

BRYAN W. PEASE (State Bar #239139)
302 Washington St. #404
San Diego, CA 92103
Telephone: (619) 723-0369
Facsimile: (619) 923-1001
Email: bryanpease@gmail.com

BLUMENTHAL & NORDREHAUG
Norman B. Blumenthal (State Bar #068687)
Kyle R. Nordrehaug (State Bar #205975)
Aparajit Bhowmik (State Bar #248066)
2255 Calle Clara
La Jolla, CA 92037
Telephone: (858)551-1223
Facsimile: (858) 551-1232
Email: Norm@bamlawlj.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

LA JOLLA FRIENDS OF THE SEALS, a
nonprofit organization; and JAMES H. N.
HUDNALL, JR., an individual,

Plaintiffs,

v.

NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES
SERVICE ("NMFS"), an agency of the U.S.
Dept. of Commerce; CARLOS M.
GUTIERREZ, Secretary of Commerce;
JAMES W. BALSIGER, Acting Director of
NMFS; RODNEY MCINNIS, Acting
Regional Administrator of NMFS; JAMES
LECKY, Director of Office of Protected
Resources at NMFS; CITY OF SAN DIEGO;
and DOES 1 TO 100,

Defendants.

Civil Case No.: 08 CV 1847 WQH POR

**PLAINTIFFS' REPLY IN SUPPORT OF
EX PARTE APPLICATION FOR A
TEMPORARY RESTRAINING ORDER
REQUIRING THE CITY TO FOLLOW
TWO RESOLUTIONS OF ITS CITY
COUNCIL BY PLACING A GUIDELINE
PUPPING SEASON ROPE**

1 The Federal Defendants agree the MMPA preempts enforcement of the state court order
2 prohibiting the pupping season rope but refuse to act until this Court determines whether the
3 Plaintiffs have standing to bring this action against them. The City does not dispute the
4 Plaintiffs' standing to bring this action or the power of this Court to preempt state court orders
5 that conflict with the MMPA but responds simply that until this Court orders otherwise the City
6 must comply with orders of the state court. In light of the clear consensus of all the defendants
7 that this Court must rule before they will act and the agreement of all the parties that the status
8 quo will be destroyed and irreparable harm will be suffered if the pupping season rope is not
9 installed, Plaintiffs respectfully submit that this Court should and must issue a TRO ordering the
10 maintenance of the status quo with the continued placement of the pupping season rope.

11 For the past three years, the rope has been placed on a seasonal basis in the rookery at the
12 request of NMFS to prevent MMPA violations, and there is a large opening so swimmers and
13 divers can also access the water.¹ The rope has acted as a very effective guideline for the public,
14 as there have been over 80,000 tourists per month viewing the seals, who in the absence of the
15 rope would otherwise get too close and cause stampedes and mother-pup separations. *See*
16 *Cmplt. Ex. A at 1; City Ex. 4 at 99.* Therefore, in weighing the equities of whether a TRO
17 should issue, there is no harm to anyone in maintaining the status quo by requiring continued
18 carrying out of the City Council's resolution for a pupping season guideline rope as has occurred
19 over the past three years.

20 In state court, the City noted that Judge Pate, who issued the original ruling, agreed that
21 his order could not be construed or enforced to violate the MMPA. *See City Ex. 9 at 144-145.*
22 Judge Pate stated that the MMPA is "federal legislation that can be enforced by any federal
23 agency who obviously has preemptive authority over state agencies....those are self-executing
24 acts....Clearly, the City would have to comply." *See City Ex. 9 at 144.* At the time of Judge
25 Pate's original order to excavate sand and restore water quality, *City Ex. 2 at 5*, as well as Judge

26
27 ¹ A permanent rope that did not have such an opening was previously placed from 1999-2004.
28 *See City Exhibits in Response to Plaintiffs' Ex Parte Application ("City Ex.") 9 at 143.*

1 Hoffman's more recent ruling interpreting Judge Pate's order as forbidding the rope, City Ex. 10
2 at 165, the U.S. Government had not yet made its position clear that the MMPA requires the state
3 court to allow placement of the rope. That position came later in an *amicus* filing in the *APRL*
4 case. Cmpl. Ex. G at 14. However, the Federal Defendants are unwilling to act to require the
5 City to comply with federal law. The MMPA is not "self-executing" as suggested by Judge Pate
6 in the sense that the City will automatically be prevented from complying with any state court
7 order that runs afoul of the MMPA. Rather, such a determination needs to be made by a federal
8 court.

9 As demonstrated in Plaintiffs' moving papers, Plaintiffs' state law cause of action for
10 mandamus to require enforcement of a City Council resolution based on federal preemption of a
11 state court order blocking the resolution is a question that should be resolved by a federal court.
12 *See Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005) ("a federal
13 court ought to be able to hear claims recognized under state law that nonetheless turn on
14 substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope
15 of uniformity that a federal forum offers on federal issues.") Until the issue is fully resolved, a
16 TRO should issue to preserve the status quo.

17 None of the defendants have identified any countervailing factor to justify the irreparable
18 harm that will be suffered if the TRO is not issued pending the ENE or final resolution of the
19 instant motion. At bottom the City states that it cannot act without a TRO from this Court, and
20 the Federal Defendants have requested that the City place the rope but will take no further steps
21 to ensure that it does. The result if a TRO does not issue will be grave and irreparable harm to
22 the seals and the Plaintiffs when no harm is necessary and Plaintiffs' success is reasonably likely
23 either through settlement or trial. Given these facts a TRO should respectfully be issued to
24 maintain the status quo pending final resolution of this case.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: December 11, 2008

By: /s/ Bryan W. Pease
BRYAN W. PEASE
302 Washington St. #404
San Diego, CA 92103
Telephone: (619) 723-0369
Facsimile: (619) 923-1001
Email: bryanpease@gmail.com

BLUMENTHAL & NORDREHAUG
Norman B. Blumenthal
Kyle R. Nordrehaug
Aparajit Bhowmik
2255 Calle Clara
La Jolla, CA 92037
Telephone: (858)551-1223
Facsimile: (858) 551-1232
Email: Norm@bamlawlj.com

Attorneys for Plaintiffs