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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

VALERIE O’SULLIVAN,)	Case No:
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Plaintiff,)	COMPLAINT
)	
v.)	1. PRIVATE ATTORNEY GENERAL
)	2. BREACH OF TRUST AND
CITY OF SAN DIEGO, a municipal entity,)	FIDUCIARY DUTIES
and FOES 1 through 500, inclusive,)	3. DECLARATORY RELIEF
)	
Defendants.)	
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_____)	

I. BACKGROUND

1. This lawsuit is brought as a private attorney general by VALERIE O’SULLIVAN, who at all times herein mentioned was and now is a resident of the village of La Jolla, California, located in and part of the City of San Diego, County of San Diego, State of California.

2. The lawsuit involves a portion of a beach area on the Pacific Ocean generally located at the intersection of Coast Boulevard and Jenner Street in the village of La Jolla, City of San Diego, County of San Diego, State of California. In 1931 the State of California deeded certain property in that location, the metes and bounds of which are described in Exhibit A to this Complaint, in trust to the City of San Diego for the purposes stated in the grant, to-wit, for

1 exclusive use as a public park and pool for children and other uses incident thereto, all as more
2 particularly described by the terms and conditions of the grant in trust contained in Exhibit A.

3 3. Essentially contemporaneously with the grant in trust from the State of California
4 to the City of San Diego Ellen Browning Scripps, now deceased, a great benefactress of the City
5 of San Diego, donated money to the City for the construction of a breakwater in order to form
6 what became known, and remains known to this day, as the “Children’s Pool.” Pursuant to the
7 grant of the aforesaid property in trust, the metes and bounds of which generally coincide with
8 the area of the sea and beach demarcated by the sea wall, the Children’s Pool has--since its
9 inception up to approximately 1994, and ending on September 4, 1997--been used as a public
10 facility for swimming and bathing by its intended beneficiaries, and particularly by children as a
11 children’s pool.

12 4. In or about 1994, marine mammals (principally harbor seals, sometimes hereafter
13 “seals” or obvious variants) which had previously hauled out at Seal Rock, a rock in the water to
14 the immediate north-northeast of Children’s Pool, or elsewhere, began steadily to haul out upon
15 and occupy the Children’s Pool. In connection with their occupancy of its waters and the beach
16 adjoining it, the Children’s Pool came increasingly to be off-limits to human use or occupation,
17 such that, over time, the City of San Diego, by signage, barriers and otherwise, prohibited or
18 discouraged public use of the Children’s Pool by the beneficiaries of the aforesaid trust,
19 including children who were residents of or visitors to the City of San Diego.

20 5. The marine mammals, and in particular the harbor seals, which have occupied the
21 Children’s Pool, enjoy certain protections under the United States Marine Mammal Protection
22 Act 16 U.S.C. § 1661, et seq. (“MMPA”). The act provides, *inter alia*, that “taking” of marine
23 mammals is prohibited under the act. “Taking” consists, in one form, of harassment of a marine
24 mammal, which requires an act of pursuit, torment or annoyance that has the potential to injure a
25 marine mammal in the wild or significantly disrupt its behavioral patterns. The MMPA, by its
26 terms, defines its jurisdiction, and does not apply to Children’s Pool. Furthermore, the MMPA
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1 contains certain provisions by which seals can be “deterred” from an area where they are causing
2 damage to public or private property or are endangering personal safety and can be taken for the
3 protection of the public health and welfare or for the nonlethal removal of “nuisance animals” (as
4 that term is used in the act). In particular, the MMPA permits a private person or government
5 employee to deter seals that are damaging public or private property, respectively, or
6 endangering personal safety and--in the case of a government official acting within his or her
7 official duties--allows the humane taking of “nuisance animals” by nonlethal measures or marine
8 mammals endangering the public health and welfare.

9 6. Starting in 1994, and especially after September 4, 1997, to and including the
10 present time, the occupancy of Children’s Pool by seals has damaged public and private
11 property. During that time the seals have become “nuisance animals” from the standpoint of the
12 legislated trust purpose of the Children’s Pool.

