

1 that a prudent person acting in a like capacity would use in the conduct of an
2 enterprise of like character and with like aims to accomplish the purposes of
3 the trust as determined from the trust instrument.” (Cal Prob. Code § 16040.)

4 Plaintiff cites to the fact that since at least 1997, Hubbs-SeaWorld has
5 been engaged in a rescue, rehabilitation and release program under the aegis of
6 the National Oceanographic and Atmospheric Administration or its sub-agency,
7 NMFS. [Exh. 245.] That program consists of retrieving injured or diseased
8 animals, rehabilitating them at SeaWorld in San Diego, and, upon return to
9 health, and after tagging, releasing them in Pacific waters. The release of
10 harbor seals is accomplished generally in the kelp beds immediately outside
11 the Children’s Pool. Tagged harbor seals are routinely observed hauling-out at
12 the Children’s Pool. Once it was determined that the released seals were
13 impacting the use of the Children’s Pool, the City took no steps to protect the
14 Pool from becoming a haul-out for such seals.

15 The number of seals at the Children’s Pool was minimal, if any, at the
16 time of the creation of the breakwater and the Trust grant. Starting in the
17 early 1990’s, seals came to reside in the general area of Children’s Pool in
18 growing numbers. During that time frame, the City undertook the designation
19 of the ocean and reef immediately adjoining Seal Rock as a reserve in order to
20 accommodate the seals in that area. The Reserve is within a hundred yards or
21 less of the area granted as the Children’ Pool. In such close proximity, the
22 seals, based on counts, seem to prefer the Children’s Pool to Seal Rock as a
23 haul-out. Over time, the seal population at Children’s Pool has grown to where
24 it now exceeds 200 during portions of the year. Photographs show seals on the
25 beach across the entire width of Children’s Pool at the edge of the water.
[Exh. 399.]

26 During the 1990’s, seal feces came to pollute the beach and adjoining
27 waters. The County of San Diego, Department of Environmental Health,
28 regularly tests the waters along the San Diego coastline. In 1997, the County