtain an incidental take permit under Section 10 of the ESA, which is currently in the planning stage and for which no application has yet been filed. Doc. 1080; Doc. 1080-2, ¶ 2; Doc. 1080-5, ¶ 6; 59 Fed. Reg. 7,257-58. There is no legal requirement that DWR complete and submit an application for the permit or that the permitting process conclude by a date certain.

In sharp contrast to the voluntary and open-ended nature of the BDCP, the final judgment and remand schedule is a mandatory legal obligation imposed to remedy the ESA and NEPA violations found by this Court. In essence, the moving parties seek to delay completion of a mandatory legal obligation in order to reallocate those resources towards pursuing work on a discretionary and voluntary project that, while very important, is discretionary and, ultimately, may not lead to permit issuance. As the courts have made clear in similar cases, the moving parties' lack of sufficient funding to pursue both completion of the remand and other high profile initiatives like BDCP concurrently does not justify extending the remand period. *See Ctr. for Biological Diversity*, 304 F. Supp. 2d at 1179-80. In sum, the moving parties have not carried their "heavy burden" to convince the court they should be relieved from the current schedule. *Rufo*, 502 U.S. at 385.

IV. THE PROPOSED MODIFICATION OF THE REMAND SCHEDULE IS NOT LIKELY TO CONSERVE JUDICIAL RESOURCES.

Nor would this proposal conserve judicial resources. On the contrary, amending the judgment to extend the remand schedule for three years will increase the likelihood of further judicial proceedings over operations of the state and federal water projects. Throughout this litigation, Plaintiffs have filed numerous motions for temporary restraining orders and preliminary or permanent injunctions, which have involved voluminous briefing and extra-record declarations and resulted in several weeks of evidentiary hearings. *See* Docs. 31, 433, 511, 562, 614, 767, 900.[1]

[1] As the Court is aware, the final judgment in this case was appealed to the Ninth Circuit Court of Appeals by the Federal Defendants and Defendant-Intervenors. *See* Doc. 853 (NRDC Appeal); Doc. 937 (Federal Defendants' Appeal). Considerable disagreements exist over the jurisdiction of the district court to grant interim injunctive relief that modifies the status quo of operating in compliance with the biological opinion(s). The Court of Appeals has already vacated the district court's findings and rulings on a motion for injunctive relief after final judgment had been entered, finding they were moot. Doc. 1075 ("Appellees' Motion to Dismiss, filed on December 5, 2011, is GRANTED. Because the

The final judgment invalidated, but did not vacate, the existing biological opinion. Doc. 884; Doc. 1064. As a result, the CVP and SWP are required to operate in compliance with the existing biological opinion, including RPA actions and the incidental take statement. However, the instant motion appears to contemplate modifying the existing RPA, providing that:

> The RPAs will be evaluated and refined through the collaborative science and adaptive management program and may be modified through administrative action or judicial approval as appropriate. The operations and operational strategies implemented under the collaborative science and adaptive management program will incorporate adjustments, as determined by FWS or NMFS, using the flexibility currently authorized by the RPAs or other appropriate administrative or judicial mechanisms.

See Doc. 1080-1 at 3. Some Plaintiffs interpret this language to indicate "a willingness to evaluate the RPA requirements in the current biological opinion and make potential adjustments to the RPA." Doc. 1084 at 3. However, it is unlawful simply to amend a biological opinion; rather, reinitiation of consultation is required to make such changes. *See Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059, 1077 (9th Cir. 2004) (rejecting purported "amendments" to biological opinion, concluding that reinitiation of consultation may be required under 50 C.F.R. § 401.16(b)).