13 7. In addition, seal occupancy of the waters and the adjoining beach eventually
14 resulted in contamination of the waters and beach at the Children’s Pool, such that the Children’s
15 Pool was polluted beyond the safe or reasonable tolerance by humans, and especially children,
16 was closed to public use on September 4, 1997, and remained so until April 1, 2003, when the
17 City of San Diego purported to permit joint human and seal use of the Children’s Pool.

18 The announced ambition of joint use was an arrant fiction, conjured up by the
19 trustee City of San Diego for unknown reasons, since people using the pool on those purported
20 terms, such as Plaintiff herein, were charged as violators of the MMPA in so doing and thus
21 swam only at risk of federal prosecution. Moreover, contamination of the Children’s Pool by
22 marine mammals made it effectively unavailable for any human use, especially by children. And
23 the trustee City of San Diego, by signs and barriers across its entire accessible side, cordoned off
24 and thus in effect closed down the Children’s Pool to use by its intended beneficiaries. These
25 conditions remain the visible status of the trustee’s so-called joint-use policy at the Children’s
26 Pool.

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1 8. Starting in 1994, and especially after September 4, 1997, to and including the
2 present time, fecal coliform and other contaminants from harbor seals in the waters and beach at
3 the Children’s Pool have constituted a hazard to personal safety and have endangered the public
4 health and welfare.

5 9. Plaintiff is informed and believes, and thereon alleges, that on or about October
6 15, 2003, public studies and tests for contamination of some 448 California beaches showed that
7 Children’s Pool was one of the most contaminated beaches in the state.

8 10. Starting in 1994, and especially after September 4, 1997, the marine mammals
9 occupying Children’s Pool have caused, and continue to cause, damage to public and private
10 property, in particular the trust property that is the Children’s Pool, have become “nuisance
11 animals,” and have constituted, and continue to constitute, a danger to the personal safety and
12 the health and welfare of intended beneficial users of the pool. The trustee City of San Diego
13 has failed and refused, and continues to fail and refuse, to take any effective action whatsoever,
14 including measures permitted under the MMPA, to deter the marine mammals from the damage
15 they cause and the hazards they constitute. This is so despite offers from MMPA enforcement
16 authorities of the United States to assist the trustee City of San Diego in deterring marine
17 mammals from the Children’s Pool.

18 11. Furthermore, the MMPA contains provisions by which application can be made to
19 the United States Secretary of Commerce for an exemption from the moratorium on taking under
20 certain terms and conditions set forth in the act. Part of the relief sought in this action, among
21 other desired relief, is to compel the trustee City of San Diego to apply to the Secretary for any
22 necessary exemption for the Children’s Pool, one of the most contaminated beaches in the State
23 of California, in order to deter the marine mammals occupying it from further damaging it and
24 to stop the “nuisance” and the hazards to personal safety and the public health and welfare they
25 continue to pose.

26 12. At various times during the occupancy by the marine mammals of Children’s Pool
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1 the City Council of the City of San Diego has discussed the problem and has called for legal
2 opinions from the City of San Diego City Attorney. In particular, and without limitation, on or
3 about March 29, 1999, upon motion of Councilman Juan Vargas, passed by the then-current City
4 Council, the City Council voted to examine the entire background of the Children’s Pool
5 including “the legality, and how it was left in the will,” presumably referring to the will of Ellen
6 Browning Scripps. (It was commonly thought, in error, that the will of Ellen Browning Scripps
7 had bequeathed the land to the City of San Diego, whereas the truth appears in paragraphs two
8 and three above, i.e., that the State of California had given the property in trust to the City of San
9 Diego and Ellen Browning Scripps had donated the money to build the breakwater.) Despite a
10 passed motion to that effect, the City of San Diego has failed and refused, and continues to fail
11 and refuse, to explore the legalities of the background of the trust, its current status, or the status
12 of the MMPA as it applies to the Children’s Pool trust. Moreover, the City of San Diego has
13 failed and refused, and continues to fail and refuse, to explore or take available exemptions from
14 the moratorium on taking or legal measures to stop the continuing damage to public and private
15 property, the ongoing “nuisance” and the hazards to personal safety and the public health and
16 welfare caused by the seals in occupancy at the Children’s Pool.

17 13. It is estimated, and will be proved at the time of trial, that as many as 1,000,000
18 beneficiaries of the trust have been unable to use the Children’s Pool who would otherwise have
19 used it during the period of its practically or legally prohibited use, which has caused damage in
20 an amount unspecified but which will be proved at trial. Beneficiaries of the trust will continue
21 to be damaged in the same manner in the future unless the trustee City of San Diego is
22 compelled to perform its duty by making use of available remedies to deter marine mammals
23 from the trust property.

24 14. It is the prayer of this action, brought under a private attorney general theory, as
25 follows:

26 a. To compel the City of San Diego to observe the terms of the trust by, *inter*

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1 representative or agency capacity, or otherwise, for the events and happenings referred to upon
2 the theories expressed herein.

3 17. Defendants are in breach of their trust obligations pursuant to the grant of the
4 Children’s Pool property, as set forth in Exhibit A hereto, and the law.

5 18. This action is appropriate to be brought under a private attorney general theory
6 because it seeks enforcement of an important right affecting the public interest and the result of
7 this lawsuit will inure to the benefit of members of the public, as beneficiaries of the trust,
8 deprived of a trust asset by the negligence and otherwise wrongful conduct of the trustee City of
9 San Diego and FOES 1 through 500.

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13 **III. SECOND CAUSE OF ACTION**

14 19. Plaintiff incorporates all the foregoing allegations as part of the Second Cause of
15 Action.

16 20. Defendants are in breach of their fiduciary obligations under the trust agreement
17 as contained in Exhibit A hereto and the law. As such, they are liable to Plaintiff as hereinbefore
18 set forth.

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20 **IV. THIRD CAUSE OF ACTION**

21 21. Plaintiff incorporates all the foregoing allegations as part of the Third Cause of
22 Action.

23 22. Defendants had notice of the legal status of the Children’s Pool from its inception
24 in 1931 upon the grant of the land in trust to the City of San Diego. Evidenced by the events as
25 set forth above, the City of San Diego at all times knew, or should have known, of its obligation
26 as a trustee to prevent “nuisance,” to safeguard the property from damage and to eliminate

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1 hazards to personal safety and to the public health and welfare by reasonable measures that could
2 have been, and can continue to be, taken under the MMPA to stop the “nuisance,” to deter the
3 seals from causing such continuing damage and hazards to personal safety and to protect the
4 public health and welfare.

5 23. Despite such knowledge and awareness, the City of San Diego has failed and
6 refused, and continues to fail and refuse, to take the indicated and appropriate action under the
7 law to stop marine mammals from causing such damage or endangering such personal and public
8 rights.

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10 **V. FOURTH CAUSE OF ACTION**

11 24. Plaintiff incorporates all the foregoing allegations as part of the Fourth Cause of
12 Action.

13 25. A controversy has arisen and a dispute exists as between Plaintiff and other
14 members of the public and Defendants as to the obligations imposed by Exhibit A and the law
15 and the consequent obligations incumbent upon said defendants; the nature, extent and duration
16 of their trust obligations thereunder; the nature, extent and duration of their fiduciary duties
17 thereunder; their breach thereof; whether, and to what extent, Defendants, and each of them,
18 knowingly violated their trust obligations or fiduciary duties; and the damages caused by the
19 foregoing.

20 WHEREFORE, Plaintiff herein as a private attorney general seeks the relief as stated
21 above in paragraph 14 against the City of San Diego and FOES 1 through 500.

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KENNERSON & GRANT, LLP

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26 Dated: March 12, 2004

By: _____
Paul Kennerson

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Attorney for Plaintiff VALERIE O'SULLIVAN

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