Unlike prior stipulations, the instant motion does not limit or eliminate litigation over RPA actions during the remand period.[2] Instead, the motion explicitly contemplates additional judicial proceedings over interim operations. *See* Doc. 1080-1 at 3 (proposing modifications to the RPAs through "judicial approval" and/or "judicial mechanisms"). And, in fact, Plaintiffs have filed joinders to the Federal Defendants' motions emphasizing that "an ability to seek injunctive relief during the extended remand period is vitally important to plaintiffs" and that "nothing in the proposal, including the proposed extension of the remand deadlines, is intended to limit, restrict or modify the right of any party to seek injunctive relief related to any restrictions imposed on operations before new biological opinions are issued." Doc. 1084 at 3 (amended joinder of San Luis and Delta-Mendota Water Authority and Westlands Water District). While these Plaintiffs plan to

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implementation period for the Fall X2 Action has passed, any challenge to the district court's injunction is moot. *See Kitlutsisti v. Arco Alaska, Inc.*, 782 F.2d 800, 801 (9th Cir. 1986). The district court's judgment is VACATED…."); *see* Doc. 1077 (Court of Appeals' judgment takes effect).

[2] *See, e.g.*, Doc. 838, ¶ 4 ("Any party may seek judicial review of and relief from such changes to OMR flows. Should any Plaintiff or Plaintiff-Intervenor seek judicial review under paragraph 4 of this stipulation, the terms of this stipulation shall immediately and henceforth become inoperative.").

engage with the Federal Defendants in this collaborative process "with the goal that the agencies will reach operations decisions that the plaintiffs can support,"[3] they admit that "[t]here is no guarantee these collaborative efforts will succeed." *Id.* Therefore, extending the remand period for three years extends the period during which motions for interim injunctive relief may be filed.

In addition, the recent filings in this case demonstrate that during the remand period, the moving parties believe they must provide notice to the Court of all RPA implementation, giving rise to the potential for "Court decisions every two or three months throughout the water years as conditions change. That is no way to operate a water system for the state of California." Final Tr. (Apr. 4, 2011) at 21:9-21:12; *see* Doc. 1078 (Federal Defendants' Notice of Implementation of RPA Component 1, Action 1); Doc. 1079 (Federal Defendants' Revised Notice of Implementation of RPA Component 1, Action 1); Doc. 1081 (Plaintiffs' Statement of Clarification Regarding Federal Defendants' Revised Notice of Implementation of RPA Component 1, Action 1); Doc. 1083 (Plaintiffs' Notice of Amended Statement of Clarification); Doc. 1085 (Federal Defendants' Notice of Implementation of RPA Component 1, Action 2); Doc. 1087 (Federal Defendants' Revised Notice of Implementation of RPA Component 1, Action 2).

V. THE PROPOSED MODIFICATION OF THE JUDGMENT IS NOT TAILORED TO THE ALLEGED CHANGE IN CIRCUMSTANCES.

Even assuming, arguendo, that the moving parties have met their burden of proving that any delay in the schedule is justified due to changed circumstances, the moving parties have not demonstrated that a three-year delay of the remand is "tailored to resolve the problems created by the change in circumstances." *Rufo*, 502 U.S. at 391. FWS has already completed and transmitted the draft biological opinion to Reclamation. *See* Doc. 1069. Reclamation has already initiated the NEPA process, held several public scoping meetings, and accepted comments from the public on the scope of issues to be addressed during the NEPA analysis. *See* 77 Fed. Reg. 18,858 (Mar. 28, 2012). In addition, Reclamation has convened and held several meetings of a Remand Stakeholder Engagement Process to gather information from stakeholders for the remand process. *See* Doc. 1080-3, ¶ 6. In light of the substantial progress that has been made, the ongoing scientific peer

[3] Obviously, Plaintiffs' agreement on operations is not legally required under the ESA, and this is not the legal standard for complying with the ESA.

review and collaborative processes that will continue regardless of whether the motion is granted, and the moving parties' failure to meet their burden of proving that compliance with the current schedule is impossible, the motion should be denied.[4]

CONCLUSION

For the foregoing reasons, Defendant-Intervenors respectfully request that the Court deny the motion for a three-year extension of the remand.

DATED: January 17, 2013

Respectfully submitted,

/s/ George M. Torgun
TRENT W. ORR
GEORGE M. TORGUN
Attorneys for Defendants-Intervenors

/s/ Doug Obegi
KATHERINE POOLE
DOUG OBEGI
Attorneys for Defendant-Intervenor NRDC

[4] To the extent that the moving parties seek to modify the remand schedule in the future based on evidence that an extension is necessary to lawfully complete the remand based on the best available science that is currently available, Defendant-Intervenors likely would not oppose such a motion.